The 'war on terror' and International Law

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Foreword

This doctoral thesis is the culmination of extensive research and writing on the "war on terror" and the framework of international law applicable to it. The research has taken various forms and stretched back a number of years. In addition to academic study and publication, I have been involved in the application of the legal framework as a practising lawyer engaged in counter-terrorism related cases, and have sought to reflect this experience and perspective in the thesis.

My research in this field had its inception in a short paper prepared in the immediate aftermath of the 9/11 attacks, in October 2001. The paper set out in skeletal form the framework of international law that appeared to govern potential responses to those attacks. It was motivated by the relative dearth of such analysis at that time, as well as confusion regarding international law and its relevance. Over time this paper was developed into the first edition of a book, published by Cambridge University Press in 2005, entitled *The 'war on terror' and the framework of international law*. The book was widely used and favourably reviewed, and it was suggested that I consider the presentation of a modified version of the book as a doctoral thesis. I began to reflect on the possibility of deepening and expanding the study, wherein the idea for this thesis was born.

Much had changed since the 2004 date when the first edition was completed. Responses (by states, international or regional organisations and others) had proliferated, impelling normative and policy changes on the national, regional and international levels. Some practices that had sprung up around the globe in the name of counter-terrorism constituted clear violations of international law; in other situations, the practice raised complex and novel legal questions or exposed apparent gaps or tensions in the framework itself. Likewise, just as counter-terrorism responses had burgeoned, so in turn had reactions *to* them, of potentially critical significance to the long-term implications of the war on terror. Many years into post 9/11 counter-terrorism practice, it was necessary to take into account the extent to which, in a particularly dynamic field of practice, the legal framework may have been shaped or influenced by post 9/11 practice. In short, it became clear that to do it justice, what was required was more than substantial updating.

This thesis therefore builds upon, but varies from, the first edition in significant respects. In keeping with the nature of the enterprise, the thesis seeks to provide a more academic framework for the work, with a section on

methodology and a more detailed discussion of sources than the original book, through an expanded introduction and conclusion. It maintains as its key objective the identification and exploration of the current legal framework governing terrorism and counter-terrorism measures. The thesis examines developments in that framework that have taken myriad forms in recent years: standard setting initiatives by regional and international organisations, international agreements, judicial decisions (at domestic and international levels) and of course potential developments in customary international law.

Where the thesis provides much more research and analysis than the original book is in relation to the state practice that has developed in response to international terrorism. While the emphasis in the first edition was heavily on the framework that would govern future responses, the thesis necessarily focuses more attention on illustrating how those responses have in fact unfolded during the twelve years of practice since 9/11 (and the nine years since the book was completed), and how the legal framework speaks to that practice. The lethal use of force by 'drones', the systematic and coordinated 'extraordinary rendition' programme, the regimes of listing of individuals and groups, and in particular contorted attempts to address procedures for 'de-listing,' are among the most notorious of these measures. Other practices have swept the globe further beneath the radar but raising just as important international legal issues. These include for example developments in the use of criminal law and practice to punish an expanding group of persons 'associated' with or deemed to 'support' broadly defined terrorism, or the use of private actors (such as private security companies) in counter-terrorism. In all of the chapters, much of the consideration of new or amended legislation, policies and practices is new to the thesis.

Building on this core, the thesis also contains several new chapters. Two new case studies' address the practices of extraordinary rendition and the killing of Osama bin Laden, complementing an updated case study on Guantanamo Bay. Each of these explore factual scenarios in more depth than would be possible within the main chapters, and consider the multiple overlapping norms applicable to them as well as the intersections between the relevant areas of international law.

As noted above, a critical dimension of unfolding practice at this stage consists of second tier responses to anti-terrorism practices that may have strained or been inconsistent with the legal framework. A major component of this 'reaction' to the war on terror over time has been judicial, as challenges to the counter-terrorism practice have been adjudicated. An additional new chapter therefore considers the role of the judiciary in responding to human rights violations in the war on terror. This forms part of, and feeds into, consideration of the ultimate impact of counter-terrorism practice.

The importance of a holistic approach to international law as highlighted in the first edition of the book, by understanding rules not in isolation but as part of the framework as a whole, has been borne out by practice. This thesis

explores in more detail the overlapping layers of legal obligations, and intersections between them, to determine applicable law in particular situations. It also highlights the manipulation and selectivity in the approach to that framework in practice and tensions arising. Much of the uncertainty around international law in the counter-terrorism context may relate more to a refusal to be bound by law (or by particular areas of law or specific norms), or to accept the implications of law's constraint. Areas of genuine complexity in relation to the interplay of norms (such as under IHL and international human rights law or human rights and UN Security Council obligations) have, however, been acknowledged and explored in more detail than in the original book.

While the focus remains on identifying the applicable legal framework, the thesis is necessarily more reflective throughout, and in particular in the concluding chapter, as to the nature and impact of post 9/11 counter-terrorism practices that have now unfolded for over a decade, the challenges they pose and their potential longer term implications for international legality.

The research for the thesis was completed on 31 August 2013. A slightly modified version of this thesis will in due course be published as a second edition of the CUP book.

Helen Duffy
25 September 2013

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1 Introduction

1.1 Preliminary remarks

Acts of international terrorism, such as the atrocities committed on 11 September 2001 ('9/11') and others since then highlight the critical importance of the international rule of law and the terrible consequences of its disregard.[1] Ultimately, however, the impact of such attacks depends on the responses to them, and in turn on the reaction to those responses. To the extent that the lawlessness of terrorism is met with unlawfulness, unlawfulness with impunity, the long-term implications for the rule of law, and the peace, stability and justice it serves, will be grave. Undermining the authority of law can only lay the foundation for future violations, whether by terrorists or by states committing abuses in the name of counter-terrorism. Conversely, so far as states operate within the law, and bring it to bear on those responsible for terrorism and crimes committed in the name of counter-terrorism, the authority of law can ultimately be reasserted and the system of law strengthened.

An underlying premise of this study is that the legitimacy of measures taken in the name of the fight against international terrorism depends on their consistency with international law. It is essentially this reference to objectively verifiable standards and processes – rather than subjective assertions as to good and evil or those believe in freedom and those that seek its destruction[2] – that enable credible distinctions to be drawn between those who abide by the rules of the international community and those who conspire against them. In an intensely politicized area, the law can provide us with meaningful parameters within which to assess what is loosely and invariably pejoratively labelled 'terrorism' and states' responses to such acts.

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1 The number of people killed by the terrorist attacks on September 11 was officially estimated by US authorities at 2,819. See 'Names of September 11 Victims Published', *Associated Press*, 20 August 2002. Shortly after the attacks, al-Qaeda, an Islamic fundamentalist network or organization, was identified as being responsible for the attacks; see 'Al Qaeda Claims Responsibility for September 11', *CNN News*, 15 April 2002. Since 9/11, like prior to it, attacks of international terrorism have occurred around the globe with notable attacks including those in Madrid, London, Bali, Mumbai, Libya, Iraq and beyond.

2 Such references peppered political discourse post-9/11; see e.g. former US President Bush's renowned speech concerning the 'axis of evil' threatening the world, State of the Union Address, 29 January 2002, available at: http://archive.org/details/SOTU_2002.

International terrorism and measures of counter-terrorism, and many of the challenges they pose, are not new phenomena but existed long before 2001. In counter-terrorism practice since 9/11, famously framed as a 'war on terror,'[3] persistent emphasis has been placed on the exceptional nature of threats, on the unprecedented challenges posed by 'modern' international terrorism and on a 'novel' kind of conflict against a different kind of enemy.[4] Whether the nature of any terrorist threat, or indeed states' responses to it, are in fact so unprecedented, novel or exceptional has been questioned over time.[5] Emphasising the novelty of threats, responses and challenges[6] and adopting an 'exceptionalist' approach to international terrorism[7] may blind us to the relevance of lessons of the past,[8] and the extent to which international law and practice provide tested – albeit fluid and evolving – parameters to address many of the challenges posed by international terrorism.

It is indisputable however that counter-terrorism practice has proliferated on many dimensions and in many forms post 9/11 and the heralding of a 'global war on terror' has had global manifestations and repercussions. It is the practice of terrorism and counter-terrorism in this post 9/11 environment,

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3 The US President George W. Bush coined the 'war on terror' epithet on 20 September 2001, when he declared that '[o]ur war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated'. See Address of the US President George W. Bush to a Joint Session of Congress and the American People, 20 September 2001, available at: http://archive.org/details/gwb2001-09-20.flac16. As discussed below in Chapter 6, the phrase 'war on terror' was dropped by the Obama administration, but it retains the position that there is a conflict with al-Qaeda and associated groups. The fact that this is not a conflict in any legal sense is addressed in Chapter 6.

4 *See, e.g.*, 'State of the Union Address', 29 January 2002, supra note 2; Statement by Ambassador at Large, Pierre Prosper, Address at Chatham House, 20 February 2002 cited in E. Wilmshurst, *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), p. 2; Press Gaggle by Ari Fleischer, Aboard Air Force One, 5 November 2002, available at: www.whitehouse.archives.gov/news/releases/2002/11/20021105-2.html. See Chapter 6 for discussion of the 'new' war theory.

5 See, e.g., G. Abi-Saab, 'Introduction', Bianchi (ed.), *Enforcing International Law Norms against Terrorism*, Hart (2004). See International Commission of Jurists Eminent Jurists Panel Report (Eminent Jurists Report), 2009. On the nature and scale of the threat posed by al-Qaeda, see Chapter 5, 6 and 12 (conclusions). See also Van den Herik and Schrijver, 'Introduction', in *Counterterrorism Strategies in a Fragmented International Legal order. Meeting the Challenges* (Cambridge: Cambridge University Press, 2013)..

6 The shifting nature of threats over time is recognised in e.g. President Obama's speech at National Defense University, 23 May, 2013. For an example of a broad-reaching approach to threats in US policy however discussion of on the law of self defence in Chapter 5.

7 For discussion of why there can be no 'global emergency,' legally speaking, see Chapter 7. The exceptionalist approach is evident in all areas of law, such as broad reaching approaches to the use of force (Chapter 5), criminal law (Chapter 4), the invocation of a 'war' paradigm (Chapter 6) and in justifications for violations of human rights (Chapter 7). See Chapter 12 Conclusions on 'exceptionlism and its creeping reach'.

8 See 'Assessing Damage, Urging Action', Report of the Eminent Jurists Panel, 2009 (hereinafter 'Eminent Jurists Report'), 2009.

and the legal framework applicable to it, that is the focus of this thesis. The thesis locates this phenomenon of post 9/11 international terrorism and counter-terrorism, not in a normative void, however, but against a backdrop of international law and developing international practice.

The principal purpose is to identify the current state of international law concerning terrorism and counter-terrorism, which provides the framework for the assessment of acts of terrorism and the lawfulness of measures taken in the name of counter-terrorism. The UN Secretary General has noted that the 'war on terror' affects all areas of the UN agenda.[9] The legal framework in turn is derived from diverse branches of international law none of which can or should be seen in isolation. This study will seek to set out in an accessible fashion multiple areas of law, and myriad sources of law, that together form the international legal framework, and explore the connections and interplay between them. While the framework is multi-dimensional and may at times raise complex issues, it is also underpinned by basic legal principles that provide, for example, for basic levels of protection, process and accountability in all situations.

Assertions regarding the nature and role of the international legal framework have abounded in the post 9/11 era. Allegations have been levelled of perceived 'gaps' in the legal framework or of a framework that is inadequate, 'outmoded,' 'quaint,' or too 'inflexible' to address the realities of modern terrorism and state reactions to it. Some have foreseen transformative shifts in the legal framework to embrace the nature of counter-terrorist practice – heralding 'turning points' or 'Grotian moments' in the legal order.[10] Others have questioned the very relevance and authority of international law in the face of security challenges embodied in the 9/11 attacks and the threat of their recurrence.[11]

By setting out the key parts of the legal framework, this book will question whether there are genuine normative gaps in the legal framework, or, as one commentator noted, more perceived 'interpretative' or 'policy-created' gaps.[12] It will also question whether there has been a seismic shift in the legal order, while exploring areas of potential legal development post-9/11 and their effect. It will highlight the nature of the legal framework, including the extent (and

9 Statement by UN Secretary-General Kofi Annan to the Security Council, 4 October 2002, Press Release SG/SM/8417, SC/7523, and subsequent General Assembly resolution A/RES/67/97. See also the background report by UN Secretary General Ban Ki Moon, Delivering Justice: Programme of action to strengthen the rule of law at the national and international levels, UN doc. A/66/749, 16 March 2012.

10 Examples of such claims appear throughout relevant chapters, and conclusions in this respect are drawn in Chapter 12.

11 Chapter 7.B.1.

12 K. Samuel, 'The Rule of Law Framework and Its Lacunae: Normative, Interpretative, and/or Policy Created?' in Salinas de Frias, Samuel and White, *Counter-terrorism International Law and Practice* (Oxford: Oxford University Press, 2012).

the limits) its flexibility to adjust to terrorism and counterterrorism in the 21st century, tensions and challenges that arise, and areas where the law may indeed be unsettled or weak, in flux, or likely to develop in the future.[13] In short, it seeks to grapple through the fog created by a 'war on terror', in which international law has at times been notably absent, at others distorted, and often presented as hopelessly confused or ill equipped to address 'new challenges'.

While the primary focus of this book is on identifying the legal framework, a secondary and inter-related focus is on highlighting and assessing how states have responded in practice to the challenges of counter-terrorism post-9/11. While terrorism, counter-terrorism, and the international legal framework governing them existed long before 9/11, a particular flurry – and perhaps at time frenzy – of normative, political and institutional development and activity have ensued since the introduction of the so-called global war on terror. This activity has often fallen foul of the rule of law framework, as well as in some situations contributed to and shaped that framework for the future.[14] This study considers examples of practice in the fight against terrorism alongside the legal framework, to identify issues that have arisen regarding its interpretation and application, the extent of compliance with it and areas of possible legal development.

The post-9/11 practice explored in subsequent chapters has unfolded on multiple levels (international, regional and national). It has involved a plurality of actors (legislature, judiciary, executive, intelligence agencies, private actors and others). It has taken a multiplicity of forms including the passage of laws and implementation of policies and practices, through the conduct, direction or control of states, or their complicity and support, and through acts and omissions. Although in some areas the extent, nature and influence of US practice have justified greater emphasis on that state than on others, terrorism, counter terrorism and the challenges they pose in the post-9/11 era are global phenomena. The focus of the study is accordingly global. It draws on universal norms and practice but also regional and sub-regional standards, and examples of counter-terrorism practice not only from the state leading the war on terror but from a range of states around the globe, from Afghanistan to Algeria, Bahrain to Bali, Colombia to Chechnya, and beyond, where diverse practices in the name of terrorism raise persistent questions regarding respect for the legal framework.

It is a feature of the broad reaching approach to the 'war on terror' and counter-terrorism, that some of the practice illustrated may be viewed as not in fact relating to international terrorism at all. One example might be the Iraq

13 A thorough analysis of how the law may have changed since 9/11 is not, however, the objective of this study.

14 GA Res. 67/97 'The rule of law at the national and international levels', UN Doc. A/RES/67/97, 14 January 2013.

invasion and related developments, which may have had little real link with counter-terrorism agenda but which occurred in the broad context of, and were justified in large part by reference to, the fear of international terrorism.[15] Many counter-terrorist measures taken in states around the world, where terrorism (and counter-terrorism) have been matters of concern long before 2001, are not a post 9/11 'war on terror' phenomenon. Many of them, however, have found justification by reference to a new global imperative around the fight against terrorism since then. The practice explored in subsequent chapters illustrates how the long shadow of 9/11 has been a pretext for action against individuals and entities not linked to those events an din some cases not linked to terrorism at all.[16] Elasticity in the exceptional approaches to terrorism and the creeping reach of terrorism related justifications is one of the features of the war on terror to which we will return in the concluding observations.

The focus is on identifying the obligations of states under international law, reflecting the fact that international law does not, generally, impose obligations on private actors or groups as such (unless their acts are attributable to the state which is then responsible). This state-centricity of the international legal order has been described as a limiting factor for the relevance of international law in this area. It is also increasingly subject to question as the thesis shows for example, in light of developments of individual criminal responsibility, explored in Chapter 4, the effective 'individualization' of international law through sanctions regimes that effectively impose international legal obligations directly on individuals, discussed in Chapter 7,[17] and the growing momentum towards recognition of non-state actor responsibility more generally, noted in Chapter 3. While focusing on the international legal obligations and practice of states, the study therefore also reflects the plurality of actors, involved in terrorism and counter-terrorism, and international legal issues arising.

This book does not and could not present a comprehensive factual report on the plethora of state practice in response to terrorism since 9/11. It seeks, however, to highlight through examples specific issues of law that the 'war on terror' has thrown up, of relevance to an assessment of the role and relevance of international law in light of the global security threat that has beset the start of the 21st century.

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15 President Bush is reported as having stated that 'one of the hardest parts of my job is to connect Iraq to the war on terror' and the controversy around the existence of any plausible link supports that proposition. See further Chapter 5B.3 on the use of force in Iraq.

16 Chapters 7 and 11 contain examples of the creeping reach of terrorism justifications, and Chapter 12 'Conclusions'.

17 The 'individualisation' of international law notably occurs through e.g. security council sanctions that directly address and impose sanctions on individuals and not , as was traditionally the case, on states; see Chapters 7B.8 and 11 and Van den Herik and Schrijver, *Terrorism Law and Practice*, supra note 5.

1.2 Thesis and Scope of Enquiry

As foreshadowed above, this thesis addresses several overarching groups of questions. The first group relates to the nature of the legal framework. To what extent can and does the existing legal framework speak to and govern 'international terrorism' and states responses thereto? How should we understand that framework, considering its key provisions and its structure as a whole? Does the framework equip the international community of states to meet the challenges associated with international terrorism, or is it, as some have suggested, inadequate or inappropriate to govern in the post-9/11 era?

The study will therefore seek to set out the parameters of the international legal framework applicable to international terrorism and responses thereto. It will explore areas of uncertainty, areas where the law may be in flux, while demonstrating that there are no gaping holes in the international legal order.

A secondary question that flows from the first is to what extent have the norms and mechanisms of the international legal system been respected, upheld, distorted or undermined in the practice of counter-terrorism in this post 9/11 environment. It will approach this question by exploring examples of practice on the various levels and types referred to above, international and national, executive, legislative and judicial. It will address, principally, state practice that is carried out (or purports to be carried out) in response to international terrorism, but also practice in responding to wrongs arising in the course of counter-terrorism.

A third group of underlying questions that emerge from the consideration of the law and the practice relate to the longer implications of the 'war on terror'. The thesis does not purport to provide an in-depth study of the potential movement in customary law through state practice and *opinio juris*. It does, however, highlight the possibility, by reference to examples, of how the framework may itself have been influenced by the practice explored. It therefore highlights the implications of the war on terror for the legal framework. In the final chapter, drawing conclusions from the research, it reflects on the broader implications for the rule of law and outstanding challenges. Terror attacks in recent years render beyond a doubt the challenge facing the international community, to address effectively the scourge of international terrorism. The war on terror highlights the countless challenges for the international community to ensure that this is done within a rule of law framework.[18]

18 See Chapter 12 which reflects on these challenges.

1.3 SOURCES OF INTERNATIONAL LAW AND TERRORISM

It is perhaps a unique – certainly an unusual – feature of the present area of study that one phenomenon, international terrorism, is addressed through such a plurality of areas of international law and fed by such a multiplicity of sources of law. The identification of the legal framework set out in this book has therefore been drawn from a diverse range of overlapping and mutually reinforcing sources of law relevant to an understanding of terrorism and counter-terrorism.

The norms addressed include primary norms that impose obligations on states in respect of the prevention and response to terrorism, or constrain the manner in which that counter-terrorism unfolds. Secondary norms that address the consequences of breach and rules of state responsibility are also central to this study.

The traditional starting point of every discussion of sources of law is Article 38 of the Statute of the International Court of Justice,[19] which lists 'sources' of international law.[20] In setting out the legal framework applicable to international terrorism, this study focuses on treaty law and customary international law as the most important sources of international law. However, the study also relies on many other subsidiary sources which have differed greatly in the nature and their weight, but each has their place in a proper understanding of the legal infrastructure of counter-terrorism related law.

1.3.1 International treaties

Most of the rules of the international legal system derive from agreements between States,[21] which in turn give rise to obligations that become binding on states parties to them. While there is no one comprehensive global terrorism treaty, as discussed in Chapter 2, a complex network of international treaties exists, enshrining a broad range of international obligations, of relevance to

19 Although Article 38 is formally only binding on to the International Court of Justice (and previously, to the Permanent Court of International Justice) as to the law applicable to cases before it, it is generally considered as the 'authoritative' list of the sources of international law'. See R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (Oxford: Oxford University Press, 2008), ninth edition, p. 24.

20 The sources according to Art. 38 include a) international conventions; (b) customary international law; (c) general principles of law 'as recognized by civilized nations.'

21 The rules relating to the formation, modification, suspension and termination of international agreements are contained in two multilateral conventions, the Vienna Convention on the Law of Treaties of 1969, 1155 UNTS 331, entered into force 27 January 1980 (hereinafter VCLT 1969) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986. Most of the provisions of the Vienna Conventions are considered to reflect customary international law.

terrorism and counter-terrorism. Some are general in nature, others address specific conduct or issues; some are universal or international and others regional or bilateral.

It is a basic rule that only States which are parties to a treaty are bound by it, and an international agreement cannot in itself produce obligations on third party States.[22] For major international treaties such as those addressed in this study, states generally become bound through ratification or accession.[23] Among the fundamental rules governing international agreements is that once a State is bound by a treaty, it must fulfil the obligations deriving from it in good faith,[24] and may not for example 'invoke the provisions of its internal law as justification for its failure to perform a treaty'.[25] A state that has *signed* but not ratified a treaty 'is obliged to refrain from acts which would defeat the object and purpose of the treaty'.[26]

While the vast majority of treaties, including the terrorism conventions or extradition treaties referred to in this book, aim at exchanging rights and obligations between the parties, some multilateral treaties covered by this study lay down general rules that appear to be directed at, and which affect, all states of the international community. The category of so-called 'law-making treaties',[27] which includes for example certain multilateral conventions on the protection of human rights discussed at Chapter 7, or the Geneva Conventions and other multilateral treaties on international humanitarian law discussed at Chapter 6, may either set standards for the international community as a whole, or codify customary law (see below). Moreover, the UN Charter is a key source in this area, which stands apart from other treaties given its quasi-constitutional status, and its universal coverage.[28] This is also reflected

22 This fundamental rule is referred to as the rule *pacta tertiis nec nocent nec prosunt*. See Section IV (Articles 34-8), VCLT 1969.

23 See Article 11 VCLT 1969: '[T]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.' Note however that signature does not generally bind the state, see Article 12, VCLT 1969.

24 This is commonly expressed with the Latin maxim *pacta sunt servanda*. See Article 26, VCLT 1969: 'Every treaty in force is binding on the parties and must be performed by them in good faith.'

25 Article 27, VCLT 1969.

26 See Article 18, VCLT 1969.

27 See I. Brownlie, *Principles of Public International Law*, 7th ed. (Oxford, 2008), p13 'Law-making treaties create *general* norms for the future conduct of the parties in terms of legal propositions, and the obligations are generally the same for all parties ... Such treaties are in principle binding only on parties, but the number of parties, the explicit acceptance of rules of law, and in some cases, the declaratory nature of the provisions produce a strong law-creating effect at least as great as the general practice considered necessary to support a customary rule.'

28 See in particular Chapter 4 on the use of force and Chapter 7 on human rights.

in Article 103 of the Charter itself, noting the prevalence of Charter obligations over other international agreements.[29]

The result of the widespread ratification of universal treaties,[30] and the multiplicity of overlapping regional and specific treaties, is that many of the core obligations referred to in this study derive from binding treaty obligations incumbent on all states. Treaties may in turn influence the development of customary international law in particular areas; in particular, the fact that a large number of States have ratified a number of the conventions referred to in this study may constitute a strong indication that the rules embodied in them correspond to rules of customary international law.[31] The study conducted by the ICRC on customary international humanitarian law, for example, supports the view that many of the provisions of the Geneva Conventions and Protocols now reflect customary law.[32]

1.2.2 Customary international law

In the absence of a legislative body with the power to create rules binding on all the subjects of the international legal system,[33] the only source of 'general' rules of international law is customary international law (CIL). CIL derives from the practice of States[34] where this practice is more or less uniform, generally consistent and widespread, and considered to be legally necessary or

29 Art. 103 provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

30 Extremely high levels of ratification of certain treaties make their claim to represent global standards compelling. See e.g. the Convention on the Rights of the Child with 193 state parties; the Convention on the Elimination of Discrimination against Women with 187 state parties; the Convention against Torture with 153 parties; the ICESCR with 160 state parties; or from IHL, the Geneva Conventions which have 194 parties.

31 See, in general, M. Akehurst, 'Custom as a Source of International Law', 47 (1974-75) BYIL 1. The treaty would provide strong evidence of the opinio juris, one of the key elements of customary international law.

32 See J. Henckaerts and L. Beck, *Customary International Humanitarian Law*, ICRC, (Cambridge: Cambridge University Press, 2005 (hereinafter 'ICRC Study on Customary IHL').

33 The UN Charter confers to the Security Council the power to adopt decisions which are binding on all UN Member States (and therefore on virtually every State of the international community) by virtue of Article 25 of the Charter (see Chapter 5, section A). This does not however imply that the Security Council should be considered as an 'international legislative body'.

34 'State practice means any act or statement by a State from which views about customary law can be inferred; it includes physical acts, claims, declarations *in abstracto* (such as General Assembly resolutions), national laws, national judgments and omissions. Customary international law can also be created by the practice of international organizations and (at least in theory) by the practice of individuals'. Akehurst, 'Custom as a Source of International Law', supra note 31, p. 53.

obligatory.[35] Generality of practice does not mean uniformity or universality.[36] The fact that a number of States follow a certain course of conduct, and other States do not protest, may be sufficient to affirm the generality of the practice; conversely the fact that some states violate norms or disagree with their content does not necessarily undermine the legal standards themselves. The second prong of the test – the attitude to the practice as obligatory or 'necessary', referred to as *opinio juris* – is crucial in distinguishing State practice relevant for the purpose of identifying a customary rule from practice, which denotes mere international usage.[37]

While the 'practice' of states referred to in this study is intended to illustrate how the war on terror has unfolded, and does not purport to be representative, it is worthy of note that this practice may also be relevant to the evolution of the customary legal framework, as discussed further below.[38]

As reflected in the sources relied upon in this study, state practice, and *opinio juris*, may take many forms. State practice may comprise both 'physical and verbal acts of states',[39] embracing executive, legislative and judicial practice on the domestic level, as well as statements manifest through the functioning of international entities, such as the General Assembly, Security Council, or regional bodies. The plethora of activity by inter-state entities in the field of counter-terrorism since 9/11, and in particular the many statements by states in these fora, provide fertile ground for identifying *opinio juris*.[40] Many of the treaties, judicial decisions or subsidiary sources examined in the study may themselves be indicators relevant to identifying customary law.

35 *C.d. opinio iuris sive necessitates*. As noted by the ICJ: 'Not only must the acts concerned amount to a settled practice, but they must also be such or be carried out in a certain way as to be evidence of the belief that this practice is rendered obligatory by the existence of a certain rule requiring it.' *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *The Netherlands), ICJ Reports 1969*, p. 3, para. 77. See Akehurst, 'Custom as a Source of International Law', supra note 31, pp. 16-18.

36 ICJ judgment of 27 June 1986 in the case *Military and Paramilitary Activities of the United States in and against Nicaragua (Nicaragua v. United States), ICJ Reports* 1986, para. 186.

37 On the distinction between custom and usage – 'a general practice which does not reflect a legal obligation' – see Brownlie, *Principles*, supra note 27, p. 6.

38 See part 1.2.2 'How International Law Changes' below.

39 See generally J.M. Jenchaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (ICRC and Cambridge University Press, 2009).

40 On the other hand in particularly sensitive areas related to national security, practice is predictably opaque, and states may refrain from commenting publicly on the conduct of other states for a host of political reasons. On some areas discussed in the study, political and security sensitivities may therefore pose particular difficulties in discerning the views of states.

While some states will be more active on the international plane, thus more influential on the evolution of customary law, once a customary rule of international law has come into being, all States are bound by it.[41]

1.3.3 Other sources

Next to treaty law and customary international law, Article 38 ICJ Statute also refers to general principles, judicial decisions and teachings/doctrine of international law as supplementary sources.

i) General principles of Law

'General principles of law' is enshrined in article 38 of the ICJ Statute as a source of international law.[42] Identifying such 'general' principles can be a contentious process, and the content of such principles is ripe for considerable dispute. There are, however, core legal principles that prevail across most if not all domestic legal systems, and are reflected at international level and should inform a holistic approach to the legal framework.[43]

Those of relevance in the present field would include basic principles of criminal law such as *nemo iudex in sua causa*, the presumption of innocence, *ne bis in idem*, *nullum crimen sine lege* or *nullum pone sine lege*. Other core principles may include the principles of humanity, the concept of procedural fairness and the right to a remedy, or the principle of 'good faith' recognized by the International Court of Justice (ICJ) as touching every aspect of international law'.[44]

In practice, these 'general principles' are particularly important where there may be gaps or weaknesses in the other sources of law, or in novel areas of practice wherein reference to national approaches to the legal principles at stake may assist the interpretation of international law. As noted above,

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41 States may, however, in certain circumstances, avoid obligation through persistent objection to the rule, provided that the rule is not a *jus cogens* rule (see further below). For a discussion of custom and the role of 'bigger states', relevant to an assessment of the 'war on terror', see V. Lowe, 'The Iraq Crisis: What Now?', 52 (2003) ICLQ 859, p. 863. See also Great Powers and Outlaw States: Unequal Sovereigns in the International Legad Order, Cambridge, 2004.

42 Article 38 (1) ICJ Statute.

43 'The phrase embraces such general principles as pervade domestic jurisprudence and can be applied to international legal questions'. G. von Glen, *Law Among Nations*, 6th ed. (New York, 1986), p. 22. See also F. Raitonod, General Principles of Law in the Decisions of International Criminal Courts and Tribunals, Martinis Nijhoff, 2008.

44 Art 2(2) UN Charter; Declaration on Freandly Relations; Border and Transborder Armed Actions (Nicaragua v. Honduras), 1988, p. 105. The ICJ found good faith one of basic principles governing creation and performance of legal obligations. See also Oppenheim's, *International Law 9/11*, Ed. (Oxford 2008) p. 39-40.

allegations of gaps and uncertainties have been a defining feature of political discourse post-9/11.

ii) Judicial Decisions, Jurisprudence and Jurists

Significant emphasis is placed in this study on judicial responses to terrorism. Judicial decision are often said not to be sources of law in a strict sense, particularly as there is no system of 'precedent' in the international system,[45] thus formally they apply rather than create law. Yet this may fail to reflect the true extent to which international law develops through judicial interpretation, clarification or application.

This study will include judicial determinations from courts and bodies on various levels: international, regional and national. It will include decisions of the particularly influential International Court of Justice (ICJ), or international human rights bodies, on the international level. It will refer also to significant decisions of regional courts and bodies such as the European Court of Human Rights (ECtHR) or the European Court of Justice (ECJ), or of the African Commission on Human and Peoples' Rights (ACommHPR) or the Inter-American Court on Human Rights (IACHR). On the national level, a plethora of jurisprudence has emerged, from the criminal court practice considered in Chapter 4 to various courts addressing a broad range of issues with human rights implications, discussed in Chapter 11.

These decisions serve multiple functions in the present study. National courts are organs of the state, and judicial decisions may bring the state into conflict with its international obligations. They provide examples of state practice. International and regional courts also have an important role in shaping the legal framework in various ways. On one very direct level, some decisions are themselves binding, albeit only on parties to the case. They may directly impel national legal change as states and governments implement decisions and judgments, bringing laws as well as practices into line with international legal obligations. They may also shape and clarify through practice the nature of international legal standards and may contribute to customary international law. It is therefore one of the peculiar features of national court decisions that they may both contribute as a source of law and give rise to violations of it.

The study illustrates the ways in which legal standards in this field have developed through judicial decision-making. Decisions of the ICJ and other international courts and tribunals provide authoritative interpretations of the law and are in practice often followed as authority in later cases. The influence of the judgments and decisions of at least some of the international courts and bodies on legal standards is inevitably more relevant to some areas than to others. In the field of human rights, jurisprudence plays a particular role in

45 Article 59 of the ICJ Statute.

the establishment of legal standards, as amply illustrated by the law set out in the present study. Many relevant areas of the legal framework explored – such as positive obligations, the extra-territorial scope of human rights obligations or state responsibility for human rights violations – reveal what is essentially judge-made law, developed wholly or in large part through judicial interpretation and application of the sometimes relatively skeletal treaty provisions. Judicial decisions in the human rights field and beyond contribute to the elaboration and understanding of the 'principles' and interpretative approaches of human rights law that are key to the holistic and effective application of that body of law within a broader legal system.[46]

In the field of IHL, this is the case to a lesser extent, given the dearth of international bodies specifically charged with applying that body of law. Particularly in the post-9/11 era, however, principles and rules of IHL have been applied by courts in multiple cases, as the study will demonstrate.[47] In other areas, such as the use of force, there is much less international adjudication in practice, though ICJ decisions remain authoritative.

In turn, the jurisprudence emerging from these judicial decisions feeds back into the treaty law of the future, as seen in the specific provisions of conventions on issues such as torture or enforced disappearance or aimed at protecting particular groups, which built on human rights jurisprudence.[48] On another level, judicial decisions – national or international – may contribute to the formation of customary international law, or provide evidence of the 'general principles' of law referred to in Article 38.

As for the legal analyses of jurists, while they do not create law as such, they may 'ease or impede the passage of new doctrines into legal rules.'[49] Article 38 specifically provides that, in order to determine the content of these (treaty-based or customary) rules of international law, recourse may be had to the writings of legal scholars.[50] These are referred to in the book as they

46 These principles include an evolutive approach to law as a living instrument, the principle of effectiveness, a purposive and contextual interpretation, and finally a holistic approach in line with broader international law. See Chapter 7A.6.

47 See eg the deliberations of criminal courts such as in the case of *Hamdan* where US courts had to determine whether material support for terrorism was a crime under IHL at the relevant time, in Chapter 4, or in the processes surrounding the Guantanamo *habeas corpus* or criminal cases in Chapter 8.

48 The more recent provisions of human rights treaties e.g. the Torture convention or the Convention on Forced Dsiappearance, discussed at Chapter 7, are more elaborate than earlier general convention and adopted the detailed rules developed through human rights jurisprudence.

49 V. Lowe, 'The Iraq Crisis', p. 860.

50 Article 38(1)(d) of the ICJ Statute specifies that the Court may have recourse to 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

may provide evidence of the content of customary or treaty law,[51] or illuminate the direction in which the law may be developing

The study looks beyond the primary sources of international law in the form of treaties and customary law, or the supplementary sources referred to in Article 38, to other potential sources. The prolific development in the field of terrorism and counter-terrorism in recent years has been characterized by the engagement of a particularly diverse group of standard setters. In this field in particular it is therefore critical to consider the role of other actors, and the relevance of other sources, mindful of the fact that these inevitably carry varying weights. While these include the national and international judiciaries emphasised above, close regard must also be paid to the role of the Security Council, and even the different role of non-state actors, in the development of the legal framework.

iii) Security Council and General Assembly

The principle political organs of the UN have played active roles in the development and implementation of the legal framework surrounding terrorism and counter-terrorism in recent years.[52] Security Council resolutions in the field of terrorism have assumed a perhaps unusually significant role, in light of the use of Chapter VII binding powers to set down elaborate measures that states are legally bound to take in relation to terrorism, which the Council found to constitute a threat to peace and security. This has been described the Security entering its 'legislative phase',[53] which it did most notably in Security Council Resolution 1373.

There is academic discussion over whether Security Council resolutions, which are of course not included in Article 38, should be treated as separate sources of law at all. Objections are various, but understandably include the 'unrepresentative and undemocratic' nature of the body, rendering the Council arguably unsuitable for international law making.[54] The fact remains, however, that under the Charter, the Council does have a unique role in issuing binding decisions, and in light of post 9/11 practice explored in this study, the significance of that exercise of power can hardly be doubted.[55]

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51 Note that these are not themselves 'sources' of law *stricto sensu*, but provide evidence of the content of treaty or customary norms. See Brownlie, *Principles*, supra note 28, p.23.

52 While other bodies may also influence legal development the focus here is on the Security Council and General Assembly, which have particular roles and influence. See e.g. World Summit Outcome document, 24 October 2005, A/RES/60/1, para. 80, and in relation to terrorism, paras. 81-90.

53 Paul C. Szasz, 'The Security Council Starts Legislating', 96 A.J.I.L. 901 (2001). José E. Alvarez, 'Hegemonic International Law Revisited', 97 AJIL 873, 874 (2003); S. Talmon, 'The Security Council as World Legislator', AJIL, Vol. 99:175 (2005).

54 Talmon, 'The Security Council', supra note 53, p. 179.

55 See eg Chapter 7B.1 on the wide-reaching impact of SCRes 1373.

Somewhat paradoxically perhaps, just as Council activity is relevant to an assessment of emerging obligations, it is also in the frame as regards emerging violations. As noted in Chapter 7, the question of whether the Council is obliged to respect the international legal framework, and whether it has done so, is a matter of controversy post-9/11. It may be argued that key resolutions such as SC Resolution 1373 simultaneously created one set of legal obligations, while effectively violating others, creating difficult issues for states as regards conflicting obligations.[56]

General Assembly resolutions have quite a different role in the legal architecture. Such resolutions are not mandatory in the same way as Council Chapter VII decision, but they may nonetheless, in certain case, have significant normative value, as the ICJ and others have recognized.[57] Assembly resolutions have particular authority and universality, as the Assembly represents the entire community of states and as such may reflect the *communis opinio* of the international community and give expression to the prevailing international ideology in a manner that no other international body does. As such, despite an overshadowing by the Council's activism in this field post 9/11,[58] the General Assembly is generally considered to be the principal UN organ engaged in standard setting and its resolutions make a potentially significant contribution to the body of general international law.[59]

iv) Other 'softer' sources?

A 'subsidiary role' in the determination of the content of international law may also be attributed to the corpus of resolutions of other international organisations, declarations and non-binding international instruments commonly referred to as 'soft law.' While they are not binding *per se*, and have not been relied upon as definitive statements of the law, they may give more detailed expression to some of the binding prescriptions and prohibitions of international law and provide evidence of customary law.

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56 See Chapter 7.B.1 on the controversies around whether the Council can be said to have any such obligations, as well as potentially conflicting states'obligations and litigationin Chapter 11.

57 See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*) (ICJ Reports 1986, 99-100 and 102) noting the relevance of the attitude of states towards certain General Assembly resolutions as acceptance of the validity of the rule or set of rules declared by the resolution themselves. Where there is broad consensus they may provide a strong indication of custom: see ICJ, Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (ICJ reports 1996, 70-71).

58 See e.g. Chapter 7B.1

59 First among noteworthy examples in this field might be the GA Resolution adopting the 2006 UN Global Strategy: see World Summit Outcome Document, 24 October 2005, UN Doc. A/Res/60/1; UN General Assembly Resolution on Global Counter-Terrorism Strategy, UN Doc. A/Res/64/297.

Care is due in this respect, not least given the plethora of activity in this field in recent years, and the broad range of 'Principles,' 'declarations' or 'standards' of differing degrees of authority and weight that are increasingly relied on as 'soft law' standards. Those given emphasis in this study include work of UN entities and experts such as special rapporteurs, working groups and other UN mechanisms, and selected expert groups. In this fast moving and at times challenging field of law and practice, reports such as those of the UN special mechanisms, have had a leading role in identifying practices, but also in impelling legal debate by states, and influencing other standard setting. The authoritative non-binding work of the International Law Commission on state responsibility provides another example that has been drawn on, and in turn has been closely relied upon by judicial organs in recent years.[60]

In the field of terrorism and counter-terrorism, the sources of law considered are, like the various branches or areas of law, inter-connected, fluid and often mutually reinforcing. Primary sources evolve not only at diplomatic conferences but also through practice and interpretation, with subsidiary sources contributing to the development and formation of customary international law or the interpretation of treaties. Soft law sources may firm up through the practice of judicial decision making, which in turn may influence future treaty development. Security Council resolutions may be based on treaties – for example SC 1373 built on the Financing Convention – and vice versa. Together this varied and complex arrangement of sources, while different in nature, source and legal weight, forms a detailed international normative system on terrorism and counter-terrorism, which is not cast in stone but constantly evolving.

1.4 How international law changes

International law is not static, and the international law governing terrorism has been a particularly dynamic field in recent years. Every legal system needs to be able to develop its rules to take into account the evolution and changing exigencies of the society it regulates.[61] The international legal system is

60 See generally J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility: Oxford Commentaries on International Law* (Oxford: Oxford University Press, 2010). See also Chapter 4 discussion on how such rules have been relied on domestically (e.g. in the *Ahmed* case, abuse of process) or in Chapters 7 and 11 (the *A and Others,* admissibility of evidence) or in Chapter 10 on state responsibility for receipt of intelligence. This reflects what may a trend on the part of judges national and international levels to have regard to broader non-binding but authoritative comparative and soft law standards, as well as the 'transjudicial' reference todecisions of different systems.

61 Within domestic legal systems, the task of keeping the law 'up to date' is generally carried out by the legislative power and, in varying ways, by the judiciary.

characterised by the absence of a body entitled to create (and to modify) legal rules binding on all its subjects. Just as international law is mainly created by States, as set out above, so is it generally changed by them. Thus while the core part of this book (Part Two) has chapters that deal first with the framework and subsequently with its application in practice, it is recognised that it is impossible to entirely dissociate the legal framework from its application through 'practice', as the relationship between the two is symbiotic.

The process through which treaty-based rules of international law change is quite straightforward[62] (even if securing the necessary political consensus may be anything but).[63] By contrast the process relating to the modification or 'abrogation' of rules of customary international law is somewhat more complicated. Just as customary international law comes into existence when most States of the international community follow a certain course of action believing that it is required by a legal norm, so may customary rules lose their binding force, and change, where the consistent and general practice of states, and the *opinio juris* supporting them, ceases. In this respect, the peculiarity of the international legal system lies in the fact that 'violations of the law can lead to the formation of new law'.[64] Discussion of the practice of states in responding to 9/11, and reactions to those responses, assumes particular significance in a system where departure from existing legal standards, and responses to the same, may ultimately impact those standards.[65] The book highlights areas where it may be that the law has shifted as a result of states practice post-9/11.

However, several points of caution are worthy of emphasis in this respect. The first is that, of course, not every violation of an international rule leads to a change in the law.[66] Likewise, the fact that particular states may reject or argue against the existence of an established customary law rule should not be considered as unravelling the rule itself. In most cases, not even consistent patterns of violations by a number of States imply that a rule has been

62 A treaty, or some of its provisions, may be subsequently amended by the parties through the adoption of another international agreement. See Article 31, VCLT 1969.

63 See, e.g., the global terrorism convention negotiations which have been a long fraught and inconclusive process, by contrast to the specific conventions that have been concluded and ratified relatively speedily.

64 R. Higgins, *Problems and Process: International Law and how We Use it* (Oxford: Oxford University Press, 1995) p. 19.

65 While not purporting to provide an in-depth analysis of potential changes in the law, which will undoubtedly engage international scholars for years to come, this book highlights areas where early indications are that the law may change, or be clarified, through recent events, and other areas where, despite disregard for the law, legal change is unlikely.

66 The factors include the nature of the rule, the number of states 'violating' and the reactions of other states. In respect of certain rules, such as those relating to the use of force for example, the ICJ has noted that the fact that states do not express opposition to the practice should not, generally, be taken to confirm its lawfulness. However, expressions of opposition can help to clarify the lack of *opinio juris*, and avoid the perception of acquiescence in the breach. See J. Charney, 'Universal International Law', 87 (1993) AJIL 529 at 543-5.

superseded. The 'obligatory quality' of a rule of customary law is lost only if the behaviour of those States which refuse to comply with the rule, and the consistent reactions of other States, are supported by the belief that the rule is no longer binding.[67]

Second, some customary rules of international law are particularly difficult to modify. This is due to their status as peremptory norms of international law or *jus cogens* norms, which have been defined as 'substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values'.[68] As rules which aim to protect values considered fundamental by the international community as a whole, *jus cogens* rules have the additional characteristic of creating obligations *erga omnes*, i.e. 'obligations owed by a State towards the international community as a whole'.[69]

Examples of the norms considered in this book that would clearly enjoy *jus cogens* status include the prohibition on torture or the waging of aggressive war, and arguably many more of the norms at the core of the study and illustrated through the case studies, such as basic principles of human rights or humanitarian law.[70] Another norm which conflicts with a jus cogens norm is invalid. The significance of *jus cogens* in practice in this area is clear from, for example, judgments of various bodies in recent years which have looked closely at the compatibility of Security Council resolutions mandating sanctions against individuals with *jus cogens* norms.[71]

Another consequence of a norm having *jus cogens* status[72] is the fact that it can be modified 'only by a subsequent norm of general international law

67 The ICJ, determining the content of the customary rules prohibiting the use of force and intervention in the internal affairs of another State, has stated that the fact that the prohibition was frequently breached was not sufficient to deny its customary character. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States), ICJ Reports 1986*, p. 14, para. 186. On reactions to the war on terror, see Chapter 12.

68 See ILC Commentaries to Articles on State Responsibility, Commentary to Article 40(3). See also the definition set out in Article 53, VCLT 1969. While commentators differ on the content of such rules, the ILC's Commentaries to the 1969 Vienna Convention (*Yearbook ILC 1966*, vol. II, pp. 248 ff.) and to the Articles on State Responsibility, suggest that norms such as those prohibiting the use of force contrary to the principles of the UN Charter and those that protect core human rights, including the prohibition of torture or slavery, are generally considered peremptory norms of international law.

69 *Barcelona Traction, Light and Power Company, Limited, Second Phase*, *ICJ Reports 1970*, p. 3, at para. 33.

70 See e.g. discussion of these norms in Chapters 5 and 7.

71 *Jus cogens* has had real implications in the war on terror. See, e.g., A. Bianchi, 'Human Rights and the Magic of Jus *Cogens*', 19 Eur. J. Int'l Law 3 (2008), pp. 491-508; see also *Kadi* decision, where the Court of First Instance of the European Communities (CFI) indirectly reviewed the legality of Security Council anti-terror resolutions against the background of human rights peremptory norms, discussed in Chapter 7.

72 The fact that the international community as a whole recognises a rule of general international law as a peremptory rule has important consequences for international responsibility; see Chapter 3.1.

having the same character'.[73] In practice, determining that a *jus cogens* rule no longer exists, or that its content has changed, would require near 'universal' state practice and strong evidence indicating that the value it protects is no longer considered a fundamental one by the international community.

1.5 THE LEGAL FRAMEWORK AS AN INTERCONNECTED WHOLE

Finally, it bears emphasis that while each of the following chapters explores a different aspect of the legal framework, they are inherently interconnected. This book demonstrates the extent to which an understanding of the international system of law requires that it be seen as a whole, with each of the branches of international law understood by reference to the core principles from which they derive and to one another. The complex dynamic relationship between areas of law and sources has practical consequences, as this book will illustrate. It requires, in relation to any particular set of facts that we look beyond the simple identification of an applicable rule to consider a diverse range of different sources and potentially applicable norms, and their interrelationship.

These inter-connections between norms will be highlighted throughout this book – at times requiring that the law set out in a subsequent chapter be pre-empted and at others that aspects of foregoing chapters be revisited. It will highlight tensions that arise, such as between IHRL on the one hand and IHL or peace and security law on te other. The intersection of different areas will be highlighted throughout the chapters, explored in more detail in relation to particular scenarios in the case studies, and returned to in the concluding chapter.[74]

As will be illustrated more fully in the body of the study, it has been the selective application of particular branches or norms of the legal framework (notably from the law applicable in armed conflict), while ignoring other applicable norms (notably core human rights law) as well as underlying principles from IHL itself, which has characterized war on terror. The fragmented approach has fed the notorious claim that some people lie beyond laws protection, caught in legal protection gaps that do not in fact exist.[75]

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73 Article 53, VCLT 1969. Nor can they be modified or derogated from by agreement between States: Articles 53 and 64, VCLT 1969 make clear that a treaty which conflicts with a peremptory norm is void.

74 These interconnections are drawn out further in the concluding chapter.

75 See eg as Chapter 8 Guantanamo.

1.6 Structure of the thesis

This thesis consists of three parts. The first sketches out preliminary issues of law relating to 'international terrorism' and 'international responsibility' for terrorism. The second, more substantial, part explores the lawfulness of certain responses to international terrorism. It considers the criminal law response, and the law governing resort to armed force between states, as well as the law governing how responses may be executed, with chapters on human rights law and international humanitarian law applicable in armed conflict.

While the focus is on the legal framework pertinent to the particular area of law, in these chapters of Part Two[76] the 'legal framework' section of each chapter (Part A) is followed by an 'application' section (Part B), which highlights key issues regarding the treatment of that framework in the 'war on terror.' These sections explore practices post-9/11 that illustrate certain characteristics of the 'war on terror' and its relationship to international law. While the practice highlighted is necessarily a selective illustration of issues arising, the framework sections, by contrast, provide the law by which new measures may be assessed as they emerge, as they do almost daily, in this rapidly unfolding area. Chapters 2-7 therefore set out the legal infrastructure of terrorism and counter terrorism, identifying norms, mechanisms and principles from numerous areas of law that are engaged in the fight against 'international terrorism'.

In Part 3, case studies look across the areas of law, illustrating how they co-apply, intersect and take effect in practice in relation to particular controversial factual scenarios. The case studies illustrate also the extent of non-compliance with and obfuscation of the legal framework, as well as on occasion highlighting tensions or controversies within the framework itself.[77] Chapters 8-10 focus on detentions at Guantanamo Bay, the killing of Osama bin Laden and extraordinary rendition respectively. A further chapter explores judicial responses to the war on terror, and explores the role of the courts in adjudicating the human rights challenges that 'war on terror' has given rise to. The final chapter set out conclusions of the research as regards the legal framework, explores overarching characteristics of the practice of the war on terror, and questions its longer term implications.

76 The most central, and the lengthiest, chapters setting out the law and illustrating its application or disregard follow this bifurcated structure – in relation to criminal justice, the use of force, humanitarian law and human rights law.

77 See, e.g., Chapters 3 Responsibility and 10 Extraordinary Redition on complicity in international law.

1.7 OVERVIEW OF CHAPTERS

The political significance of the "terrorism" label since 9/11 is beyond dispute, and is explored throughout the study. Chapter 2, Part One begins however by addressing the *legal* significance of 'terrorism' as a concept in international law. It considers the renowned lack of a global convention defining 'terrorism', while sketching out international and regional developments (before and after September 11) towards a generic definition of terrorism, and the proliferation of conventions addressing specific forms of terrorism. While it is doubtful that there is an accepted definition of terrorism under treaty or customary international law at the present time, the chapter introduces other international legal norms that do, however, address the prohibition on terrorism and obligations in respect of it.

Chapter 3 addresses responsibility under international law. It assesses first the responsibility of states for acts of international terrorism, and the basis on which acts perpetrated by private individuals, networks or organisations (such as al-Qaeda or 'associated groups'[78]) may be attributed to a state (such as Afghanistan post-9/11). It distinguishes attribution of responsibility for terrorist attacks themselves from responsibility for other wrongs, and considers the consequences of each, under international law. It also assesses the extent to which private individuals or organisations – so-called 'non state actors', such as al-Qaeda or individual members or associates thereof – may incur responsibility under international law. The final section considers issues of state responsibility arising in relation to responses to international terrorism. Specifically, it explores how the multi-actored, transnational complexity of the 'war on terror' has sharpened focus on the significance of shared state responsibility where a state acts through or in cooperation with other states. It explores also state responsibility where the state acts. through private contractors, on the other. It considers the right, or in exceptional circumstances the responsibility, of other states to take measures in response to international wrongs carried out in the course of terrorism, or indeed in the name of counter-terrorism.[79]

In Part Two, Chapter 4 considers international terrorism and responses thereto through the prism of criminal law. Part A first describes the crimes that may be committed through acts of international terrorism, outlines relevant principles of criminal law that determine who may be held responsible and considers which courts or tribunals can exercise jurisdiction and in what circumstances. Second, it considers the implementation and enforcement of

78 See Chapter 6 IHL.

79 Many wrongs committed in the name of counter-terrorism, such as the unlawful use of force, arbitrary detention, torture or extraoprdinary rendition, are highlighted in subsequent chapters.

criminal law, in particular law and practice in respect of international cooperation in criminal matters.

Chapter 4 Part B considers the application of the criminal law model in practice since September 2001. It notes the apparent dearth of criminal law responses in the wake of 9/11, and the transformation of laws and practice over time. It explores normative developments, revealing a trend towards the 'preventive' role of criminal law, and an exceptionalist approach to criminal law and procedure in the field of terrorism in recent years. Examples include expanded terrorism related offences and modes of liability, modified principles and procedures in the investigation and prosecution of terrorism, and innovations in international cooperation. It considers the relationship between those developments and other legal obligations, notably in the field of human rights law, and the implications for the criminal process itself. Finally, while the focus is on international terrorism, it also notes that the international criminal law paradigm is relevant also crimes under international law committed in the name of countering terrorism, and the dearth of practice to date in holding individuals criminal responsible for 'war on terror' crimes.

Chapter 5 considers the exceptional circumstances in which the use of force may be lawful in response to international terrorism. These concern self-defence or pursuant to Security Council authorisation under Chapter VII of the UN Charter. While discussing whether there are other possible justifications the focus is on those justifications that have been advanced in practice. In various contexts since September 11 where reliance on an expansive approach to self-defence against terrorism has dominated. The Chapter therefore explores in most detail the scope of, and limits on, the right to self-defence in response to international terrorism. Chapter 5, section B considers this legal framework in light of the use of force post-9/11. The lawfulness of the use of force in the interventions in Afghanistan and Iraq post-9/11 is considered, and the ongoing assertion of the right to use force across borders, particularly in targeted killings of alleged members of al-Qaeda and associated groups around the globe.

Chapter 6 considers the relevance, scope and nature of international humanitarian law (IHL) applicable during armed conflict to the international fight against terrorism. It assesses the legal nature of 'armed conflict' and key norms of IHL that apply in it, notably those that govern legitimate targeting, permissible methods and means of warfare, humanitarian protections and the responsibility of states party to the Geneva Conventions to ensure compliance with IHL standards.

In light of this legal framework, Chapter 6, section B explores the issue that has dominated, and stymied, legal discourse since the launching of the so-called 'war on terror': to what extent is there or can there be a global a war with al-Qaeda and associated groups? It also addresses, secondarily, the nature of those armed conflicts that have arisen post 9/11, and particular issues of IHL arising. The compatibility of practices arising in the purported global

'armed conflict with al Qaeda and associated groups,' including in relation to the treatment of "enemy combatants," detentions and drone attacks on alleged members of al-Qaeda and associates worldwide are also considered.

Chapter 7 considers the international human rights law (IHRL) framework of relevance to the 'war on terror'. It discusses where, when and to whom the human rights framework applies. It highlights the inherent flexibility of IHRL and the ways in which it accommodates and is responsive to security imperatives and the challenges of international terrorism. Specific rights implicated by terrorism and counter terrorism are then addressed.

Chapter 7, section B seeks to illustrate some of the many overarching and specific questions that arise in relation to the application of this legal framework post-9/11. Three broad groups of issues that go to the relevance and applicability of the framework, as well as challenging issues regarding interplay of legal regimes, are addressed. These are the relationship between security and human rights; the applicability of human rights obligations to states acting abroad, and the applicability of human rights in the 'war' on al-Qaeda (and its interplay, where appropriate, with IHL). The chapter also highlights specific post-9/11 practices that violate or strain the human rights framework. Among the many issues highlighted are: broad anti-terrorist legislation and the implications for the principle of legality, profiling practices in light of equality norms, the implications of listing and delisting of terrorist suspects, the erosion of the right to privacy and the multifaceted attacks on the protection against torture and inhuman treatment. More general questions relate to the marginalisation of human rights law and mechanisms in the immediate aftermath of 9/11, and whether there is a discernible trend back towards a more central role for human rights protection in the on-going 'war on terror'.

Part III consists of three case studies that 'apply' the legal framework discussed in preceding chapters. Chapter 8 relates to the detentions in Guantanamo Bay, Cuba, which came to symbolise the arbitrariness of the 'war on terror,' as a vehicle to consider some of the legal issues highlighted in Chapters 6 and 7 and the interconnections between them. It considers the lawful bases for prisoners' detention and the basic procedural rights to which they are entitled under IHRL and IHL, as well as issues arising from their trial by military commission. The chapter concludes by questioning the implications of the Guantanamo Bay anomaly – for the US, for other states, and for the rule of law more generally.

Chapter 9 presents the second case study, focusing on the killing of Osama bin Laden, and the appropriateness, from a legal standpoint, of the prompt assertion in its wake that 'justice ha[d] been done'. It considers the lawfulness of his killing, on available facts, with regard to the various areas of international law at stake, including the *jus ad bellum, jus in bello* and the nature of the right to life under human rights law. International legal issues arising

in relation to the subsequent disposal of bin Laden's corpse in the Arabian sea are also raised.

Chapter 10 considers the practice of 'extraordinary rendition', led by the CIA but made possible by a complex network of other states and private actors. More than any other practice, it highlights issues regarding multiple actor responsibility. The chapter explores the potential implications of many areas of law, and which states may be responsible in respect of which forms of participation in the programme, and areas of tension or uncertainty in this respect. It considers efforts to secure justice and accountability for rendition, and the implications of the rendition programme and the impunity that has surrounded it to date.

Chapter 11 explores the role of the courts, with a focus on the adjudication of human rights claims in respect of which litigation has been most voluminous.[80] It highlights limitations placed on the judicial role in various guises since 9/11. Despite this, it assesses judicial responses to have emerged from the war on terror by reference to significant cases. It analyses the role and potential impact of that human rights litigation in an area where transparency, accountability and reparation for victims of the war on terror has proved elusive.

The concluding chapter 12 looks across the array of law and practice that has been highlighted in preceding chapters. Considering the legal framework as a whole, it reflects on the nature of the normative order governing terrorism and counterterrorism. It will suggest that it reveals no gaping holes in the legal framework, nor the transformative shifts post-9/11 that some heralded at the outset of the 'war on terror', while acknowledging areas of tension and uncertainty that have emerged, and pockets of legal development. It identifies certain overarching characteristics of the 'war on terror', which it will suggest are the antithesis of the principles that underlie a rule of law approach to counter-terrorism. By exploring the legal framework, and state practice in respect of it post-9/11, the book finally questions the – as yet uncertain – long-term implications of the war on terror for international legality. It ends by highlighting some of the challenges that face the international community if we are to meet the commitment that has now been made on paper to move from a 'war on terror' blighted by illegality to an effective, rule of law approach to counter-terrorism.[81]

80 Chapter 4 deals seperately with the practice of criminal trials.
81 See e.g. UN Global Strategy supra note 59.

PART I

2 'Terrorism' in International Law

Terrorism is a term invoked prolifically in international practice. The events of 11 September 2001 were ubiquitously and uncontroversially characterised, and internationally condemned, as acts of 'international terrorism'. Their wake brought unprecedented unity of purpose on the international level as to the need to prevent, punish and otherwise combat international terrorism. Various subsequent attacks strengthened that resolve.[1] Legally binding measures directed against terrorism ensued, with broad-reaching political and legal effect, including Security Council resolutions that imposed a wide range of obligations on states to prevent and suppress terrorism and ensure 'terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.'[2] Around the globe, laws have been rewritten, policies changed, 'exceptional' measures imposed, and an enormous (and some say excessive[3]) international counter-terrorist effort brought to bear on the suppression and prevention of international terrorism.

One could be forgiven for assuming that international terrorism is a readily accessible legal concept. But is the universal condemnation of terrorism matched by a universal understanding of what we mean by the term? Are the obligations to suppress and punish terrorism matched by an internationally accepted definition of what precisely it is that is to be penalised? In 2001, when questioned on the definition of terrorism, then UK Permanent Representative to the UN Sir Jeremy Greenstock suggested 'What looks, smells, and kills like terrorism is terrorism.'[4] If so, to paraphrase the famous dictum of a US judge

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1 Attacks attributed to international terrorism have occurred around the globe since 9/11, including in Madrid, London, Bali, Mumbai, Moscow, Libya, Iraq, the united States and far beyond.

2 SC Res. 1373 (2001), 28 September 2001, UN Doc. S/RES/1373 (2001). This resolution also established a Counter-Terrorism Committee to monitor the implementation of the resolution. SC Res. 1377 (2001), 28 November 2001, UN Doc. S/RES/1377 (2001), sets out the tasks for the Committee.

3 M. Koskinniemi, 'What is International Law For?" in M. Evans, *International Law*, 3rd ed. (Oxford: Oxford University Press, 2010).

4 Sir Jeremy Greenstock, the Permanent Representative of the UK to the UN when questioned in October 2001 about the lack of a definition of terrorism, stated: 'There is common ground amongst all of us on what constitutes terrorism. What looks, smells and kills like terrorism is terrorism'. UN Doc. A/56/PV.12, 1 October 2001, p. 18.

that drives in the same direction, do we simply know terrorism when we see it,[5] and is that a sufficient legal basis to give rise to obligations of states and criminal responsibility of individuals?

The search for an accepted definition of terrorism in international law has been described as 'resembl[ing] the Quest for the Holy Grail'.[6] By the time of 9/11, scholars and practitioners had already put forward at least 109 possible definitions, and several more have been ventured since.[7] In the wake of 9/11, there appeared to be renewed impetus to settle on an internationally agreed definition. Yet, as discussed below, diplomatic attempts to draft a global terrorism convention continued to fail, as consensus around a single definition of international terrorism proved elusive. Alongside the stagnant treaty process is an increasingly tumultuous debate as to whether customary law already provides for a definition of terrorism.[8]

While the status of terrorism *per se* in international law may remain subject to debate, what is clear is that legal developments relating to terrorism have not been paralysed by the impasse in achieving a global definition. Specific conventions addressing particular types of terrorism, developments by regional organisations for their regional purposes, and advances in other areas of international law have provided legal tools to address conduct that we commonly refer to as acts of terrorism.

This chapter will sketch out international and regional developments towards the adoption of a general definition of terrorism as part of a comprehensive convention, as well as the proliferation of specific terrorism conventions. Exploring the various definitions put forward in international practice, it will ask to what extent it can be said that there is an internationally accepted definition of terrorism under customary international law. If there is no such generic international definition, it will ask whether this leaves a gap in the international legal order as regards the phenomenon commonly referred to as terrorism. In this respect, this chapter assesses the extent to which the prohibition of terrorism and obligations in respect of it are addressed by other international legal norms. It concludes by enquiring as to the consequences of the use of the 'terrorism' label absent a definition provided in law. Related questions, such as the implications for international cooperation to combat terrorism or for human rights protection, will be explored in more detail in

5 *Jocabilis v. Ohio* US 378: 184, 197, Justice Stewart 'I know terrorism when I see it', as cited in A. Arend and R. Beck, *International Law and the Use of Force: Beyond the U.N. Charter Paradigm* (New York: Routledge, 1993), p. 140.

6 G. Levitt, 'Is "Terrorism" Worth Defining?', 13 (1986) *Ohio N. Univ. Law Rev.* 97.

7 The UN Special Rapporteur on Terrorism and Human Rights at the time of the 9/11 attacks, noted that 109 definitions were put forward since 1936. UN Doc. E/CN.4/Sub.2/2001/31, 27 June 2001, p. 8.

8 Special Tribunal for Lebanon (STL) Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Interlocutory Decision), STL-11-01-I, 16 February 2011. See further below.

later chapters which focus on the legal framework governing states responses to terrorism.

'Terrorist' is a label used loosely, selectively and invariably pejoratively. Since long before 9/11, but increasingly since then, 'terrorism' has been invoked to justify the application of 'exceptional' laws, legal regimes or practices, often with serious consequences. In this murky area, where the defining elements of terrorism are often confused with value judgements about those accused of it, the principal goal of this chapter is to unravel the terminology and identify the extent to which there are objectively applicable legal standards.

2.1 DEVELOPMENTS TOWARDS A COMPREHENSIVE DEFINITION OF INTERNATIONAL TERRORISM

2.1.1 Pre-9/11: historical developments

As early as the 1930s, serious efforts were underway to achieve consensus on a general definition of terrorism. The 1937 Convention for the Prevention and Punishment of Terrorism defines terrorism as '[a]ll criminal acts directed against a State and intended or calculated to create state of terror in the minds of particular persons or a group of persons or the general public'.[9] The difficulties in achieving consensus around this definition were such that the 1937 Convention never came into force and the search for an international consensus was temporarily abandoned.

In the early seventies, the United Nations stepped into the fray and in 1972 an *ad hoc* committee of the General Assembly was mandated to consider a Draft Comprehensive Convention and produce a definition.[10] The Committee ultimately produced a report that falls short of that objective, but rather serves to underline the problems associated with the definitional quandary. Specifically, fuelled by the recent experience of wars of national liberation fought against former colonial powers, the report reveals persistent division regarding the inclusion or exclusion of 'national liberation movements' within the definition.[11] Thus attempts to derive a generic definition again fell by the wayside (in preference for the framework of conventions identifying specific forms of

9 Article 2(1), Convention for the Prevention and Punishment of Terrorism (Geneva, 1937, never entered into force), League of Nations Doc. C.546M.383 1937.

10 During the 1960s, conventions were adopted addressing specific facets of terrorism, as discussed at 1.1.3 below but the killing of 28 persons by a Japanese suicide squad at Lod airport, and of 17 Israeli athletes at the Munich Olympic Games in the seventies have been described as the impetus for this renewed initiative. *See* J. Dugard, 'The Problem of the Definition of Terrorism in International Law', (hereinafter 'Definition of Terrorism') conference paper, Sussex University, 21 March 2003, p. 4.

11 Obote-Odora, A., 'Defining International Terrorism', 6.1 (1999) *E Law – Murdoch University Electronic Journal of Law*.

terrorism, on which international consensus *could* be achieved, as discussed below).[12]

By the 1990s, shifting global politics – the end of the cold war and of apartheid, the achievement of independence from colonialism for several African countries and apparent progress towards peace in the Middle East – gave those in favour of a global convention fresh hope that consensus on a generic definition of terrorism might finally be achievable.[13] In 1994, there was something of a breakthrough in the form of the 'Declaration on Measures to Eliminate International Terrorism', which although non-binding, was subsequently endorsed by the United Nations General Assembly.[14] It defined terrorism as 'criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes'. Notably, it condemned terrorism as 'in any circumstances unjustifiable whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature'.[15] Thus, there was an attempt to divorce the condemnation of terrorism from the value judgements about the causes or reasons that may underpin it.

Building on this development, General Assembly Resolution 51/210 established an *ad hoc* committee in 1996, *inter alia* to streamline efforts to arrive at a Draft Comprehensive Convention. The first draft of the Comprehensive Convention was presented by India in the Working Group in 1996.[16] In the debate that followed in the *ad hoc* Committee the extent of controversy surrounding a generally accepted definition of terrorism was quickly apparent. Nonetheless, an indirect development came in the definition in the 1999 Convention for the Suppression of Financing of Terrorism.[17] Despite this, controversy around the generic definition within the context of the global convention continued. The Committee's work was ongoing when terrorism

12 *See* this Chapter, para. 1.3.

13 Dugard, 'Definition of Terrorism', *supra* note 10, p. 6.

14 GA Res. 50/53, 11 December 1995, UN Doc. A/RES/50/53 (1995) and GA Res. 51/210, 17 December 1996, UN Doc. A/RES/51/210 (1996).

15 This definition was reiterated in subsequent General Assembly resolutions. *See*, e.g., GA Res. 51/210; GA Res. 52/165, 15 December 1997, UN Doc. A/RES/52/165 (1997); GA Res. 53/108, 8 December 1998, UN Doc. A/RES/53/108 (1998); GA Res. 54/110, 9 December 1999, UN Doc. A/RES/54/110 (1999) and GA Res. 55/158, 12 December 2000, UN Doc. A/RES/55/158 (2000).

16 Doc A/C.6/51/6 of 11 November 1996. In 2000, India presented an amended version: *see* Doc A/C.6/55/1 of 28 August 2000, also reproduced in 42 *Indian J Int'l L* (2002) 219.

17 International Convention for the Suppression of the Financing of Terrorism, 1999, Art. 2(1)(b): "…any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". It does not define the conduct as such but refers to conduct covered by conventions addressing particular forms of terrorism – *see* this chapter, para. 2.1.3 below.

shot to the top of the international agenda on 11 September 2001, and its quest continues to the present day.

2.1.2 Post 9/11 developments: a global convention to meet a global concern?

Following 11 September 2001, international statements demonstrated unparalleled unity in the condemnation of international terrorism. The Security Council for its part, without defining terrorism, called on states to adopt wide-ranging measures on the domestic level including the criminalisation of terrorist acts and their financing. It also urged states to ratify existing conventions and adopt pending conventions, in an apparent reference to the Draft Comprehensive Convention.[18]

As the working group of the *ad hoc* committee hurried to re-commence its work in this new context, all delegations were unequivocal in their condemnation of terrorism in all forms and manifestations.[19] The momentum towards the global convention may, at that point, have seemed irresistible. However, beyond the rhetoric, many additional years of negotiating time and efforts at various junctures to instill a sense of urgency in the process,[20] strikingly little progress has been made.[21] Old divisions have continued to characterise the negotiations, as explained below. Indeed while the 'outstanding' issues on which agreement could not be reached had not and have not changed considerably with years of negotiations, new controversies have emerged in

18 In para. 3 of SC Res. 1373 (2001), *supra* note 2, the Security Council called upon all States to '(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001).' *See also* SC Res. 1269 (1999), 15 October 1999, UN Doc. S/RES/1267 (1999). *See* the Security Council's approach to terrorism and growing clarity in SC Res. 1566 infra.

19 UN Doc A/C.6/56/L.6, para. 1 of Annex IV, Part A, Report of the Working Group of the Sixth Committee on 'measures to eliminate international terrorism' (29 October 2001); *see* http://www.un.org/law/terrorism.

20 On 10 March 2005, then-Secretary-General Kofi Annan insisted that '[T]he time has come to complete a comprehensive convention outlawing terrorism in all its forms'. Secretary-General's keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security – 'A Global Strategy for Fighting Terrorism', Madrid, Spain, 10 March 2005, available at http://www.un.org/sg/statements/?nid=1345. *See also* 'UN seeks definition of terrorism', BBC News, 26 July 2005, available at http://news.bbc.co.uk/2/hi/americas/4716957.stm; *see also* Secretary-General's press encounter after meeting with Jordanian Foreign Minister Farouk Kasrawi, 11 November 2005, available at http://www.un.org/sg/offthecuff/?nid=794.

21 *See* UN Docs A/58/37, A/C.6/58/L.10, A/59/37, A/C.6/60/L.6, A/61/37, A/C.6/61/SR.21, and A/62/37. For an account of negotiations, *see* M. Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism. Major Bones of Contention', 4 J Int'l Crim. Just. (2006) 1031.

response to new proposed solutions (with even the title of the draft emerging as the subject of debate).[22]

The current informal definition of terrorism for the purposes of the Draft Comprehensive Convention (Article 2), prepared by the Coordinator for negotiating purposes, defines terrorism as unlawfully and intentionally causing (a) death or serious bodily injury to any person; (b) serious damage to public and private property, including a State, government or public facility;[23] or (c) other such damage where it is likely to result in major economic loss.[24] The definition further requires that 'the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or abstain from doing any act'.[25]

While various aspects of this definition have been subject to criticism over the years on the basis of the breadth and vagueness of terms,[26] the heart of the outstanding controversy might be classed in three inter-related groups. Two relate to the potential authors of terrorism under the Convention's definition, namely whether states on the one hand and 'national liberation movements' on the other, should fall within the purview of the Convention.[27] The third is whether conduct in armed conflict should be excluded, and if so, whether such exclusion applies to both 'parties' to the conflict.[28]

Some negotiators sought (unsuccessfully, it would seem) to depart from the age-old debate around the qualification or not of oppressive states versus liberation movements as terrorists by treating the question not as part of the definition of terrorism as such, but as a limitation on the scope of the Convention. Thus Article 18 of the Draft Comprehensive Convention excludes from the scope of the Article 2 definition acts carried out during armed conflict, on the basis that another body of international legal rules, namely international

22 In 2008, debate emerged over removing the word 'comprehensive'. Sixty-third session of the Sixth Committee, Agenda item 99, Measures to Eliminate International Terrorism, Oral Report of the Chairman of the Working Group, 24 October 2008, para. 27. Negotiations are ongoing at time of writing, despite some delegates suggesting a pause in negotiations: UN Press Office L3209 (8 April 2013) and L3210 (12 April 2013).

23 The text provides 'including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment'. Informal text of Article 2, Report of the Working Group on Measures to Eliminate International Terrorism, UN Doc. A/C.6/56/L.9, Annex I.B.

24 *Ibid.*

25 *Ibid.*

26 *See* e.g. F. A. Guzman, *Terrorism and Human Rights No. 1* and *Terrorism and Human Rights No. 2* (International Commission of Jurists, Geneva, 2002/3).

27 *See* proposals regarding Article 18 of the Convention, *infra*. UN Doc A/C.6/56/L.6, *supra* note 19, para. 7. *See also* Marcello Di Filippo, 'Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes', *E.J.I.L.* 2008, 19(3), 533-70; Lucia Aleni, 'Distinguishing Terrorism from Wars of National Liberation in the Light of International Law: A View from Italian Courts', *J. of Int'l. Crim. Just.* 2008 6(3): 525-39.

28 Proposals regarding draft Article 18 below.

humanitarian law, already governs armed conflict, including wars of national liberation.[29]

However, the current draft excludes only 'armed forces', thereby exempting only state forces and not others whose conduct would also be governed by IHL, such as non-state parties to non-international armed conflicts, or liberation movements in the context of wars of national liberation.[30] The proposed exclusion notes that 'the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention'.[31] This encounters stringent resistance from delegations intent to ensure that those national liberation movements fighting against such state forces are likewise excluded. One counter-proposal therefore seeks to exclude both 'parties to a conflict', and to ensure that those fighting 'foreign domination' are considered within the purview of any such exclusion.[32]

The Article 18 proposal excluding conduct already covered by IHL is supported by those, including the ICRC, concerned that conduct permissible under IHL should not be covered by 'terrorism', potentially jeopardizing the applicable framework of IHL.[33] It is argued that conduct that violates IHL is adequately governed by the framework of IHL, and that conduct that may be permissible under IHL should not be labeled 'international terrorism.' Doing so may preclude the application of amnesties at the end of the conflict (which IHL contemplates for offences not amounting to violations of IHL and which

29 Such wars are considered international conflicts under Article 1(4) of Additional Protocol I to the Geneva Conventions. Some other conventions, such as the The International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997, UN Doc. A/RES/52/164, in force 23 May 2001) took the same approach: *see* Preamble and Article 19. *See* by contrast the example of the Financing Convention at 2.1.4 below.

30 Informal text of Article 2, Report of the Working Group on Measures to Eliminate International Terrorism, UN Doc. A/C.6/56/L.9, Annex I.B.

31 *Ibid.*

32 An alternative draft by the Organisation of the Islamic Conference excludes '[t]he activities of the *parties* during an armed conflict, *including in situations of foreign occupation*'. United Nations General Assembly, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixth session (28 January-1 February 2002), Annex IV, art. 18. *ref; See* Dugard, 'Definition of Terrorism', *supra* note 10, p. 9. *See also* Mahmoud Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism', ICJ (2006) 4 5 (1031). However, in order to provide further clarity, a new paragraph 5, framed as a 'without prejudice clause', was added during the 2007 session of the Ad Hoc Committee.

33 *See* for example, ICRC, 31st International Conference of the Red Cross and Red Crescent, 'International Humanitarian Law and the challenges of contemporary armed conflicts', 28 November 2011, p. 48-53, ICRC Doc. 31IC/11/5.1.2, available at http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf.

is said to provide an important incentive to compliance with IHL).[34] Unfortunately, existing international conventions take divergent and at times unclear approaches to application in armed conflict, causing potential confusion as to the interplay of these regimes.[35] It remains to be seen, if a comprehensive convention comes to pass, what approach it will adopt on these issues and to what overall effect on the coherence of the broader international legal framework.

In conclusion, if any shift in negotiations could be discerned post-September 11, beyond a strengthened condemnation of acts such as those executed that day, it was in the expressions of support, in principle, for a global convention. Commentators have long disagreed on the desirability of a comprehensive Convention[36] as much as on its content, yet reports of UN negotiations post-September 11 recorded that States 'reiterated the urgency of adopting a comprehensive convention on international terrorism'.[37] At least immediately following September 11, then, the quest for a global terrorism convention appeared to become accepted as a political reality. Yet the feasibility of achieving such a Convention, its precise content or scope, and of course the support that it might eventually muster, remain shrouded in uncertainty to the present day.

While some continue to seek to propel the process forward, with the passage of the years, there may be a loss of momentum and confidence in the inevitability, or indeed the value, of a global convention.[38] Some commentators have reverted to suggesting that 'a less ambitious approach' should be pursued which concentrates on further elaborating functional legal definitions of terrorism for specific purposes; this certainly reflects the reality that the greatest normative activity before and after 9/11 can be found in conventions related to specific forms of terrorist-related activity, addressed below.[39] On the other hand, experience post 9/11 explored in this book testifies to the importance of a clear and precise definition of terrorism and the abuse that

34 *See* Claudia Martin, in van den Herik and Schrijver (eds.), *Counter-terrorism Strategies in a Fragmented Legal Order*, (Cambridge: Cambridge University Press, 2013). Such amnesties are distinct from amnesties for serious violations of human rights, which are impermissible under international law, as discussed at Chapter 7.

35 *Ibid.*

36 *See* for example, Dugard, 'Definition of Terrorism', supra note 10, pp. 12-14, and J. Murphy, 'International Law and the War on Terrorism: The Road Ahead', 32 (2002) *Israel Yearbook on Human Rights* 117.

37 UN Doc A/C.6/56/L.6, supra note 19, Annex IV, para. 4, 'Informal summary of the general discussion in the working group, prepared by the Chairman'.

38 Kim Prost, in van den Herik and Scrijver, *Count-terrorism Strategies*, *supra* note 35, arguing that even from the point of view of facilitating international cooperation, a global convention is unnecessary.

39 *See* Di Filippo, *supra* note 27, p. 533-70.

results in practice from its absence.[40] The vastly divergent definitions of terrorism in national law and their application in the years following 9/11 may thus lend weight to the arguments in favour of pursuing a global definition. Whether this can ever be achieved, and the fate of the global convention, remain to be seen.[41]

2.1.2.1 Other UN developments: providing a 'description' or 'framework' but not a 'definition' of terrorism

In 2004, a couple of developments at the UN level contributed to the debate around definitions. Most significantly, following the notorious Beslan school siege in the Russian Federation, the Security Council for the first time passed a resolution that does provide a definition of sorts:

> 3. *Recall[ing] that* criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.[42]

Security Resolution 1566 is broad reaching in its scope: the material element, or *actus reus* comprises any criminal acts, while the victim group is exemplified rather than defined as 'including' but not being limited to civilians. It could therefore be criticised for lack of clarity, but this may overlook the purpose of resolution 1566 which does not purport to provide a binding definition, but to provide a framework to assist states to provide for appropriate defini-

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40 On the definitional issues, *see* e.g. Chapters 4 and 7 below and Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, E/CN.4/2006/98 (paras. 26-50, 72), and B. Saul, 'Defining 'Terrorism' to Protect Human Rights' (October, 29 2008) in *Interrogating the War on Terror: Interdisciplinary Perpsective*, D. Staines, ed., pp. 190-210, (UK: Cambridge Scholars Publishing, 2007).

41 Providing a definition many years after states have changed their laws to comport with Security Council Resolution 1373 may be too late to avoid inconsistent legislation, unless by contrast to that in Security Council Resolution 1566, it obliged states to bring their law and practice into line.

42 Security Council Resolution 1566, s/RES/1566 (2004), para. 3, available at http://www.un.org/ Docs/sc/ unsc_resolutions04.html. For background and debate, see 'Security Council Acts Unanimously to Adopt Resolution Strongly Condemning Terrorism as One of the Most Serious Threats to Peace', available at http://www.un.org/News/Press/docs/2004/sc8214.doc.htm.

tions in domestic law. In principle states should provide greater clarity and specificity themselves in domestic law, though in practice it is the tendency to do just the opposite that lends support to the need for a clearer international framework.

The UN-sponsored high-level independent panel, reporting at the end of 2004,[43] advanced a 'description of terrorism'[44] which it found not to cover State violence (which was adequately covered by other norms of international law) and that no justification existed for terrorism by non-state actors.[45] It thus sought to contribute to drawing a line under the on-going state *versus* liberation movement debate and move the Comprehensive Convention negotiations forward.[46] This description, like the Security Council framework, is clearly not binding but intended to provide guidance to states seeking to implement their obligations in good faith. As noted, it has done surprisingly little to dampen controversy at the negotiating table of the global Convention.

2.1.3 Specific international conventions

As attempts to arrive at a comprehensive terrorism convention floundered at various stages, the search for a generic definition was replaced by the elaboration of a framework of conventions that identify specific forms of terrorism. Currently, there are 14 primary universal instruments pertaining to the subject of international terrorism.[47] A notable area of steady progress

43 U.N. High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', U.N. Doc. No. A/59/565 (2 December 2004). This document was drafted by a panel of independent experts created by former Secretary-General Kofi Annan in order to provide a shared, comprehensive view about the way forward on critical issues regarding UN reform and collective security.

44 '[A]ny action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.' U.N. High-level Panel on Threats, Challenges and Change, ibid, para. 164.

45 *Ibid.*, at para. 160, identifying these two issues as the stumbling blocks for an agreed definition.

46 Kofi Annan urged that the Comprehensive Convention integrate this description of terrorism. *See* Report of the Secretary-General 'In larger freedom: towards development, security and human rights for all', para. 91, delivered to the Security Council and the General Assembly, U.N. Doc. A/29/2005 (21 March 2005).

47 Report of the Secretary-General on Measures to Eliminate International Terrorism, UN Doc. A/64/161, available at http://www.un.org/en/ga/sixth/64/Terrorism_Table_64th.pdf. The instruments are: Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963, 1248 U.N.T.S. 451, in force 4 December 1969; Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970, 860 U.N.T.S. 12325, in force 14 October 1971; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, 23 September 1971, 974 U.N.T.S. 14118, in

since 2001, when the Security Council called on states to 'work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism',[48] has been in the increased number of ratifications of these specific or sectoral conventions, as well as an increased emphasis placed on implementation.[49] These conventions do not generally attempt to define terrorism, with the notable exception of the 1999 Convention for the Suppression of Financing of Terrorism which addresses only one aspect of terrorism, but contains a generic definition of sorts by describing terrorism as:

> any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[50]

More commonly, the specific conventions do not provide a general definition, but rather address specific types of conduct and set forth a framework of

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force 26 January 1973; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Montreal, 24 February 1988, 974 U.N.T.S. 14118, in force 6 August 1989; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973, 1035 U.N.T.S. 15410, in force 20 February 1977; International Convention against the Taking of Hostages, New York, 17 December 1979, 1316 U.N.T.S. 21931, in force 3 June 1983; Convention on the Physical Protection of Nuclear Material, Vienna, 3 March 1980, 1456 U.N.T.S. 24631, in force 8 February 1987; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988, IMO Doc. SUA/CONF/15/Rev.1, in force 1 March 1992; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 10 March 1988, 1678 U.N.T.S. 29004, in force 1 March 1992; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Montreal, 1 March 1991, U.N. Doc. S/22393, in force 21 June 1998; International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, UN Doc. A/52/653, in force 23 May 2001; International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, UN Doc. A/Res/54/109, in force 10 April 2002 ('Financing Convention'); International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005, UN Doc. A/Res/59/290, in force 7 July 2007; Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, Beijing, 10 September 2010, DCAS Doc No. 21 (not yet in force); and the Supplementary Protocol to the Convention for the Suppression of Unlawful Seizure of Aircraft, both signed in Beijing 2010, not yet in force as of early 2013.

48 SC Res. 1373 (2001), *supra* note 2.

49 K. Prost, *supra* 38, in v.d. Herik and Schrijver.

50 In the Financing Convention, Art. 2(1)(b) the terrorist conduct is question is not specificed other than by reference to specific terrorist conventions addressing particular forms of terrorism. Art 2 provides a definition of 'financing' which is also contentious: *see* for e.g. A Gardella, The Fight against the Financing of Terrorism between judicial and Regulatory Control, in A Bianchi (ed), *Enforcing International Law Norms against Terrorism*, (Oxford, UK: Hart Publishing, 2004), p. 415.

obligations on states parties, including measures to prevent criminal activity and cooperate in its prosecution. They often oblige states to either extradite or submit for prosecution persons suspected of the offences covered, subject to limited exceptions,[51] and to cooperate in, for example, intelligence and evidence gathering. Unlike certain other international treaties, they do not themselves purport to criminalise conduct, but to impose obligations on states to do so in domestic law.[52]

This alternative 'piecemeal' approach to terrorism was consolidated during the 1970s, with conventions addressing offences onboard aircraft or at airports,[53] crimes against internationally protected persons,[54] hostage taking[55] and acts aboard ships and at sea.[56] It continued to develop in the post cold war period, alongside the frustrated quest by the 1996 *ad hoc* Committee to find a global definition. During the nineties, this resulted in two noteworthy conventions relating to 'terrorist bombings'[57] and the financing of terrorism.[58] The Terrorist Bombings convention provides as comprehensive a terrorism convention as has been approved to date, covering the use of 'explosive or other lethal devices' in a public or state facility with intent to cause death or destruction, in particular where there is intent to cause terror in the public or particular individuals.[59] The Financing Convention prohibits provision of financial support for any of the acts covered by other *ad hoc* terrorist conven-

51 *See* exception in certain conventions e.g.the 1997 Terrorist Bombing Convention, where there are substantial grounds for believing that extradition would lead to serious human rights violations or is motivated by discrimination. The traditional exception for 'political offences' has been removed in certain treaties eg. the Terrorist Bombings or Financing Conventions. See Chapter 4.

52 *See* for e.g. Convention against Torture, Convention against Genocide or the Geneva Conventions and Protocols thereto; for a discussion of 'terrorism' as a crime under international law, see below, Chapter 4A.1.1.4 and terrorism in armed conflicts, this chapter 1.1.

53 The Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft 1963, *supra* note 48; the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, *supra* note 48; the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 and its Supplementary Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988, *supra* note 48.

54 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973, *supra* note 48.

55 International Convention Against the Taking of Hostages 1979, *supra* note 48; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf 1988, *supra* note 48.

56 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988, *supra* note 48.

57 International Convention for the Suppression of Terrorist Bombings 1997, *supra* note 48.

58 Financing Convention, *supra* note 48.

59 Article 2, International Convention for the Suppression of Terrorist Bombings 1997, *supra* note 48.

tions. Notably, both of these conventions apply irrespective of the political, ideological, racial or religious reasons that may underpin the acts.[60]

A further convention addressing 'nuclear terrorism' was adopted and entered into force on 7 July 2007.[61] A person who unlawfully and intentionally possesses radioactive material or makes or possesses any nuclear or radioactive explosive or dispersal device (or attempts to do so) with the intent to cause (1) death or serious bodily injury, or (2) substantial damage to property or the environment, commits an offence under the Convention.[62] The Convention requires States Parties to establish these offences as criminal acts under national law and to make them punishable by appropriate penalties that take into account their grave nature.[63]

2.1.4 Terrorism in armed conflict

International law also provides a definition of terrorism for the specific context of armed conflict. 'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population', are prohibited in international and non-international armed conflict under treaty[64] and customary IHL.[65] Serious violations of this and other IHL prohibitions may also amount to a war crime for which individuals may be held to account, as affirmed, for example, by the International Criminal Tribunal for the former Yugoslavia (ICTY)[66] or the Special Court for Sierra Leone.[67] As such, terror inflicted on

60 *Ibid.*, Article 6. Note the far-reaching provisions on cooperation, such as the exclusion of political offences, in these conventions.

61 International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005, UN Doc. A/Res/59/290, in force 7 July 2007 ('Nuclear Terrorism Convention').

62 Article 2 Nuclear Terrorism Convention, *ibid*.

63 *Ibid.*, Article 5.

64 Article 51 of Additional Protocol I and Article 13 of Additional Protocol II. See also Article 33(1) of the Fourth Geneva Convention, which provides that 'terrorism is prohibited' without defining the phenomenon.

65 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law,* Vol. 1: Rules, ICRC (2005), pp. 8-10. See also the STL Interlocutory Decision, *supra* note 8 and *Prosecutor* v. *Galic*, Case No. IT-98-29-T, Judgment, 5 December 2003; *Prosecutor v. Galic*, Case No. IT-98-29A, Appeal Decision, 30 November 2006.

66 The ICTY adjudicated the first case concerning the offence of inflicting terror on the civilian population during armed conflict, which it found amounted to a crime under treaty law: *Galić*, Trial and Appeal Judgments, *supra* note 68. *See also Prosecutor v. Milosevic* Case No. IT-98-29/1, Trial Judgment, 12 December 2007, and Appeals Decision, 12 November 2009.

67 E.g. the Special Court for Sierra Leone's first judgment including the crime of terrorism, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-04-16-T, 20 June 2007; and *Prosecutor v. Charles Taylor*, Trial Judgment, Case No. SCSL-03-01-T, 18 May 2012. See K. Keith, Deconstructing Terrorism as aWar Crime: The Charles Taylor Case, *J.I.C.J.* 11 (2013), 813. *See also* the Special Tribunal for Lebanon Interlocutory Decision, *supra* note 8.

the civilian population in armed conflict is a special case, providing an exception to the rule that 'terrorism' as such is not defined in, and does not constitute a crime under, international treaty law.[68]

As acts of terror in armed conflict are covered by IHL, by this specific provision or others addressing for example attacks against civilians, some of the 'Terrorism Conventions' purport not to apply in times of armed conflict, although as noted above the approach is irregular, and the issue remains controversial in the context of the Draft Comprehensive Convention. It currently excludes from the scope of application only the actions of 'armed forces' of the state during conflict, leaving non-state parties whose acts may respect IHL vulnerable to prosecution for terrorism.[69] By contrast, the Financing Convention includes within its scope terrorism in the context of armed conflict, and provides a specific definition for this purpose.[70] Unfortunately, it does not reflect precisely the definition of terrorism in IHL, causing potential confusion as to the interplay of norms.[71]

2.1.5 Regional conventions

Regional organisations have, to varying degrees, assumed responsibility for addressing terrorism, giving rise to at least nine regional conventions.[72] At

68 For the customary status of terrorism generally, see this Chapter, para. 1.2. On the customary status of the terror crime under IHL, see Henckaerts and Doswald-Beck.

69 E.g. Article 12 of the International Convention against the Taking of Hostages 1979 excludes hostage-taking in armed conflicts; Article 19 and Preamble, Terrorist Bombings Convention excludes only 'activities of armed forces during an armed conflict', as does the current draft of the UN Draft Comprehensive Convention, Article 18. Some treaties also exclude from their scope of application military vehicles and aircraft (e.g. see Article 1(4) of the Tokyo Convention 1963, Article 3(2) of the Hague Convention 1970, Article 4(1) of the Montreal Convention 1971 and Article 2 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988). By contrast, while the OAU Convention on the Prevention and Combating of Terrorism of 1999, provides in Article 22 that 'nothing in this Convention shall be interpreted as derogating from … the principles of international humanitarian law', while the specific exclusion at Article 3 appears to relate only to 'the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle'.

70 Article 2(1) refers to '[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'.

71 The definition differs slightly from the war crimes definition above, for example by omitting the critical 'primary purpose' to spread terror. See *Galić* judgment, *supra* note 68.

72 Arab Convention on the Suppression of Terrorism ('Arab Convention'), Cairo, 22 April 1998, in force 7 May 1999; Convention of the Organization of the Islamic Conference on Combating International Terrorism, Ouagadougou, 1 July 1999, in force 7 November 2002; European Convention on the Suppression of Terrorism, Strasbourg, 27 January 1977, in

the regional – as at the international – level, two broad approaches emerge. On the one hand, the European Union and the League of Arab States have produced generic definitions of terrorism for their regional purposes. By contrast, others, such as the Council of Europe or Organization of American States, do not define terrorism but refer to the existing conventions that address specific forms of terrorism.

2.1.5.1 Generic definition

Generic definitions of terrorism promulgated by regional organisations generally apply only to the member States of those organisations. To the extent that they reveal common or different understandings of the nature of international terrorism, however, they are relevant to a discussion of the definition of terrorism in customary law, as discussed below.

The Arab Convention on the Suppression of Terrorism was adopted by the League of Arab States in 1998.[73] Article 1(2) of the Convention defines terrorism as:

> Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources.

This definition of terrorism has been criticised for its breadth, vagueness and consequent susceptibility to abuse.[74] In particular, the unqualified reference

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force 4 August 1978; OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, Washington, D.C., 2 February 1971, in force 16 October 1973; OAU Convention on the Prevention and Combating of Terrorism, Algiers, 14 July 1999, in force 6 December 2002; SAARC Regional Convention on Suppression of Terrorism, Kathmandu, 4 November 1987, in force 22 August 1988; Shanghai Convention on Combating Terrorism, Separatism and Extremism, Shanghai, 15 June 2001, in force 29 March 2003; Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, Minsk, 4 June 1999, in force dates vary; Inter-American Convention against Terrorism, Bridgetown, 3 June 2002, in force on 10 July 2003; Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16 May 2005, in force 1 June 2007; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16 May 2005, in force 1 May 2008.

73 Arab Convention on the Suppression of Terrorism, *supra* note 75 (unofficial translation from Arabic by the UN translation service available at http://www.ciaonet.org/cbr/cbr00/video/cbr_ctd/cbr_ctd_27.html).

74 *See* Amnesty International's concerns with the scope of such 'threats' as potentially including legitimate political opponents: 'The Arab Convention for the Suppression of Terrorism: a serious threat to human rights', AI Index: IOR 51/001/2002, 9 January 2002.

to 'violence' or the 'threat' of violence – irrespective of whether it achieves any actual result, or of the gravity of the violence caused or threatened[75] – allows for a potentially very broad range of conduct to be brought under the rubric of this Convention.

Only eight days after September 11, the Commission of the European Union presented a proposal to the European Council for a Framework Decision on Combating Terrorism, intended to arrive at a common European definition of terrorism.[76] The Framework Decision, adopted by the Council on 13 June 2002, states that:

> terrorist offences include the following list of intentional acts which, given their nature or their context, may seriously damage a country or international organisation where committed with the aim of:
> (i) seriously intimidating a population, or
> (ii) unduly compelling a Government or international organisation to perform or abstain from performing any act, or
> (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation.[77]

Article 1 then goes on to outline the offences to which terrorism relates, including attacks on persons, damage to property, seizure of means of transport, 'endangering' people or the environment, weapons offences and threatening to commit any of those acts,[78] while Articles 3 and 4 bring within its scope 'offences relating to a terrorist group' and 'offences linked to terrorist offences'.[79] This Council statement was adopted as a 'common position',[80] requiring member states to take the legislative steps required to implement its terms in national law. It has been criticised for the use of 'unclear, vague and uncertain concepts.'[81] In 2008 this was compounded by a further Frame-

75 E.g. the Financing Convention, *supra* note 48, and the Draft Comprehensive Convention both refer to a requisite level of violence to be achieved, i.e. serious injury.

76 *See* Commission Proposal for a Council Framework Decision on Combating Terrorism, 19 September 2001, COM (2001) 521 final.

77 Article 1, Council Framework Decision on Combating Terrorism, 13 June 2002 (2002/475/JHA), OJ L164/3 of 22 June 2002 (hereinafter 'European Council Framework Decision on Combating Terrorism'). Council Framework Decision 2008/919/JHA of 28 November 2008 obliging states to criminalise 'public provocation', 'recruitment' and 'training,' 'aiding and abetting, inciting and attempting' terrorism. *See* further Chapter 4.

78 Article 1, European Council Framework Decision on Combating Terrorism contains the definition of terrorism; *see also* 'preventative offences', *ibid*.

79 *Ibid.*, Articles 2-4 requiring that these forms of association and liability be criminalised in domestic law.

80 A Council Statement is a declaration of political intent, having no legal force. But under Article 15 of the Treaty on the European Union Member States are under an obligation to ensure that their national policies conform to the 'common positions' adopted by the Council.

81 *See* Guzman, *supra* note 27 and Chapter 4.2.2.

work Decision required states to ensure that 'provocation' to commit such terrorist offences is also criminalised, as well as 'aiding and abetting, inciting and attempting' such crimes are also criminalised.[82]

2.1.5.2 Definitions by reference

The more common approach, adopted in the terrorism conventions of other regional organizations, is not to define terrorism as such but terrorist activities are identified by reference to existing UN treaties which have addressed specific forms of terrorism.[83] Regional organisations to have addressed terrorism in this way include the Organisation of American States,[84] the African Union,[85] the South Asian Association for Regional Cooperation,[86] The Council of Europe[87] and, moret recently, the Association of Southeast Asian Nations (ASEAN).[88] While these regional arrangements act as a framework for extradition or prosecution of acts which have already been deemed 'terrorist' at international law, they do not therefore make any attempt to elucidate a generic definition of terrorism.[89] One alteration to this approach is the 2006 Council of Europe Convention on the Prevention of Terrorism which is more specific and adds offences, or additional modes of liability, which must be reflected in member states' domestic laws, namely (1) 'public provocation to commit a terrorist offense'; (2) 'recruitment for terrorism'; and (3) 'training for terrorism',[90] as well as ancillary offences.[91] But this regional Convention,

82 2008 Framework Decision, *supra* note 77.

83 *See* European Convention on the Suppression of Terrorism, Strasbourg, 27 January 1977, ETS. No. 90, in force 4 August 1978. Note also that the Arab Convention, while offering a generic definition of terrorism, complements it by referring to 'terrorist offences' prohibited by pre-existing conventions (Article 3).

84 OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, Washington, D.C., 2 February 1971, in force 16 October 1973, OAS Treaty Series No. 37.

85 OAU Convention on the Prevention and Combating of Terrorism, Algiers, 14 July 1999, in force 6 December 2002, text available at http://treaties.un.org/doc/db/Terrorism/OAU-english.pdf.

86 SAARC Regional Convention on the Suppression of Terrorism, Kathmandu, 4 November 1987, in force 22 August 1988, text available at http://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf.

87 Council of Europe, Convention on the Prevention of Terrorism, Warsaw, 16 May 2005, in force 1 June 2007, text available at http://conventions.coe.int/Treaty/en/Reports/Html/196.htm. Unlike the EU position, the Council of Europe both in the earlier 1977 European Convention on the Supression of Terrorism and the 2005 Convention on the Prevention of Terrorism deal with terrorist offences by reference to crimes listed in other conventions.

88 ASEAN Convention on Counter Terrorism 2007, Cebu, 13 January 2007, available at http://www.aseansec.org/19250.htm

89 Despite not offering a definition, some of them nevertheless note the exclusion from the concept of terrorism of struggles against self-determination.

90 Article 5, Council of Europe Convention 2005.

like most others, shies away from adopting, still less advancing, any generic definition of terrorism as such.

2.2 Do we know it when we see it? Defining terrorism and customary law

As has been seen, there is no global convention that can be said to establish a general definition of 'terrorism' that might be binding on state parties under international treaty law. The question then is whether there might nonetheless be sufficient international state practice and *opinio juris* to point to the general acceptance of an international legal definition of terrorism as a matter of *customary* international law.[92] The issue had long been a matter of academic discussion, with perhaps a majority of commentators taking the view that no customary definition could be said to have crystallized.[93] The other view, however, was given voice by, among others, Professor Cassese, who had long sustained that terrorism was indeed a crime under customary law.[94] The issue came into sharp international focus when the Special Tribunal for Lebanon, under the chairmanship of (by then) Judge Cassese, decided in February 2001 that terrorism was defined as a crime in customary law.[95]

A brief comparative analysis of the various generic definitions of terrorism that have emerged in international instruments thus far, as described above, may be instructive in determining whether there is consensus on the essential elements of a definition of terrorism. In assessing comparative practice, a few distinctions are worthy of emphasis. First, the questions whether there is uniform condemnation of terrorism, and whether states have obligations in respect of it, are of course distinct from the question whether there is a clear legal definition of terrorism in international law. Second, definitions are elaborated for different purposes, such that definitions of terrorism for immigration, administrative or other purpose will often be distinct from definitions of terrorism for criminal law purposes; just as the definitions may well be different, so are the requirements of international law in terms of the particular rigorous requirements of certainty and clarity in criminal law. Third, whether

91 *Ibid.*, Article 9 requires parties to adopt such measures as may be necessary to establish as a criminal offence under its domestic law of 'participating as an accomplice', 'organising or directing' 'contributing to the commission of' or 'attempt' to commit an offence covered by the Convention.

92 *See* Chapter 1.2

93 *See* for e.g. B. Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2008), at 270; Y. Dinstein, 'Terrorism as an International Crime', 19 *Israel Yearbook on Human Rights 1971* (1989), at 55; A. Schmid, 'Terrorism-The Definitional Problem', 36 *Case W. Res. J. Int'l. L.* 375 (2004)

94 A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), pp. 103.

95 See 'International Criminal Tribunals' below, 2.2.3.

there is broad agreement on certain 'core concepts' around the meaning of terrorism is different from the question whether there is a binding legal definition. There need not be absolute homogeneity of practice for customary law to emerge, and genuinely 'peripheral variations'[96] may not affect the emergence of the norm, but the content or substance of the norm – the particular elements of the definition – must be clear if a rule is to lay claim to govern as a binding legal norm.

Even a brief survey of first, international instruments and practice, and second, national laws, casts doubt on the proposition that there is sufficient clarity around the definition of terrorism for the term to be defined (still less criminalized) in international law, with significant differences remaining on most if not all of the key elements of such a definition.

2.2.1 Identifying elements of a definition of terrorism from international instruments and practice

2.2.1.1 Conduct

The conduct (or in criminal law terms, the *actus reus* or material element of the offence) varies between definitions. The more restrictive approach is found, for example, in the Draft Comprehensive Convention and the Financing Convention which covers essentially causing death, serious injury and in some cases damage to property.[97] By contrast, a broader reaching and less precise approach is adopted in the Arab Convention which covers any 'violence or threats of violence'. The 1994 Declaration and 2004 Security Council definitions refer to undefined 'criminal acts' committed pursuant to a particular purpose, thus not really defining the material element of terrorism at all.[98] Likewise, the definition put forward by the Special Tribunal for Lebanon, while going a little further, does not contain an exhaustive list of acts, but refers to 'the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act'.[99] Whereas some formulations

96 STL Interlocutory Decision, *supra* note 8, p. 62, para. 97.

97 The Financing Convention, *supra* note 48, refers only to causing 'death or serious bodily injury'.

98 E.g. SC Res. 1566, para 3 above.

99 STL Interlocutory Decision, *supra* note 8, p. 49-50, para. 85. '[A] number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinio juris* in the international community, accompanied by a practice consistent with such *opinio*, to the effect that a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority

cover 'inchoate' offences, where no result occurs, others depend on certain types of injury, damage or loss having actually occurred.[100]

2.2.1.2 Purpose, Motive and 'Justification'?

Terrorism tends to involve two or more subjective layers. The acts are rarely an end in themselves but rather a vehicle to achieving particular gains, which are usually ideological rather than private. Beyond the normal requirement of intent in respect of the conduct (e.g., the bombing, murder, other act etc.), the person responsible will usually intend his or her acts to produce broader effects, namely spreading a state of terror and/or compelling a government or organisation to take certain steps towards an ultimate goal. In criminal law terms, the existence of this double subjective layer in many of the definitions appears to indicate that if there is a crime of terrorism, like certain other international offences, it is a *dolus specialis* crime, i.e. a crime that requires, in addition to the criminal intent corresponding to the underlying criminal act, the existence of an ultimate goal or design at which the conduct is aimed.[101]

The need for such a broader design or purpose is often described as the essential element differentiating terrorism from other forms of violence or illegality. However, deep controversy and divergence of approaches surround the purposive element. Definitions are not consistent in including a requirement of 'terrorisation' as such and those that do generally do not define it, with some envisaging a generalised terror e.g. provoking 'terror in the general public',[102] and others including the much narrower terrorization of 'particular individuals.'[103] 'Terror' is not a necessary element in numerous definitions that contemplate a broader range of possible objectives. The EU definition, for example, includes 'seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation' as a possible purpose.[104] The Arab Convention[105]

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to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.'

100 E.g. in both the European Council Framework Decision on Combating Terrorism and Arab Convention, 'threats' to commit specified acts suffice.

101 Persecution and genocide, for example. For a discussion on the category of *dolus specialis* in the context of genocide, see Cassese, *International Criminal Law*, *supra* note 97, p. 103.

102 UN GA Res. 51/210, *supra* note 14. On the IHL prohibition of 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population' in international or non-international armed conflict, *see* this chapter, para. 1.4.1

103 SC Res. 1566, *supra* 2.1.2.1.

104 Article 1, European Council Framework Decision on Combating Terrorism.

105 Article 1(2) of the Arab Convention refers to 'seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources'.

and the OAU Convention[106] are broader still in the range of possible objectives. Commonly, but not invariably, definitions also refer to another subjective layer by requiring that the terror, destabilisation or other objective is in turn pursued with a view to compelling a response from another (but while this is usually from the government or state, in some definitions it may also be from an international organisation).[107]

Some definitions on the international level also include an underlying political or ideological motivation as an additional layer to the definition of terrorism, but such inclusion has uneven support and remains a matter of very considerable controversy.[108] For some, the political or ideological motive is at the heart of the definition of terrorism, while for others it is irrelevant, or indeed precluded by principles of human rights or criminal law.[109]

A further issue, highlighted in relation to the 'authors' of terrorism, relates to whether considerations of a political, philosophical or other nature might constitute a 'justification' for terrorism. There has been a tendancy over time to move away from the language of 'justification', with this explicitly ruled out in certain definitions, such as the Security Council Resolution 1566 of 2004, but not in others.[110] Linked to this are different approaches to whether acts

106 A 'terrorist act' under the OAU Convention is one which is (i) intended to 'intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or *to act according to certain principles*; or (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or (iii) create general insurrection in a State', Article 1(3).

107 '[T]he purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or abstain from doing any act.' Draft Comprehensive Convention, Article 2. While the Arab Convention refers only to compelling the state, in the European common definition, terrorist acts may be directed at a state *or* an international organisation.

108 E.g.. SC Res. 1566 has no motive requirement. The STL judgment found no convergence of state practice on the existence of an ideological or political motive, but considered it an important element in understanding the nature of terrorism and one that may eventually 'emerge as an additional element of the international crime of terrorism'. STL Interlocutory Decision, p. 68-69, para. 106.

109 Under general principles of criminal law, personal motive is irrelevant, although this is not always clear in definitions of terrorism. Some consider the human rights to thought, conscience and religion, and limits on 'profiling,' to preclude such a motive requirement in criminal law while others consider it integral to notions of terrorism. See debate between Kent Roach and Ben Saul: Roach, 'The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive', and Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought', in *Law and Liberty in the War and Terror*, A. Lynch, G.Williams, and E. MacDonald (eds.), (Annandale: The Federation Press, 2007), p. 45. See also STL Interlocutory Decision, *supra* note 8, p. 63-69, para. 98-106.

110 SC Res. 1566, *supra* note 43, notes that acts referred to in the resolution 'are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature'. *See also* Article 5, Terrorist Bombings and Financing

of terrorism can constitute 'political offences' and whether the political nature of an offence can constitute an exception to the duty to prosecute for terrorism.[111]

2.2.1.3 Who or what is protected

A further criterion on which definitions differ is the scope of potential 'victims' of terrorist acts. The 1937 definition, for example, is unusual in covering only acts directed against the state.[112] Other conventions, such as the 1999 Financing Convention, by contrast protect 'civilians' or other persons not taking a direct part in hostilities in armed conflict.[113] More recent examples, such as the UN Draft Comprehensive Convention, include a broader range of targets, applying to injury or damage to 'any person' and to property whether 'public' or 'private'.[114] Varying approaches to the target group that may 'terrorised' – whether a 'people' or 'population' en masse as opposed to individuals – has been noted above.[115]

2.2.1.4 International element

Generally, conventions addressing 'international terrorism' explicitly restrict their application to terrorism with a cross-border element. With the exception of terrorism committed in the context of non-international conflict (which as noted may be a war crime under international law), international conventions and declarations do not apply to domestic terrorism where the conduct, perpetrators and victims arise within one state. However, the regional terrorism instruments referred to express no such limitation.[116]

Conventions which, like the 1994 Declaration, preclude any such justification. Earlier specific conventions and certain regional ones contain no such provision.

111 The 'political offences' exception is increasingly being eliminated, especially in relation to terrorism post September 11. *See* below Chapter 4B.2.3 and this chapter, para. 2.1.4 regarding the human rights implications of this trend. Regarding specific terrorist conventions, *see*, for e.g., Article 11, Terrorist Bombings Convention and the Financing Convention, *supra* note 48.

112 Article 2(1), Convention for the Prevention and Punishment of Terrorism (Geneva, 1937, never entered into force), League of Nations Doc. C.546M.383 1937.

113 Financing Convention, Art. 2(1)(b), *supra* note 48.

114 Informal text of Article 2, Report of the Working Group on Measures to Eliminate International Terrorism; UN Doc. A/C.6/56/L.9, Annex I.B.

115 Chapter 2.2.1.2.

116 See, for e.g., the European Council Framework Decision on Combating Terrorism and Arab Convention.

2.2.1.5 The authors: state actors and national liberation movements

Back in 2001, then Special Rapporteur on Terrorism and Human Rights, Ms Kalliopi K. Koufa, found the 'degree of consensus' around the definition of terrorism not to extend to the thorny issue of 'who can be a potential author of terrorism'.[117] Despite the passage of time, the international community has not definitively answered questions highlighted as controversial (relating to whether, in turn, states and national liberation movements can be responsible for 'international terrorism').

As regards the first question whether state conduct may constitute international terrorism, international instruments take different approaches.[118] While the 1991 Draft Code of Crimes Against the Peace and Security of Mankind included international terrorism within the scope of crimes that can be committed by the State,[119] terrorism was dropped from the list of offences covered by the 1996 version of the Draft Code.[120] Most subsequent provisions, while often not explicitly excluding the possibility of states falling within their purview, do exclude many guises of direct state terrorism by implication, either because the terror is inflicted against a state's own people (and is thus excluded by the broadly accepted 'international element' criterion referred to above), or because it takes place in armed conflict (and is explicitly excluded as already governed by IHL).[121] While it remains sensitive – as seen for example from the fact that negotiations towards the nuclear terrorism convention were long stymied by differences of view on this critical point, which are also manifest in the Draft Comprehensive Convention discussed above – the majority of 'international terrorism' provisions do not address state terrorism as such.[122]

In this respect, two points are worth clarifying. The first is that one justification for excluding 'state' terrorism from definitions of international terrorism is that the state is, or should be, accountable through other branches of law,

117 Koufa, 'Progress Report', *supra* note 7. See also U.N. High-level Panel on Threats, Challenges and Change, supra note 44, and Di Filippo, supra note 28.

118 See Dugard, 'Definition of Terrorism', *supra* note 10, p. 5. See also Report of the International Law Commission 43rd session, UNGAOR, 46 Session, supp. no. 10 A/46/10 (1991), Article 24. However, many implicitly exclude state terrorism, as discussed below.

119 Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission, reprinted in Report of the International Law Commission on the work of its forty-third session, 29 April-19 July 1991, UN Doc. A/46/10, 1991.

120 Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission, reprinted in Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, UN Doc. A/51/10, 1996, available at http://untreaty.un.org/ilc/ texts/instruments/english/commentaries/7_4_1996.pdf.

121 *See* this Chapter, para. 1.2. *See also* the view of the U.N. High-level Panel on Threats, Challenges and Change, *supra* note 51, that state terrorism is adequately covered by other international norms.

122 Controversial questions regarding state terrorism, and whether state action may itself constitute international terrorism – addressed here – should be distinguished from state responsibility for international terrorism by private actors: *see* Chapter 3.1.

such as human rights,[123] humanitarian law or the law on the use of force, whereas the responsibility of non-state actors is more limited.[124] On this basis the Secretary General's Report of 2004 found the objections that 'state terrorism' should be included in a global definition of terrorism 'uncompelling' given that it is covered by other international norms. Secondly, the exclusion of 'state terrorism' should be distinguished from (a) state responsibility for terrorism carried out by private actors, which are attributable to the state according to the general rules of state responsibility, and (b) state responsibility for violations of other obligations, which may include refriaing from sponsoring or supporting terrorism for example.[125]

Stark differences of approach are seen also in relation to the yet more intractable question of the distinction between 'terrorism' and acts undertaken pursuant to 'the inalienable right to self determination and independence'.[126] The determination on the part of many states, particularly but not exclusively from the developing world, to exclude national liberation movements from any definition of terrorism has characterised almost all negotiations towards a definition in international practice.

As noted, the 1994 Declaration was thought to be a milestone in stating that the 'criminal acts' covered by it are 'in any circumstances unjustifiable whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature', without reference to national liberation movements (NLM)s. The Security Council Resolution 1566 and numerous other instruments follow this approach. However, the Arab and African regional conventions expressly exempt from the terrorist definition peoples struggling for self-determination or national liberation in accordance with international law, 'including armed struggle against colonialism, occupation, aggression and domination by foreign forces'.[127] Under the Arab Convention, it has been noted that, while on the one hand relatively banal acts could be covered by the terrorism definition (due to the broad-reaching conduct covering by the definition), on the other, the most serious indiscriminate attacks against civilians could be excluded 'as long as [they were] perpetrated in the name of the right to self determination'.[128] A slightly different manifestation of the same phenomenon could be seen in a European Union note accompanying

123 Chapter 7 on responsibility and the extra-territorial application of human rights obligations.
124 U.N. High-level Panel on Threats, Challenges and Change, supra note 44.
125 See Chapter 3 for discussion of responsibility and 2.3 below.
126 GA Res. 3034 (XXVII), 'Measures to Prevent International Terrorism', 18 December 1972, UN Doc. A/RES/3034 (XXVII).
127 OAU Convention, Article 3(1); Arab Convention, Preamble and Article 2(a). See also Convention of the Organisation of the Islamic Conference on Combating International Terrorism which couples this exclusion with a provision stating that 'political, philosophical ... or other motives shall not be a justifiable defence'.
128 E. David, *Eléments de droit pénal international – Titre* II, *le contenu des infractions internationales*, 8th ed. (Brussels, 1999), p. 539. *See further* Guzman, *supra* note 27.

the draft European Framework decision circulated after 11 September 2001, which noted that the definition of terrorism does not include 'those who have acted in the interests of preserving or restoring democratic values'.[129]

This issue continues to dog the negotiation of the UN Convention, as noted above, with dispute remaining as to whether there should be an exception for all types of conflict – international or non-international, and including wars of national liberation and situations of 'foreign occupation'.[130]

A holistic approach to the legal framework would suggest that the definition of terrorism take into account other norms of international law. There is force therefore in the argument that it is less essential to include state terrorism as states are bound by other international legal obligations. This argument is weakened in practice in the war on terror context in which, as will be seen, states seek to deny the applicability of relevant norms or branches of law[131] and to evade responsibility and accountability under them.[132] On the other hand, as regards liberation movements, it has been suggested with some force that 'if international law takes self-determination seriously,' definitions of terrorism must exclude legitimate liberation movements that forcibly resist its denial, and states should not be allowed to criminalize – as terrorists – those who do so.[133] Whatever the merits or demerits of such inclusions or exclusions, in practice there is insufficient consensus to allow passage out of the quagmire on this most intransigent of issues.

In brief, this short survey reveals numerous commonalities but also substantial points of divergence in the approach to the definition of terrorism to date. It is undoubtedly possible to discern, in a general way, key features of terrorism, such as certain unlawful acts carried out for ideological ends. It is rather more difficult to identify, from the survey of international instruments, clear and precise elements of a definition that can be said to have garnered international support.

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129 The note circulated with the draft decision continues: 'Nor can it be construed so as to incriminate on terrorist grounds persons exercising their legitimate right to manifest their opinions, even if in the course of the exercise of such right they commit offences.' See Statewatch, 'Critique of the Council's Agreed Decision on the definition of terrorism', *Statewatch bulletin*, November-December 2001, available at http://www.statewatch.org/news/2002/feb/06Aep.htm. But see SC Res. 1566, *supra* note 43.

130 Article 18 Draft Comprehensive Convention; *see* discussion of UN negotiations para. 2.1.2.

131 *See* e.g. Chapter 7B2 and 7B3 denying the scope of application of human rights law extra-territorially or in armed conflict as an example of states seeking to avoid their obligations and accountability.

132 E.g. Chapter 7B14.

133 Ben Saul, 'Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law', (2006) *Australian Yearbook of International Law* 25, pp. 177-226 available as Sydney Law School Research Paper No 08/122, p. 13. Saul suggests self determination should be excluded 'by the full application of Protocol I', and human rights law should impede States from criminalising on this basis.

2.2.2 Other international practice: United Nations General Assembly and Security Councils

Various resolutions of the UN General Assembly and Security Council have referred to the duties of states in respect of terrorism, from the duty to refrain from support[134] to the more proactive duty to suppress.[135] While many are non-binding,[136] these resolutions may reflect or contribute to the development of customary law regarding the obligations in question.[137] As discussed above, post September 11, the Security Council went further and called on states to take broad-reaching measures against 'international terrorism', including criminalising such conduct.

For the most part, these UN initiatives do not provide a definition of terrorism and hence, one could argue, fail to give precise content or meaning to the obligations to which they refer and, in any event, to contribute to our understanding of a definition of international terrorism in customary international law. It has been argued that these resolutions, particularly those that refer to criminal law, presuppose sufficient understanding of the phenomenon referred to in international law.[138] But then, the current state of negotiations on a global convention, and the Security Council's call to states, in the context of resolution 1373, to advance these negotiations belie such a view.

It remains doubtful to what extent the UN initiatives directed at providing content to the meaning of 'international terrorism' highlight the existence of sufficiently widespread agreement on the elements of a legal definition. In providing its 'description' of terrorism, the High-level Panel of the General

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134 GA Res. 2625 (XXV), 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', 24 October 1970, UN Doc. A/RES/2625 (XXV), which has been cited as declaratory of customary law with regard to the non-use of force, provides that '[e]very state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife and terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts'. See also preamble of SC Res. 748 of 31 March 1992, UN Doc. S/RES/748 (1992).

135 GA Res. 51/210, 'Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism', 17 December 1996, UN Doc. A/RES/51/210 (1999) refers in the preamble that 'criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them'.

136 Cf Security Council resolutions passed under Chapter VII. Other resolutions, including those of the GA, are not strictly binding under the Charter but may play a significant role in the formation of customary norms: *see* Chapter 1 and M. Wood, "The interpretation of Security Council resolutions", *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, p. 74.

137 On UN declarations and resolutions and the development of custom, see the arbitration award in *Texaco Overseas Petro. Co./California Asiatic Oil Co.* v. *Libyan Arab Rep.*, para. 83, reprinted in 17 *ILM* 1. See also *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States*), 1986 ICJ Reports, p. 14, paras. 188 and 198.

138 See Cassese, *supra* note 97.

Assembly indicated in 2004 that there was a lack of agreement on a clear definition of terrorism, which it considered to undermine the normative regulation and moral stance against terrorism.[139] Subsequent pleas by then-Secretary-General Kofi Annan for states to provide 'clarity' around the definition of terrorism reinforce the perceived gap. While the 2004 Security Council resolution was significant in providing a 'definition,' it was clearly non-binding and aimed at providing a helpful framework for national definitions rather than itself embodying a legal definition. Consistent with its nature as a reference point to assist states in providing the necessary specific definitions in domestic law, it provides a broad approach rather than a detailed specific definition, and, as noted in the brief survey above, it both reflects and differs from approaches found elsewhere.

2.2.3 The practice of International Criminal Tribunals

The practice of international criminal tribunals is also relevant to the debate regarding whether there is in fact an international legal definition of terrorism, and specifically whether terrorism is a crime under international law (defined with sufficient clarity to provide a basis for criminal prosecution).

The Statutes of the International Criminal Tribunal for Rwanda (ICTR) and of the Special Court for Sierra Leone include terrorism as one of the crimes within their respective jurisdictions,[140] and as noted above there have been convictions.[141] These have been cited as creating a strong assumption that the drafters considered that there was in fact a crime of terrorism under international law at the time when the crimes within the jurisdiction of those tribunals were committed,[142] However, it is clear from the context of these provisions, that they cover the specific prohibition on terrorism in armed conflict. As discussed above, this is a special sub-category of terrorism which is defined in IHL – and amounts to an international crime that the ICTY has

139 'The Panel calls for a definition of terrorism which would make it clear that any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians and non-combatants, with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from any act. I believe this proposal has clear moral force, and I strongly urge world leaders to unite behind it.' Secretary-General's Kofi Annan's keynote address, *supra* note 20.

140 For the first judgment of the Special Court for Sierra Leone including the crime of terrorism, see *Prosecutor v. Alex Tamba Brima*, *supra* note 70.

141 *See* for e.g. *Galic, supra* note 68, *Simma, supra* note 70, and *Taylor, supra* note 70, referred to above.

142 Cassese, *supra* note 97, pp. 120-21, asserting that a definition of terrorism does exist and citing in support Article 4 of the Statute of the International Criminal Tribunal for Rwanda (ICTR).

also prosecuted – rather than purporting to confer jurisdiction over a broader generic offence of terrorism in international law.[143]

The Special Tribunal for Lebanon, established in 2007, is the first international tribunal that focuses its jurisdiction on what is plainly a terrorist act,[144] although its competence as described in its statute is to apply 'the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism….'.[145] In a significant interlocutory decision of February 2011, the Appeals chamber decided that it should interpret Lebanese law in light of international law, and went on to conclude, controversially, that terrorism was already a crime under customary law. The Tribunal found as follows:

On the basis of treaties, UN resolutions and the legislative and judicial practice of States, there is convincing evidence that a customary rule of international law has evolved on terrorism *in time of peace*, requiring the following elements: (i) the intent (*dolus*) of the underlying crime and (ii) the special intent (*dolus specialis*) to spread fear or coerce authority; (iii) the commission of a criminal act, and (iv) that the terrorist act be transnational. The very few States still insisting on an exception to the definition of terrorism can, at most, be considered persistent objectors. A comparison between the crime of terrorism as defined under the Lebanese Criminal Code and that envisaged in customary international law shows that the latter notion is *broader* with regard to the means of carrying out the terrorist act, which are not limited under international law, and *narrower* in that (i) it only deals with terrorist acts in time of peace, (ii) it requires both an underlying criminal act and an intent to commit that act and (iii) it involves a transnational element."[146]

While the views of Tribunal President Cassese were well known from his prior academic work, the judicial decision was surprising, given ongoing controversy as to the failure to reach international agreement on a definition of terrorism, and differing elements emerging from national and international

143 The Statute of the Special Court for Sierra Leone (annex to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002), available at http://www.sc-sl.org/index.html) and the Statute of the ICTR, in both cases in Article 3 ('Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II') at (d) cover 'acts of terrorism'.

144 On 13 December 2005, the Government of the Republic of Lebanon requested the United Nations to establish a tribunal to try those allegedly responsible for the 14 February 2005 attack in Beirut that killed the former Lebanese Prime Minister Rafiq Hariri and 22 others. Pursuant to Security Council resolution 1664 (2006), the United Nations and the Lebanese Republic negotiated an agreement on the establishment of the Special Tribunal for Lebanon. Further to Security Council resolution 1757 (2007) of 30 May 2007, the Statute of the Special Tribunal entered into force on 10 June 2007. *See* http://www.stl-tsl.org/.

145 STL Statute, *ibid*, Article 2 'Applicable criminal law'referring inter alia to "the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, …"

146 STL Interlocutory Decision, *supra* note 8, p. 3, emphasis in original.

practice. Where the question is whether terrorism is defined as a *crime* under international law, the controversy can only be more pronounced, and the requisite degree of clarity and specificity stricter.[147] In the context of this particular case, prosecution, defence and interveners all agreed that there was no crime of terrorism under customary law, yet the tribunal *propio motu* took a different view.[148]

The decision has been promptly and stridently critiqued, with serious questions arising regarding the sources on which the tribunal based its assessment as to state practice and opinion juris.[149] Despite this, it is likely that this decision will be interpreted as lending some weight to the argument in support of the cystallisation of a customary norm. While it remains unclear whether the decision of the Special Tribunal will stand the test of time or be challenged before that Tribunal itself, it is clear that one decision of an international body is, in any event, far from conclusive on the question.

The ICC experience, for its part, points in a different direction. The 160 states participating in the Rome conference on the establishment of the International Criminal Court noted that no definition of the crime of terrorism could be agreed upon for inclusion in the Statute, apparently indicative of the lack of any such definition under international law at the time of the ICC Statute's adoption.[150] Attempts to include a crime of terrorism in the Court's jurisdiction have thus far gained relatively little traction.[151]

International criminal law practice is therefore divided. Beyond the Lebanon tribunal decision, which stands apart in its endorsement of a crime of terrorism in peacetime, international criminal practice does not appear to support the existence of a definition of terrorism in customary international law (other

147 It has been noted that the national practice cited in support of the conclusions does not distinguish between definitions of terrorism in criminal law and definitions for any other purposes in domestic law.

148 STL Interlocutory Decision, *supra* note 8, para. 83 of the judgement describes as 'forceful' the position of both parties in this respect. Their pleadings and interventions are available at http://www.stl-tsl.org/en/the-cases/stl-11-01/filings.

149 Ben Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', 24 *Leiden J. of Int'l L.* 677 (2011), 677-700; K. Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is there a Crime of Terrorism under International Law?", 24 *Leiden Journal of Int. Law* 655 (2011).

150 *See* e.g. Resolution E adopted by the Rome Conference on the International Criminal Court as part of its Final Act (UN Doc. A/CONF.183/10): 'Regretting that no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion within the jurisdiction of the Court'.

151 For the Dutch formal proposal to include terrorism within the Court's jurisdiction at the Kampala review conference, see Assembly of States Parties to the Rome Statute of the International Criminal Court: Eighth Session, The Hague, November 18-26, 2009, U.N. Doc. ICC-ASP/8/20, Appendix III at 65-66.

than perhaps in respect to the war crime of inflicting terror on the civilian population).[152]

2.2.4 National definitions

In considering whether a customary definition has emerged, it is also relevant to look at state practice on the national level. However, here still less definitional convergence emerges. The way national laws approach key elements of a definition of terrorism can be discerned from international reporting obligations, notably to the Security Council as regards implementation of obligations[153] as well as from surveys of state practice on the national level.[154]

Many states had specific counter-terrorism legislation in place long before the 'war on terror', which, unsurprisingly, present differing definitions of terrorism reflecting diverse historical and political national contexts.[155] Post-September 11, a plethora of new anti-terrorist measures were grafted onto the canvas of existing laws; while many states introduced entirely new terrorism legislation in the years following, others with long histories of counter terrorism but renewed resolve in the different geopolitical landscape, introduced

152 See Statutes of the ICTR and of the Special Court for Sierra Leone, supra note 143; *Prosecutor v. Galić*, supra note 68; Statute of the International Criminal Court (ICC), Rome, 17 July 1998, UN Doc. A/CONF.183/9, hereinafter 'ICC Statute'.

153 A broad range of national practice can be seen from state reports to the Security Council Counter-Terrorism Committee on the criminalization of terrorist acts under SC Res. 1373, para 2(e): www.un.org/Docs/ sc/committees/1373/reports.html.

154 See Ben Saul, 'Defining Terrorism', *supra* note 96 (or did you mean his article at note 41?). The Special Tribunal for Lebanon also selects examples of state practice in support, and for examples of practice in country reports of human rights monitoring bodies see Chapter 7. See also *Global Anti-Terrorism Law and Policy*, Victor V. Ramraj, Michael Hor and Kent Roach (eds.), (Cambridge: Cambridge University Press, 2005), particularly Chapters 14, 18, 22-24 and 26. The International Commission of Jurists Bulletin on Terrorism provides examples of legislative and other developments as they unfold.

155 E.g. Article 270 of the Italian Criminal Code has no requirement for religious or political motivation or spreading fear or intimidation among the population, as the law was focused on organised crime and the activities of the mafia. Post-September 11, the law has been extended to cover acts with an international dimension. See K. Oellers-Frahm, 'Country Report on Italy', Conference on 'Terrorism as a Challenge for National and International Law', *Max Planck Institute for Comparative Public Law and International Law*, Heidelberg, 24-25 January 2003, at www.edoc.mpil.de/conference-on-terrorism/country.cfm. In Japan, Article 17(1) of the National Police Agency Organisation Act of 1954 limits terrorism to a particular political view, covering '[v]iolent or subversive activities on the basis of ultra-left ideology and other assertions with the intention of achieving their purpose by spreading fear and apprehension'. *Ibid.*, N. Hirai-Braun, 'Country Report on Japan', Conference on 'Terrorism as a Challenge for National and International Law', at www.edoc.mpil.de/conference-on-terrorism/country.cfm.

significant legislative changes.[156] Many of these laws were enacted according to expedited national procedures.[157] Not infrequently, such counter-terrorism legislation has been the subject of criticism from human rights courts and bodies for its breadth and/or ambiguity, as discussed further in Chapter 7.

The enactment of new laws is in part a response to Security Council resolutions passed in response to September 11,[158] in particular Resolution 1373 passed under Chapter VII of the UN Charter (thereby imposing a legal obligation on member states of the UN), which specifically requires states to ensure that 'terrorist acts' are criminalised in domestic law.[159] Security Council resolutions referring to obligations in respect of terrorism either make no attempt to define the phenomenon however (SC Resolution 1373 (2001)) or provide a non-binding framework (SC Resolution 1566 (2004)).[160] Despite the establishment of a Counter-Terrorism Committee with a limited mandate to monitor the implementation of the resolution,[161] in practice the Security Council has left unfettered flexibility for the state to define terrorism as it sees fit.[162] The fact that so many of the definitions in anti-terrorism legislation post September 11 have given rise to serious concerns regarding compatibility with international human rights standards may itself undermine the claim that they represent an emerging international legal definition.[163] But it is the diversity of approach on key elements that makes such a claim most difficult to sustain.

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156 E.g. Singapore and Malaysia made fewer amendments to their existing anti-terrorism regimes, whereas newly democratic Indonesia resisted the imposition of harsher new laws: see for example, *Global Anti-Terrorism Law and Policy*, *supra* note 160, Chapters 13 and 14.

157 Less than two months after 9/11 the 342-page US Patriot Act 2001, which amends over fifteen statutes, passed into law. The UK government rushed through the Anti-Terrorism, Crime and Security Act 2001 within a month of submitting its draft to Parliament, thereby only allowing parliamentary debate and not the normal customary committee scrutiny. Both pieces of legislation afforded domestic law enforcement agencies and international intelligence agencies wide-ranging powers and restricted human rights protections.

158 SC Res. 1368 (2001), 12 September 2001, UN Doc. S/RES/1368 (2001), called on member states to work together to stop terrorism and punish those responsible.

159 SC Res. 1373, *supra* note 2.

160 SC Res. 1566, supra note 43.

161 The Committee originally made clear that it was not interested in monitoring the human rights implications: "The Counter-Terrorism Committee is mandated to monitor the implementation of Resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate." A briefing to the Security Council on 18 January 2002, available at http://www.un.org/en/sc/ctc/rights.html. It now embraces a rights dimension to its work; see Chapter 7B1.

162 Resolution 1373 (2001) established the Committee and SC Res. 1377 (2001), *supra* note 2, clarified its tasks including to promote best practices, including the preparation of model laws as appropriate; and to disseminate the availability of existing technical, financial, legislative and other assistance programmes to assist the implementation of Resolution 1373.

163 *See* Chapter 7B.5.

It has been noted that some national terrorism laws have had considerable impact on definitions adopted in other states, as have international or regional initiatives of course, leading to some similarity of approaches and language appearing across different states.[164] Despite this, for the most part definitions vary considerably in their approaches – from adopting definitions by reference to existing specific conventions, to the establishment of newly drawn up offences, that sometimes bear scant resemblance to international, regional or other national definitions.[165] Even within regions and among states implementing the same regional standards, such as the 27 European countries who are obliged to implement the EU's Framework Decision on Combatting Terrorism, divergent approaches are apparent.[166]

In many states, terrorism is not defined in national legislation at all.[167] Where it is, the definitions cover a strikingly diverse range of *conduct*. While many involve some (often varied) forms of violence,[168] laws not infrequently cover a broader range of conduct including any 'any intentional act',[169] or any 'explosion, arson or *other action*'[170] that meets the other elements of the definition (generally relating to the purpose behind the conduct). Some states have no purpose element, simply defining terrorism as violence calculated to cause death or injury, and where there is such an element, it takes broad ranging forms. In some cases it covers terrorizing, intimidating or inducing fear in the population,[171] while in others terrorism is defined as intent to damage, weaken or oppose the state or public order, or to jeopardize essential values.[172]

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164 Definitions of terrorism in Australia, Hong Kong, New Zealand, South African laws are said to have been inspired by the definition in UK legislation; *see* Ramraj, Hor and Roach, *Global Anti-Terror Law and Policy*, *supra* note 160, p. 630.

165 *See* e.g., 'creating a condition of widespread and extraordinary fear and panic' in Phillipines Human Security Act 2007. Further examples of broad appraoches are discussed in Chapter 7B5.

166 Stephanie Schmahl, 'Specific Methods of Prosecuting Terrorists in National Law', in Terrorism as a Challenge for National and International Law: Security versus Liberty?, Walter, Schorkopf, et al. (eds.), (Berlin: Max-Planck-Gesellshaft, 2004), p. 81.

167 Saul notes that the dominant approach in states' criminal laws is to address terrorism through ordinary offences under criminal law; this was more striking prior to 9/11 but remains true despite an increase in national level definitions since 2001. Saul, supra note 91, pp 264, 268.

168 *Ibid*.

169 For example, Jordanian Anti-Terrorism Law No. 55 of 2006, Official Gazette No. 4790, at 4264, 1 November 2006, defines the material element of terrorism as 'every intentional act, committed by any means and causing death or physical harm to a person or damage to public or private properties, or to means of transport, infrastructure, international facilities or diplomatic missions'.

170 For example, the Russian Federation: Article 3 of the Federal Law no. 35-FZ of 6 March 2006 on 'Countering Terrorism'.

171 Saul refers to 15 states including simple generic definitions of terrorism of this type, *supra* note 96, p. 266.

172 *Ibid.*, p.268.

Divergence between states is also noteworthy as regards the inclusion or omission of a political or religious motive requirement. The rejection of such a requirement by the Security Council's 2004 definition[173] is not necessarily reflected in practice on the national level.[174] The extent of the controversy on this element is apparent from the Canadian judiciary's rejection of such a requirement in Canadian legislation as violative of human rights.[175]

In practice, uncertainty flows from particular elements and from the totality of definitions which combine a range of subjective and objective elements with unclear results. This is exemplified in the Russian anti-terror law, which defines terrorism as "the ideology of violence and the practice of influencing the decision making of state bodies, local municipal bodies or international organizations, involving intimidation of the population and/or other forms of illegal violent action."[176]

Unfolding practice on the national level should be closely observed as potentially constituting the most important development in this field, as a matter of practical significance and as a source of state practice that could, with time, contribute to the development of customary law (discussed below), but there is little indication of uniformity of practice around a legal definition having emerged at this stage or of this changing in the forseeable future.

2.2.5 Meeting the legality threshold: preliminary conclusions on customary international law?

The question whether terrorism is defined in international law is therefore controversial. While a thorough review of the practice of states in defining terrorism goes beyond the scope of this study, the differences of approach highlighted belie the notion of consensus around a definition of terrorism.

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173 *See* SC Res. 1566, supra note 43, but see STL Interlocutory Decision, *supra* note 8.

174 *See* e.g., K. Roach, 'The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive', *supra* note 114, p. 45, on Australian, Canadian and UK definitions reference to political or religious motivation. New Zealand and Hong Kong have also adopted the inclusion of religious or political motives, whereas the US, some Middle Eastern and some European countries use harm as a primary definer. See also *Global Anti-Terrorism Law and Policy*, *supra* note 160, particularly Chapters 14, 18, 22-24 and 26.

175 A Canadian Court in *R v. Kawaja* [OJ] 4245 [73] found that the Canadian requirement of religious or political motivation in the commission of the crime of terrorism violated fundamental freedoms. See Roach, 'The Case for Defining Terrorism with Restraint and Without Reference to Political or Religious Motive', *supra* note 114, p. 45. For an interesting academic debate, see Roach, *supra* and Ben Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?', *supra* note 114, p. 28.

176 Russian Countering Terrorism Law 2006, Sobranie Zakonodatel'stva Rossiisskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 35-FZ, available at http://www.garant.ru/law/12045408-000.htm, discussed in S. T. Bridge 'Russia's New Counteracting Terrorism Law: The Legal Implications of Pursuing Terrorists Beyond the Borders of the Russian Federation', 3 (2009) *Colum. J. E. Eur. L.* 1.

While the heart of the definitional dispute undoubtedly relates to the potential authors of terrorism, there is divergent practice in respect of most, if not all, elements of the definition.

Commentators differ as to whether there is sufficient clarity around a definition of terrorism under customary law.[177] The heart of the issue is whether there is a sufficiently solid core of a definition to hold that there is a clear prohibition in law and, in particular, that there is an international crime carrying individual responsibility.

In making this assessment, the requirements of legality must be kept centre stage.[178] The legitimacy of the law's restriction of rights and freedoms depends on it being sufficiently clear and accessible that individuals are able to conform their behaviour to the limits of the law. As human rights courts frequently remind us, genuine uncertainty as to the content and scope of law renders that law void for vagueness, and where the question is the existence of a definition under *criminal* law, particularly stringent requirements of legal certainty arise. It is questionable whether many of the definitions advanced above, applicable in particular regional or other contexts, themselves meet the requirements of *nullum crimen sine lege*, and more doubtful yet whether the common core that might be distilled from them would meet such a test.

Counter-terrorism laws continue to emerge and a rule of customary law could, at least conceivably, evolve as international practice develops. National practice is being generated constantly, as states introduce new legislation or reinforce existing laws and practices. The definitions in domestic legislation reveal both some consistency and much divergence of approach. As noted above, several states have followed one another's approach to the definitions of terrorism, leading to some key examples of parallel provisions in mostly similar but sometimes quite different legal systems.[179] Differences of approach are, however, at least as striking as the similarities.[180] The examples of the vastly divergent approaches to conduct, purpose and the motivation requirement on both the international and national levels, discussed above, illustrate

177 Cassese, *supra* note 94, p. 120, suggests that there is consensus on the 'general notion' of terrorism and that disputes relate only to the question of National Liberation Movements, which he describes as a dispute not as to an element of the definition but as to the 'exceptions' that apply thereto. See also J. Paust, 'Addendum: Prosecution of Mr. bin Laden *et al*. for Violations of International Law and Civil Lawsuits by Various Victims', *ASIL Insights* No. 77, 21 September 2001, at www.asil.org. Cf. *See* R. Higgins, 'The General International Law of Terrorism', in *International Law and Terrorism,* R. Higgins and M. Flory (eds.) (London: Routledge, 1997); B. Saul, *Defining Terrorism in International Law* note 96, at 270; Y. Dinstein, 'Terrorism as an International Crime', 19 *Israel Yearbook on Human Rights 1971* (1989), at 55; A. Schmid, 'Terrorism-The Definitional Problem', 36 *Case W. Res. J. Int'l. L.* 375 (2004).

178 *See* Chapter 7.

179 Note similar approaches across the commonwealth and beyond, inspired by the definition in UK legislation, *Global Anti Terror Law and Policy*, *supra* note 160, p. 630.

180 *See*, for example, discussion of the European states' approaches in Schmahl, *supra* note 172.

this. Such divergence should be no surprise, given not only the inevitable peculiarities of the particular historical and geo-political concerns of the individual state, but also the lack of homogeneity in the international and regional levels and the controversy that underpins the difficulties in arriving at an internationally accepted definition.[181]

Consensus may be consolidating around many of the elements of a definition in the context of the negotiations around a global draft Convention, with the notable exception of the National Liberation Movement issue. However, as the Draft Comprehensive Convention has not been completed or adopted, still less signed and ratified, it would appear premature to rely on the current state of these negotiations alone as indicative of customary international law at the present time. The adoption of new terrorism legislation which took a growth spurt post September 11 may have slowed down, such that the 'soft-law guideposts' provided by Resolution 1566 in 2004 have had less obvious restraining influence than it might otherwise have had.[182] The evolution of national legislation will however continue, including through on-going attempts at model legislation, such as that adopted in 2011 by the African Union, which may over time lead to a greater consistency of approach than has been evident in practice to date.[183]

Attempts to guide and to exercise more effective oversight over states for the definitions adopted and their application may gain pace. It remains just conceivable that evolving national practice will move closer together and lead to future changes in customary international law, to which the potential adoption and acceptance of a generic definition in a global convention would undoubtedly contribute, but this remains some way off.

For the time being, it may be tentatively concluded that international law cannot be said to prohibit or indeed penalise terrorism, according to an understood definition of the term under customary international law. So far as there remain such uncertainties and ambiguities around the existence of a definition or its scope, it must be highly doubtful whether criminal prosecution on this basis would be consistent with the cardinal principles of legality and certainty in criminal matters.

2.3 FILLING THE GAP? TERRORISM AND OTHER INTERNATIONAL LEGAL NORMS

If there is no generic definition of terrorism in international law, does this leave a gap in the international legal order? Two groups of issues are worth highlighting.

181 *See* Chapter 2.1 above.

182 Saul, 'Legislating from a Radical Hague', *supra* note 155, p. 9.

183 E.g. 'African Model Law on Counter Terrorism' at the 17th Ordinary Session of the Assembly of the Union, held in Malabo, in July 2011: see Assembly/AU/Dec.369 (XVII).

First, the absence of a definition of terrorism does not mean that serious acts of violence, such as those carried out on September 11, are not addressed by international (and of course domestic) law. As noted above, acts of 'terrorism' are covered by multiple specific conventions addressing particular types or aspects of terrorism, including hijacking, hostage taking, violence against internationally protected persons, terrorist bombing and financing terrorism. Indeed it has been described as 'difficult to imagine a form of terrorism not covered by these Conventions'.[184]

As treaty law, they are binding only on states parties to them, and the prosecution of associated offences depends on their incorporation into domestic law. Calls for the ratification and implementation of these conventions have, however, been made repeatedly by the Security and others post 9/11.[185] As a result, the enhanced ratification, and implementation, of these sectoral conventions has been a major area of positive development post 9/11.

Specific pockets of normative growth have arisen in recent years, bolstering this sectoral framework. For example in relation to the challenging issue of terrorist financing,[186] there has been a proliferation of developments from Security Council resolutions,[187] to regional conventions and regulations,[188] as well as softer law standards and recommendations.[189] Coupled with enhanced ratification and implementation of existing provisions, these measures have facilitated the rapid tracing, freezing and ultimately confiscation of

184 Dugard, 'Definition of Terrorism', *supra* note 10, p. 12. On this basis, Dugard, like others, does not consider it essential or desirable to conclude a generic definition in a global convention.

185 *See* e.g. SC Res 1373, 1566 and others. See also Prost, *supra* note 39.

186 A Gardella, 'The Fight against the Financing of Terrorism between judicial and Regulatory Control', in A Bianchi (ed), *Enforcing International Law Norms against Terrorism*, (Oxford: Hart Publishing, 2004), p. 415. Particular challenges are said to arise from poor international regulation of the financial system or its unsatisfactory implementation.

187 *See* e.g. SC Res 1373 and subsequent resolutions, which have referred to obligations in respect of terrorist financicng, including calls to ratify the 1999 convention. The Security Council has addressed terrorist financing and monitored implementation through its Counter-terrorism committee.

188 *See* e.g. European Union Council decision 2002/996/KHA 28 Nov 2002; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, which entered into force on 1 May 2008. On issues raised in the Southern African context, see Annette Hübschle, 'Terrorist financing in Southern Africa', ISS paper 132, 2007.

189 E.g. the Financial Action Task Force (FATF) is an inter-governmental body established in 1989 to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and related threats. FATF has issued numerous Special Recommendations in this field post 9/11: see http://www.fatf-gafi.org/topics/fatfrecommendations/. See other expert groups in Gardella, *supra* note 195.

property or assets in suspected cases of money laundering and terrorist financing, and the exchange of information.[190]

In addition, as discussed in more detail in Chapter 4, acts commonly referred to as 'terrorist' may amount to other crimes under international criminal law, including customary law of general application. Notably they may amount to war crimes (if carried out in armed conflict) and crimes against humanity (whether or not there is an armed conflict), provided the necessary elements of those crimes are met, including that they be committed against the 'civilian population'.[191]

The crimes mentioned above do not provide comprehensive coverage of the range of possible terrorist acts: for example, attacks aimed at terrorising the civilian population in time of peace, which do not meet the widespread or systematic threshold requirement of crimes against humanity, and in a state that has not ratified the specific conventions, would probably not be proscribed under international law.[192] But the number of states to which this applies is narrowing as ratifications grow. Moreover, even in such circumstances, acts of international terrorism will be covered by ordinary domestic law. Whether or not domestic law criminalises terrorism as such, it will inevitably prohibit murder or attacks on the physical integrity of persons or on property.

The second point to note is that the lack of a definition of terrorism does not signify a lack of obligations to refrain from participating in or supporting terrorism and to take certain proactive counter-terrorist measures. Under the general rules governing relations between states, a state must for example 'not knowingly allow its territory to be used in a manner contrary to the rights of other states',[193] and to refrain from the threat or use of force, direct or indirect, against another state.[194] As regards the treatment of persons subject to a state's 'jurisdiction' or 'control', the state is also obliged under international human rights law not only to refrain from acts that jeopardise human security, but also to exercise due diligence to prevent and punish them.[195] States also

190 *Ibid*. The 2008 Council of Europe Convention also addresses the institutional dimension that often proves critical in practice; eg the need for financial intelligence units in each State Party.

191 These requires that the civilian population, not state targets, be the object of the terror or the prohibited acts amounting to crime against humanity. See, e.g., ICC Statute definitions.

192 It has been suggested that what is needed is this definition of war crimes of terror, but applicable in time of peace, although this is, like other proposals, controversial. See website of the Terrorism Prevention Branch of the Office for Drug Control and Crime Prevention (http://undcp.org/terrorism_definitions.html) and concern expressed in Guzman, *Terrorism and Human Rights No. 1*, supra note 27, p. 191.

193 *Corfu Channel (United Kingdom* v. *Albania)*, Merits, ICJ Reports 1949, p. 22.

194 *See* state responsibility in international law and obligations to refrain from force, Chapters 3 and 5.

195 On extra-territoriality of human rights obligations *see* Chapter 7A.2.1. As noted above, terror within a state is not generally thought to be covered by the concept of 'international terrorism' for the purpose of the specific terrorism conventions, or the Draft Comprehensive Convention.

have specific obligations in respect of the repression of 'terrorism' as such.[196] These include, for state parties to them, the obligations arising out of the specific terrorism conventions discussed above. But obligations may also arise from, or be reflected in, UN resolutions, such as the far reaching Security Council resolutions post September 11.[197]

The importance of the existing, and proposed, terrorism conventions lies in the provision of a framework for the obligations regarding international cooperation,[198] ensuring, for example, that states are obliged to 'extradite or prosecute' persons suspected of the offences covered by them.[199] While the obligation to investigate and prosecute is not new or limited to these conventions, they seek to facilitate the effective discharge of the cooperation obligation and to remove obstacles to extradition.[200] Particular 'modalities' of cooperation aimed at discharging the general obligation to cooperate, such as intelligence and evidence sharing, transfer of criminal proceedings, freezing and seizure of assets, execution and recognition of foreign judgments, or indeed extradition provisions, such as 'conditional extradition,'[201] have been addressed selectively in particular treaties.[202] It has been suggested that if there is a gap that the potential Draft Comprehensive Convention might fill, it may not relate so much to the definition, but to the lack of a comprehensive framework for international cooperation, covering all such modalities, including

196 As discussed below, the force of those obligations may be weakened or undermined by divergent interpretations of what is covered, and excluded, by the term.

197 SC Res. 1368, *supra* note 164, states that 'those responsible for aiding, supporting or harbouring the perpetrators, organisers and sponsors of these acts will be held accountable'. Unlike SC Res. 1373 (2001), supra note 2, this is not a Chapter VII resolution. SC Res. 1373 paras. 1 and 2 obliges states to adopt wide ranging measures including criminalisation, freezing of assets and denial of safe haven, as discussed at Chapter 3.1.2. See also e.g. SC Res. 1624 (2005) which includes an array of preventive measures including asset freezing and confiscation.

198 Cooperation is discussed in more detail in Chapter 4. 4A.2 and the human rights issues raised are highlighted in Chapter 7A.4.3.8. Strengthening obligations of cooperation has been the main import of the sectoral conventions; see M. Lehto, 'Indirect Responsibility for Terrorist Acts' p.383 and Prost, *supra* note 39, in Van de Herik and Schrijver, *supra* note 35.

199 On the obligation to extradite or prosecute (*aut dedere aut judicare*) war crimes, crimes against humanity genocide e.g., *see also* Chapter 4. See 'International Terrorism: Challenges and Responses', *Report from the International Bar Association's Task Force on International Terrorism*, 2003 and Chapter 7A4 on positive human rights obligations.

200 The usual requirements of extradition law (such as in some cases the 'double criminality' requirement), do not operate as a bar to extradition while other developments seeking to further remove obstacles to extradition, or to streamline the extradition process, have been initiated, or advanced with renewed impetus, post September 11, some with troubling human rights implications. See Chapter 4B.2.2 and para. 7A.8.

201 Article 8(2), International Convention for the Suppression of Terrorist Bombings 1998, *supra* note 48.

202 *See* IBA Task Force, 'International Terrorism', Ch. 7.

clarifying the hitherto irregular, and at times confusing, rules regarding extradition.[203]

The focus on and overuse of the terrorism terminology may, therefore, obscure the extent to which the sort of serious acts and threats we commonly associate with 'terrorism' are already regulated by other areas of international law. As is often the case, the problem lies more with the poor enforcement of existing norms, including but going beyond specific terrorism norms, than with the lack of a generic definition. In this respect it is noted that the Security Council's call to states to ratify existing terrorism conventions appears to have borne some fruit although the crucial challenge in that respect remains implementation.[204] While a generic definition in a global convention, *if* it could be achieved and could garner near universal support, may serve the interests of legal certainty and improve the efficiency of inter-state cooperation, what is clear is that its absence does not mean a legal void or necessitate legal paralysis.

2.4 CONCLUSION

Given the outstanding differences of view on its key elements, it is difficult to sustain that international terrorism is, *per se*, defined and clearly regulated in international law. The absence of a generic definition of terrorism leaves no gaping hole in the international legal order. Rather it would appear to be the case that what we commonly refer to as terrorism, although perhaps not defined as such, would most likely be prohibited by other international legal norms. In one view then, the lack of a definition of terrorism is just not that significant. As one commentator noted: 'Terrorism is a term without legal significance. It is merely a convenient way of alluding to activities, whether of states or individuals, widely disapproved of and in which the methods used are either unlawful, or the targets protected or both.'[205]

On the other hand, there can be little doubt of the political currency of the language of terrorism, particularly in the post September 11 world.[206] The stakes were raised considerably by Security Council Resolution 1373, which, in what has been described as a new 'legislative' role for the Security

203 *Ibid*. Prost, *supra* note 39.

204 Many of the existing specific conventions are already widely ratified, though not necessarily implemented. *See* Chapter 4, section B. On the challenges, see generally Schrijver and van den Herik, *supra* note 35.

205 Higgins, 'General International Law', *supra* note 186.

206 *See*, e.g. the State of the Union Speech by the United States' President, 20 September 2001: 'Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile Regime', available at http://www.whitehouse.gov/news/releases/2001/ 09/ 20010920-8.html.

Council,[207] imposes binding obligations on states to take extensive counter-terrorist measures. These include criminalising 'terrorism' and support for it, imposing serious penalties, freezing assets and excluding 'terrorists' from asylum and refugee protection. Broad-reaching obligations in respect of terrorism have been established without providing a clear definition of the conduct towards which such measures should be directed, and, by contrast to earlier binding decisions taken by the Council, without limitation as to the situation or broad time frame in which it should apply.[208]

Imposing far-reaching obligations on the basis of an ambiguous concept – described by a senior French law enforcement official as having 'opened the universal hunting season on terrorism without defining it'[209] – may reap unfortunate consequences. First, it may generate uncertainty as to the precise nature of states' obligations towards the Council, and undermine those obligations. As has been noted: 'without reaching an acceptable international definition of the term "terrorism" one can sign any declaration or agreement against terrorism without having to fulfil one's obligations as per the agreement. For every country participatory to the agreement will define the phenomenon of terrorism differently from every other country.'[210] Second, as discussed in other chapters, it raises fundamental concerns in respect of criminal law enforcement and human rights.[211] The lack of a binding definition, and 'too little too late' in terms of effective supervision of the human rights implications of national definitions and their implementation,[212] has meant that a substantial amount of effort purportedly dedicated to combating 'terrorism' has been misapplied for purposes that do not contribute to but rather subvert the international rule of law.

Despite the centrality of 'terrorism' in international law and practice, controversy surrounds most aspects of the concept of terrorism in international law. Absent a clear and accessible meaning to be attributed to the term, and consensus around the same, its susceptibility to abuse renders it an unhelpful basis for a legal, rather than political, analysis of events such as 9/11 or

207 P. Szasz, 'Note and Comment: The Security Council starts Legislating', 96 *AJIL* 901, October 2002.

208 While the September 11 attacks to which the resolution was responding would fall within any definition of terrorism, and of other crimes under international law, Resolution 1373 is not in any way limited to that situation.

209 Statement of Mr Jean-François Gayraud, Chief Commissioner of the French National Police, and of the French judge David Sénat, reported in Guzman, *Terrorism and Human Rights No. 2*, *supra* note 26, p. 26.

210 B. Ganor, 'Security Council Resolution 1269: What it Leaves Out', 25 October 1999, available at http://www.ict.org.il/articles/articledet.cfm?articleid=93. The reflection in relation to SC Res. 1269 is equally applicable to subsequent resolutions including SC Res. 1373, *supra* note 2.

211 Chapters 4 and 7.

212 See Chapter 7B.1 'Security v Human Rights and on the role of the UN Counter-Terrorism Committee; *see also* http://www.un.org/terrorism/pdfs/fact_sheet_3.pdf.

responses thereto. Subsequent chapters will therefore address those events and responses based on other norms of international law.

3 International responsibility, terrorism and counter-terrorism

The question of responsibility for acts of international terrorism, or in response to international terrorism, has permeated discussion since 9/11. Was a state responsible for the September 11 attacks, or for acts of international terrorism since then, and what are the implications? To what extent do the permissible responses, including the resort to armed force, depend on responsibility? Questions regarding state responsibility for terrorism have arisen to similar effect in many other contexts, before and after 9/11, such as in relation to the killing of former Lebanese Prime Minister Harari,[1] the Lockerbie bombing[2] or more recently in the context of allegations of Iranian involvement in attempts on US territory and beyond.[3]

In addition to questions of state responsibility for terrorism itself are others concerning acts carried out in the 'global war on terror:' in what circumstances are states responsible in connection with wrongs by other states, or by private security companies carrying out security or counter-terrorism measures for example? While the focus is on state responsibility, fundamental questions also arise regarding those individuals and entities accused of being engaged in terrorism: to what extent can al-Qaeda, or associated entities or individuals, be considered responsible under international law?

The international responsibility of a state arises from the commission of an internationally wrongful act, consisting of conduct that (a) is attributable to a state under international law and (b) constitutes a breach of an international obligation of the state.[4] States may also be responsible in connection

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1 *See* UN International Independent Investigation Commission report, UN Doc. S/2005/662, 31, paras. 123-24; *see also* Security Council, in its Chapter VII Resolution 1636 (2005), UN Doc. S/Res/1636. *See* K.N. Trapp, 'Holding States Responsible for Terrorism before the International Court of Justice', 3(2) (2012) J Int. Disp. Settlement 279.

2 *See*, *e.g.*, Statement made on behalf of the Security Council, 9 July 1999, UN Doc. S/PRST/1999/22; Trapp, *ibid*.

3 'US to pressure Iran over "plot" to kill Saudi envoy', *BBC*, 12 October 2011, available at: http://www.bbc.co.uk/news/world-us-canada-15269348; 'Bangkok blast suspects "targeting Israeli diplomats"', *BBC*, 16 February 2012, available at: http://www.bbc.co.uk/news/world-asia-17055367.

4 Article 2 of the Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001. *See Report of the ILC on the work of its 53rd session*, UN Doc. A/56/10 (2001), Chapter IV, pp. 59-365. For text of the ILC's Articles on State Responsibility and the authoritative Commentaries, *see* J. Crawford, *The*

with wrongs by other states.[5] Subsequent chapters will address the international obligations of the state (sometimes referred to as 'primary rules' of international law)[6] – including in relation to criminal law, force, human rights and humanitarian law. This chapter deals with the 'secondary' rules that determine when a state will be responsible for those wrongs.

As will be apparent from the chapters that follow, questions of responsibility are of cross-cutting relevance to the areas of law and practice discussed in this book. Their relevance has always been more apparent in relation to some aspects of the framework of responses to terrorism than others. For example, state responsibility is not generally required for crimes under international criminal law engaging individual responsibility to arise. However, even there are connections; for example in certain circumstances state responsibility may be relevant to whether terrorist attacks amount to specific crimes (notably war crimes and the crime of aggression).[7] By contrast, the question of state responsibility has traditionally been considered closely interlinked with the lawfulness of the use of force,[8] as will be explored in Chapter 5; while doubt is increasingly cast on the view that state responsibility for an armed attack is a prerequisite to self-defence, the extent of the state's responsibility may remain relevant to an assessment of the lawfulness (*i.e.*, the necessity and proportionality) of attacking particular state targets.[9] On these and other issues arising in practice, explored in each subsequent chapter of this book and in particular in the case studies, the 'secondary' rules of responsibility set out in this chapter must be considered alongside the 'primary' obligations under international law discussed in others.[10]

As we will see, some of the rules on state responsibility in respect of terrorism and counter-terrorism have proved legally controversial, and this

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International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge, 2002).

5 Chapter IV, Articles 16-19, ILC Articles *ibid*.

6 On the distinction between 'primary' and 'secondary' rules, *see generally*, J. Combacau and D. Alland, '"Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations', 16 (1985) NYIL 81.

7 Chapter 4A1.1 on the elements of war crimes and aggression and controversies around a policy element for crimes against humanity 'on the interconnections, and the consequences of the individualisation of international responsibility' for state responsibility, see A. Nollkaemper, Concurrence between Individual Responsibility and State Responsibility in International Law. International and Comparative Law Quarterly 2003, 52, pp. 615-640.

8 *See* discussion of self-defence in Chapter 5A.2.1.

9 As discussed at Chapter 5, the view that self-defence under Article 51 of the UN Charter only arises in response to attacks by states is increasingly doubtful. Measures involving the use of force in self-defence must though be 'necessary' to avert an attack, suggesting that for such measures to be directed against the organs of a state, that state must exercise a degree of control over the attack in question.

10 Responsibility is addressed first on account of its cross-cutting relevance to the issues of practice discussed in subsequent chapters (Part B of Chapters 4-7, and Chapters 8 and 10 in particular). *See* Chapter 2.3 and Part A of Chapters 4-10 for the primary obligations.

is an area of law which some claim has shifted, or may be in particular flux, influenced in part by state practice since 2001. What is clear is that if issues of responsibility in international law were once perhaps considered principally of academic interest, they have assumed greater prominence in legal and political discourse, the practice of states and the jurisprudence of courts and adjudicatory bodies in this field in recent years.[11] State responsibility for acts of terrorism or counter-terrorism carries a range of implications, both legal and political.[12] Understanding this area of law is critical to assessing the responsibility of the multiplicity of state and non-state actors currently engaged in or associated with international terrorism or the 'war on terror', and to ensuring accountability, reparation and effective prevention in the long-term.

Part 1 of this chapter assesses the responsibility of states for international terrorism in the light of the rules on international responsibility. It considers the basis on which acts of international terrorism, perpetrated by private individuals or organisations, may be attributed to a state such that the state incurs legal responsibility for those acts, and the consequences of such responsibility. Part 2 considers the extent to which so-called 'non-state actors' – private individuals, organisations or entities, such as al-Qaeda or other terrorist groups or entities – may themselves incur 'responsibility' under international law. The relevance of the law of 'state responsibility' to assessing the unfolding *responses* to international terrorism is then addressed at Part 3. In recent years, the multi-actored, transnational complexity of the 'war on terror' has sharpened focus on the significance of understanding the nature of a state's responsibility where it acts through or in cooperation with other states, or where violations arise at the hand of private contractors, addressed at sections 3.1 and 3.2 respectively.[13] The 'war on terror' has also raised questions concerning the right, or in exceptional circumstances the obligation of other states to take measures to end serious international wrongs addressed at section 3.3.[14]

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11 *See*, *e.g.*, rendition in Chapter 10, and judicial practice in Chapters 4, 7 and 11.

12 For a fuller discussion of the implications of determining whether a state is responsible for terrorism as such, rather than the 'separate delict' of failing to meet other obligations in respect of terrorism, *see* T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Portland: Hart Publishing, 2006), p. 156 et seq.

13 *See*, *e.g.*, Chapter 10 on the responsibility of multiple states for the extraordinary rendition programme.

14 The obligations owed to the international community as a whole, and the obligation to cooperate in order to end serious breaches of *jus cogens* norms are discussed below.

3.1 STATE RESPONSIBILITY IN INTERNATIONAL LAW

3.1.1 State Responsibility for Terrorism: Legal Standards of Attribution?

As a starting point, a state on whose territory crimes are orchestrated is not automatically responsible for them.[15] As the ICJ noted in 1949 in the *Corfu Channel* case, it is impossible to conclude 'from the mere fact of the control exercised by a state over its territory and waters that that State necessarily knew or ought to have known of any unlawful act perpetrated therein nor that it should have known the authors'.[16] It would be anomalous to suggest a strict liability test in the context of international terrorism, potentially implicating the responsibility of the US, Germany or others in respect of those who trained and organised the 9/11 attacks from their territories.[17]

Instead, as noted above, the international responsibility of a state arises where a breach of an internationally wrongful act is 'attributable' to it under international law.[18] As regards acts committed by individuals or groups not *formally* linked to the state, the question of the standard for attribution of conduct to the state, and whether it has been met on the facts, is critical.[19] This question of attribution, whereby the state becomes responsible for the acts themselves, must be distinguished from the question whether the state has breached any obligations in respect of the prevention of or response to international terrorism.[20,21]

The question of state responsibility is relatively straightforward where conduct occurs at the hand of state officials or organs of the state.[22] States are directly responsible for the conduct of organs of the state, which amounts to an 'act of state'[23] even if the official exceeded or acted outside his or her authority.[24] Likewise, where individuals or entities exercise elements of 'governmental authority,' in accordance with national law, these are also deemed acts of state for which the state has responsibility, even where the

15 *See* 1.1.3. *See also Oppenheim's International Law*, 9th ed. (Oxford: Oxford University Press, 2008), pp. 502-03.

16 *Corfu Channel (United Kingdom* v. *Albania), Merits, ICJ Reports 1949*, p. 4.

17 Likewise, simple knowledge of suspected terrorist activities could potentially implicate many states, and would clearly not itself be enough.

18 ILC Articles, *supra* note 4 at Article 2.

19 If the events of September 11 could be attributable to the state, this second prong of the test would clearly be satisfied as violence against another state would violate the rules on the use of force, set out at Chapter 5.

20 For obligations of 'due diligence' to prevent, *see* below and Chapters 2 and 7. *See*, *e.g.*, Becker, *supra* note 12, suggesting that this distinction is valid but not rigid.

21 Controversies are explored further below.

22 ILC Articles, *supra* note 4 at Article 4, p. 94 et seq.

23 *Ibid*.

24 *Ibid.* at Article 7 and Commentaries, p. 106 et seq.

actors go beyond the scope of their authority.[25] Although these rules will rarely be relevant to terrorist organisations, it is at least remotely conceivable that in a 'failed' or 'failing' state, where state authorities are absent, an organisation could assume elements of governmental responsibility, rendering the acts of the organisation (carried out pursuant to this exercise of governmental authority) to acts of state.[26] Generally speaking, however, the relevant and controversial question is the standard for attribution where those directly responsible for conduct are private individuals or groups with no formal or legal relationship with the state.

States are responsible for private actors' conduct which they directed or over which they exercised effective control.[27] Controversy and uncertainty arises (heightened in recent years) as to the meaning of such 'effective control,' and whether lesser forms of involvement, such as supporting, 'harbouring', encouraging or even passively acquiescing in wrongs, or some other causal relationship short of 'control' is sufficient to render acts of terrorism attributable to the state. Controversy as to the applicable legal standards is coupled with challenges in evidentiary terms as 'a transparent relationship between terrorist actors and the state is predictably uncommon'.[28]

3.1.1.1 Effective or overall control?

International jurisprudence and the work of the International Law Commission support the view that the acts of private individuals may be attributed to a state which exercises sufficient control over the conduct in question. According to the International Court of Justice in the *Nicaragua* case, the test is whether the state or states in question exercised 'effective control'.[29] Although the Court found the US to have helped finance, organise, equip, and train the Nicaraguan Contras, this was not deemed sufficient to render the Contras' activities attributable to the US. Such a level of support and assistance did not 'warrant the conclusion that these forces [were] subject to the United States to such an extent that any acts they have committed are imputable to that

25 *Ibid*. at Article 5, p. 100 et seq. *See* more complex discussion on the application of this rule to private contractors in Part 3 below.

26 *Ibid*. at Article 9, on "Conduct carried out in the absence or default of the official authorities" and Commentaries, p. 100 et seq. On the law governing failing states, *see*, *e.g.*, Advisory Council on International Affairs, *Failing States: A Global Responsibility*, Advisory Report No. 35, May 2004, p. 59 (hereinafter *Dutch AIV Report* 2004) and Chapter 5.

27 *Oppenheim's International Law*, *supra* note 15 at p. 501; ILC Articles, *supra* note 4 at Article 8.

28 *See* S. Schiedeman, 'Standards of Proof in Forcible Responses to Terrorism', 50 (2000) *Syracuse Law Rev.* 249.

29 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, ICJ Reports 1986*, p. 14 (hereinafter '*Nicaragua* case'), paras. 86-93.

State'.[30] Despite years of outspoken criticism of this decision, generated by those who consider it to impose too rigorous a threshold for establishing responsibility,[31] the *Nicaragua* 'effective control' test was approved by the ICJ in the 2007 *Genocide* case, and remains the authoritative legal standard. It demonstrates that attribution must then be established *vis-à-vis* particular conduct (rather than over the group's actions more generally),[32] and that the threshold for attribution is high.[33]

The ILC's Articles in turn confirm the high threshold for attributing acts of private individuals to the state, providing that such acts may be attributed to the state if the person is acting on 'instructions' of the state, or under the state's 'direction or control'.[34] This standard has been described by the ICJ as 'substantially coinciding' with the effective control test endorsed by the Court.[35]

The jurisprudence of the ICTY has developed in a slightly different direction.[36] Reflecting *Nicaragua*, the Trial Chamber in the *Tadić* case noted that the relationship between the groups and the state must be more than one of 'great dependency', amounting instead to 'a relationship of control'.[37] The Appeals Chamber, while endorsing this, found that different tests applied in respect of private individuals who are not militarily organised and paramilitary or similar groups.[38] In respect of the latter the test was whether the state

30 *Ibid*. The United States was found liable for specific activities, which were the result of direct action on the part of its military or foreign nationals in its pay.

31 *See* dissenting judgments (of Judges Jennings and Schwebel) in *Nicaragua*, opining that 'substantial involvement' in the form of financial or military assistance could suffice, and discussion in G.M. Travalio, 'Terrorism, International Law and the Use of Military Force', 18 (2000) *Wisc. Int'l. L. J.* 145 at 265; *see also* C. Stahn, 'Nicaragua is dead, long live Nicaragua', in *Terrorism as a Challenge for National and International Law: Security versus Liberty* (C. Walter, S. Vöneky, V. Röben, F. Schorkopf eds., 2004), 827-77.

32 *See* ILC's Commentary to Article 8(3), *supra* note 4, confirming that state responsibility under the ILC's Articles was considered to arise in relation to particular conduct.

33 *See Nicaragua* case, supra note 29, paras. 86-93. *Nicaragua* demonstrated also the evidentiary difficulty of proving state responsibility for acts of non-state actors.

34 ILC Articles, *supra* note 4 at Article 8 and Commentary.

35 ICJ Genocide case. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (hereinafter 'ICJ Genocide case'), 2007 I.C.J. 91 (Feb. 26).

36 *See Prosecutor* v. *Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999 (hereinafter '*Tadić* Appeal Judgment'). The question was whether the acts of the VRS (Bosnian Serb forces) could be imputed to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), such that an international conflict had arisen between that state and Bosnia-Herzegovina. Note that the question arose for the purpose of determining individual responsibility for IHL violations, whereas *Nicaragua* addressed state responsibility directly.

37 *Ibid.*

38 Acts of individuals to be attributed to the state generally requires 'specific instructions', or they may be 'publicly endorsed or approved *ex post facto* by the State at issue'. *See ibid*. at para. 137.

exercised 'overall control' over the activities of the group, rather than effective control of particular conduct. The Tribunal reflected the *Nicaragua* judgment by emphasising that the 'mere provision of financial assistance or military equipment or training' was insufficient, requiring instead that the state have 'a role in organising, coordinating or planning the military actions'.[39] Moreover, the ICTY noted that where the 'controlling State' is not the state where the armed clashes occur, 'more extensive and compelling evidence is required to show that the state is genuinely in control of the units or groups, not merely by financing and equipping them, but also by generally directing or helping plan their actions'.[40]

The ICTY thus suggested a more 'flexible' standard for attribution, based on the ongoing relationship with the armed groups rather than control over particular conduct, that has been favoured by some as a more realistic vehicle for holding states accountable for violations by private actors through state support.[41] However, despite sometimes persuasive arguments as to the merits of this standard or why it may lead in some circumstances to preferred results, as a statement of the current law on state responsibility in international law, it is doubtful.[42] The ILC Commentaries suggest that while the ICTY standard may be relevant in the context of international criminal law, and to determining the threshold of international armed conflict for IHL purposes, the 'effective control' of conduct test remains the relevant one for state responsibility.[43] This is supported by the reassertion by the ICJ of the effective control test in the *Genocide* case, as noted above.

3.1.1.2 Ex post facto assumption of responsibility

Where the state does not exercise the necessary control at the time of the conduct in question, it may nonetheless assume responsibility for the wrong *ex post facto*, where it subsequently 'acknowledges or accepts' the conduct as its own.

In the *Tehran Hostages* case, the ICJ held that while the 'direct' responsibility of Iran for the original takeover of the US Embassy in Tehran in 1979 was not

40 *Ibid*. at para. 138.

41 *See, e.g.*, 3.3.2 Privatising Counter-terrorism and Responsibility where the overall control test would also fit more readily with the sort of ongoing relationship between the state and the groups with whom it contracts.

42 *See also* ICJ Genocide case, supra note 35.

43 *See* ILC Commentaries in 'Report of the International Law Commission on the Work of its Fifty-Third Session', UN Doc. A/56/10 (2001), p. 111. This is the standard espoused by the ICJ and the ILC Articles.

proved,[44] subsequent statements in the face of incidents involving hostage taking by students created liability on the part of the state.[45] To the extent that the judgment indicates that the Iranian State was considered capable of putting a stop to an ongoing situation and instead chose to endorse and to 'perpetuate' it, the Court's finding against Iran is consistent with the application of the 'effective control' test. But the judgment also makes clear that even if such a test were not met, the state may become responsible through its subsequent 'approval' or 'endorsement' of wrongful acts. This approach has been followed by the ICTY[46] and, as noted above, the ILC's Articles.[47]

One commentator has sought to rely on this test as a basis for finding Afghanistan responsible for 9/11, in light of the Taleban 'blatantly and adamantly refusing to take any action against al Qaeda and Bin Laden, and in offering them sanctuary', by virtue of which it was suggested that the government 'espoused the armed attack against the US'.[48] There is little authority, however, for treating refusal to react itself as sufficient for the purposes of *ex post facto* assumption of responsibility.[49] Rather, what is required goes beyond mere approval of the conduct of others, to a degree of endorsement whereby the state can be said to have identified the conduct 'as its own'.[50]

3.1.1.3 A grey area? 'Harbouring', 'supporting' or 'causing' terrorism (and the case of Afghanistan) post-9/11

States are not then strictly responsible for international wrongs emanating from their territory, but they are responsible for acts of individuals or groups over whom they exercise 'effective control', or where they subsequently endorse the conduct as their own. Before September 11, it had been suggested that there was also a difficult 'grey area',[51] wherein 'the issue becomes more difficult

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44 *See United States Diplomatic and Consular Staff in Teheran (United States* v. *Iran), ICJ Reports 1980*, p. 3 (hereinafter '*Teheran Hostages*' case). During the first phase of the occupation of the American Embassy, the international responsibility of Iran arose from a breach of the different primary obligations of due diligence. *See ibid*. at pp. 31-33, paras. 63-68 and below chapter 3 1.2.

45 *Ibid*., p. 35, para. 74.

46 *Tadić* Appeal Judgment, supra note 36, para. 137.

47 ILC Articles, *supra* note 4 at Article 11.

48 Dinstein, 'Comments on the Presentation by Nico Krisch and Carsten Stahn', in Becker, *supra* note 12, p. 225.

49 It would however breach other obligations required in response to serious criminal acts. *See* para. 3.2 below.

50 '[A]s a general matter, conduct will not be attributable to a State under Article 11 where a State merely acknowledges or expresses its verbal approval of it'. ILC's Commentary to Article 11, *supra* note 4.

51 *See* A. Cassese, 'The International Community's "Legal" Response to Terrorism', 38 (1989) ICLQ 589 at 599. Cassese sets out six levels of involvement that a state may have in terrorist activity. The three grey areas in the middle involve the supply of financial aid or weapons, logistical or other support and acquiescence, respectively.

when a state, which has the ability to control terrorist activity, nonetheless tolerates, and even encourages it'.[52] Since September 11, this grey area has become both increasingly significant and increasingly murky.

In part, this reflects perceptions concerning the shifting nature of terrorist organisations' capacities, and in particular the evolution in their inter-relationship with states. Changing realities whereby organisations may be as powerful as states, influenced by the growing number of failed and failing states, frequently challenge traditional assumptions regarding this relationship. The controversy is also fed however by state practice post-9/11, and specifically the Afghanistan intervention and the nature of the international reaction to it.

Immediately following the events of September 11, then US President Bush asserted that in the search for those 'responsible', no distinction would be made 'between the terrorists ... and those who harbor them'.[53] The harbouring and support language has reappeared elsewhere, including in international statements and national laws.[54] The case against Afghanistan, so far as made out by the US, amounted to the September 11 attacks having been 'made possible by the decision of the Taleban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation'.[55] Alternative formulations as to the link between the Taleban and al-Qaeda at the time included allegations that the Taleban 'protected' the al-Qaeda network,[56] while

52 Travalio, 'Terrorism', supra note 31 at p. 154.

53 'We will make no distinction between the terrorists who committed these acts and those who harbor them.' 'Statement by the President in his Address to the Nation', 11 September 2001, available at: http://www.whitehouse.gov/news/releases/ 2001/09/20010911-16.html last visited 12 November 2012.

54 *See*, *e.g.*, SC Res. 1368, UN Doc. S/Res/1368 (2001); Council of the European Union statements of 14 Sept 2001 and 21 September: 'Conclusions and Plan of Action of the Extraordinary European Council Meeting, 21 September 2001, sec. 1, para. 1, circulated as UN Doc. A/56/407-S/2001/909; Report of EU-US Ministerial meeting 20 September 2001. For an example of this language as a basis to criminalise conduct under domestic law in response to SC Res. 1373 (2001), 28 September 2001, UN Doc. S/RES/1373 (2001), *see* Canada's Anti-Terrorism Act 2001, Section 83.23, entered into force on 24 December 2001, creating the crime of 'harbouring or concealing' persons known or likely to carry out terrorist activity. I. Cotler, 'Does the Anti-Terror Bill go too far? No: We need powerful new legal tools to fight the new global terror threat', *Globe and Mail*, 20 November 2001. *See also*, M. Lehto, *Indirect Responsibility for Terrorism Acts: Redefinition of the Concept of Terrorism Beyond Violent Acts* (Leiden: Koninklijke Brill NV, 2010), p. 393 et seq.

55 'Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council', 7 October 2001, UN Doc. S/2001/946. *See* further below and Chapter 5B.1.1.1 on the failure to make out a case of legal responsibility of Afghanistan for 9/11.

56 'We know that the individuals who carried out these attacks were part of the worldwide terrorist network of Al-Qaida, headed by Osama bin Laden and his key lieutenants and *protected* by the Taleban.' Statement by NATO Secretary-General Lord Robertson, 2 October 2001, available at: http://www.nato.int/docu/speech/2001/s011002a.htm last visited on 5 May 2013 (emphasis added).

broader statements have been made as to the need for accountability of those nations 'compromised by terror,'[57] or 'allies of terror.'[58]

On 7 October 2001, the US and its allies launched military operations against Afghanistan in response to the events of 9/11, triggering questions on the compatibility with, or impact on, the law of state responsibility. The first question is whether the legal standard was met for attributing the conduct of private 'terrorist' organisations to the state in relation to Afghanistan and the 9/11 attacks. Did the relationship between the Taleban and al-Qaeda surpass association or inter-dependency and reach the requisite control by the former over the conduct of the latter?[59]

Whether the Taleban exercised effective control over the conduct of al-Qaeda (or indeed – if one were to accept the ICTY test – overall control of the entity itself), to be responsible for the attacks was the subject of doubtful speculation at the time.[60] Information emerging in the years following 9/11 – including from an official commission conducted in the United States – casts far greater doubt on the proposition.[61] There is evidence of a close and mutually beneficial association between the two, with al Qaeda providing troops, weapons and resources to the Taleban (not *vice versa*) and the Taleban providing 'sanctuary' in return.[62] Notably, states involved in the military operations, while making numerous allegations of support for terrorists, did

57 'National Security Strategy of the United States' (hereinafter 'US National Security Strategy'), September 2002, available at: http://www.whitehouse.gov/nsc/nss.pdf.

58 The 'allies of terror are equally guilty of murder and equally accountable to justice', Press Release, 'President Bush Speaks to UN', 10 November 2001, cited in D. Jinks, 'State Responsibility for Acts of Private Armed Groups', 4 (2003) *Chicago Journal of Int'l Law* 83, 85.

59 The test is effective control over specific conduct, or overall control over activities of the group, if it is militarily organised. *See Tadić* Appeal Judgment, *supra* note 36.

60 Many commentators denied the legal responsibility of Afghanistan for the September 11 attacks. *See*, *e.g.*, Jinks, 'State Responsibility', *supra* note 58, p. 83, 93-99; and M. Sassòli, 'State Responsibility for Violations of International Humanitarian Law', 84 (2002) IRRC 01. Y. Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 2011), p. 261 suggests: 'The original outrage of 9/11 could not be imputed to Afghanistan ex post facto. But, even though the Taliban were not accomplices to the 9/11 events before and during the act, they became accessories after-the-fact. By brazenly refusing to take any measures against Al-Qaeda and Bin Laden – and continuing to offer them shelter within its territory – Afghanistan endorsed the armed attack against the United States.' On ex post facto assumption of responsibility, *see* section 3.1.1.

61 The findings of the National Commission on Terrorist Attacks Upon the United States released on 22 July 2004 (the '9/11 Commission Report'), cast renewed doubt on the degree of control exercised by the Taleban over al-Qaeda, including the opposition of senior government officials to 9/11. Less surprisingly, the report rejects any suggestion of a link between the September 11 attacks and Iraq. *See* 'Qaeda had targeted Congress and CIA, panel finds', *International Herald Tribune*, 17 June 2004. The reports of the Commission are available at: http://govinfo.library.unt.edu/911/report/911Report.pdf. *See also* Becker, *supra* note 12 at p. 217.

62 9/11 Commission Report, supra note 61, p. 66. See also Chapter 6 on the evolving nature of 'al Qaeda and associates'.

not seek to make the case as to the exercise of effective or overall control by the Taleban.[63] Legal responsibility of Afghanistan was not asserted in terms by the states driving the Afghan prong of the 'war on terror', and was therefore not subject to the full debate and analysis that one might expect, given the severity of impending consequences for Afghanistan. It would certainly have been a difficult case to make on the facts and in accordance with all applicable legal standards.[64]

The second question that follows is whether, as some have suggested, the standard for the attribution of acts of private actors to states has changed as a result of the Afghan intervention and the overwhelming state support for the Afghan intervention, despite the effective control test not having been met.[65] For some, this suggests that 'harboring and supporting' terrorist groups may now be sufficient for state responsibility, reflecting the language of the Bush Administration and official documents prior to the intervention.[66] Another approach suggests that the response demonstrates an appetite for a new 'causation based' approach by which conduct is attributed to a state if the state fails in its legal obligations (*e.g.*, due diligence to prevent[67]) and this 'causes' a terrorist act.[68]

The view that the Afghanistan intervention reveals a shift in state practice or opinion appears to be based on the assumption that the decision to attack Afghanistan was premised on the attribution of al-Qaeda's actions to Afghanistan (according to a lower threshold than accepted previously).[69] However, this is unclear for various reasons. First, it is unclear to what extent the allegations levelled against the Taleban of harbouring and supporting terrorists were

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63 *See* letters from the permanent Representative of the United States, S/2001/946, *supra* note 55, and the United Kingdom to the President of the Security Council, S/2001/947, available at:http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/567/91/PDF/N0156791.pdf. *See* C. Greenwood, 'International Law and the "War against Terrorism"', 78 (2002) *Int'l Affairs* 301 at 311-12, noting that while the letters from the US and the UK to the Security Council accused Afghanistan of harbouring the terrorists, 'they stopped short of alleging that Afghanistan was, as a matter of international law, responsible for the attacks themselves'. *See also* discussion in Chapter 5, para. 5B.1.1.3.

64 According to Tal Becker, there is 'simply no evidence' of a relationship of control by the Taleban over al Qaeda. *See* Becker, *supra* note 12 at p. 217.

65 The extent of international support for the intervention is discussed in Chapter 5B.1. Becker, *supra* note 12, considers the state response to the Afghan intervention as evidence that states did not accept the classic agency test for attribution set out above. This is been questioned; see below and Lehto, supra note 54, Chapter 9.

66 *See*, *e.g.*, Jinks, 'State Responsibility', *supra* note 58 at p. 91. This language is not endorsed by a wide number of commentators despite its use by the allied forces to justify intervening in Afghanistan.

67 *See* the following section for more details.

68 Becker's theory seeks to hold the state responsible for harm it causes through wrongful activity (such as failing in its due diligence obligations) even where it does not 'control' acts of powerful networks such as al Qaeda.

69 Sassòli, 'State Responsibility', supra note 60, p. 409; Jinks, 'State Responsibility', supra note 58, pp. 85-88.

legal (as opposed to political) claims at all.[70] To the extent that they were, it is unclear whether the claim is that 9/11 was attributable to the state, or rather that providing support for terrorists in itself constitutes another internationally wrongful act. It may well be, in addition, that such attribution was not considered a prerequisite to the lawfulness of the use of force in self-defence (or indeed that in certain quarters lawfulness was not considered an essential prerequisite for military action to proceed), rather than that the standards of attribution were considered to have been met.[71] Growing recognition of the possibility of lawful self-defence absent state responsibility (discussed in Chapter 5) is consistent with the possibility that, to the extent that practice reveals a shift in the law, the shift relates to the primary rules on the use of force rather than to the secondary rules on state responsibility.

The failure of states to articulate their approach to state responsibility makes it difficult to identify whether they were acting out of an assessment that the Taleban was legally responsible and, if so, what the parameters might be for any accepted new standard.[72]

There may however be growing concern about the appropriateness of the 'effective control' standard, which, compounded by evidentiary obstacles, has been described as making attribution in terrorist cases only a 'theoretical possibility.'[73] However, despite disquiet and a myriad of apparent 'standards' being referred to or proposed by commentators, states and international institutions, it is doubtful whether any other standard lays reasonable claim to reflect the law as it currently stands.[74] While likely to stimulate further debate on the need for legal development in the future, and the law may well shift over time, it is highly doubtful whether a new standard for attribution has emerged and acquired sufficient support to displace the established rules on attribution in international law. Despite the post-9/11 muddying of legal waters, it appears likely that the high threshold of requiring that the state 'directs' or exercises 'effective control' over the conduct in question, and 'the traditional view ... that state toleration or encouragement is an insufficient state connection' for attribution of responsibility, remain valid statements of the law.[75]

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70 *See*, *e.g.*, statements regarding the accountability of the 'allies of terror' and 'nations compromised by terror' above.

71 *See* Chapter 5, para. 5B.2.1.1.

72 *See* statements to the Security Council by the US and UK, *supra* note 63.

73 Becker, *supra* note 12 at p. 7. As noted above, factual assumptions of a model in which a powerful state controlling a dependent non-state actor rather than an equal or inverted power relationship are now being questioned.

74 Becker's approach may constitute a proposal as to how the law might develop rather than an assessment of where it stands currently. As regards harbouring, it remains doubtful that there is sufficient clarity around the term to provide the quality and certainty required of law at this stage.

75 R.J. Erickson, *Legitimate Use of Military Force Against State-sponsored International Terrorism* (Maxwell Air Force Base, 1989), cited in Travalio, supra note 31, at fn. 12.

In conclusion, while formulae vary slightly, it remains the case that state responsibility for terrorism ultimately depends on 'effective control' of conduct. The evaluations of whether the test of responsibility of any state for al Qaeda affiliates at any point in time,[76] or for the many other 'allies' and 'associates' of al Qaeda worldwide against whom the US claims to be in armed conflict,[77] have to be made against this test. It is a question of degree (and an issue of fact to be established by those alleging responsibility) 'whether the individuals concerned were sufficiently closely associated with the state for their acts to be regarded as acts of the state rather than as acts of private individuals'.[78] The various standards advocated before and especially after 9/11 make a useful contribution to the debate as to *lex ferenda*, but have not reached the point where one could confidently identify a change in international legal standards. The debate does however remind us that existing rules need to be interpreted with sufficient flexibility, and mindful of realities, to be capable of practical application.

3.1.2 Responsibility for failure to prevent and protect against terrorism

It should be emphasised that the fact that the acts of al-Qaeda may not have been attributable to Afghanistan (and the Taleban as *de facto* government thereof) does not, however, mean that the latter did not breach international obligations and incur international responsibility in respect of its relationship with the al-Qaeda network.

States have obligations to take a range of measures in respect of terrorism, which existed before 9/11 but have been supplemented and strengthened since. At the very heart of the international legal order is the long-standing obligation that a state must not allow its territory to be used to commit harmful acts against other states, which plainly includes the obligation not to allow international terrorist groups to operate out of its territory.[79] With respect to international terrorism specifically, numerous conventions on particular forms of terrorism enshrine various specific duties directed at ensuring that states

76 *See* Chapter 6 B11 on the changing form and capabilities of al Qaeda since 9/11, with the 'franchise' model and role of random individuals making state responsibility more challenging.

77 *See*, *e.g.*, the 2010 US National Security Strategy: 'Al Qa'ida's core in Pakistan remains the most dangerous component of the larger network, but we also face a growing threat from the group's allies worldwide.' Available at: http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf

78 *Oppenheim's International Law*, *supra* note 15, p. 550.

79 *See* 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations', GA Res. 2625 (XXV), adopted by consensus on 24 October 1970, UN Doc. A/Res/25/2625, Principle 1, para. 9; *see also* Chapter 2.2.2; *Corfu Channel Case*, *supra* note 16; *SS Lotus* (*France* v. *Turkey*), 127 PCIJ, (ser A) no. 10.

abstain from and take measures to prevent acts of terrorism emanating from the state's territory, as reflected in several Security Council and General Assembly resolutions before 2001. After 9/11, these obligations were reiterated and expanded by the Security Council obliging all states, *inter alia*, to 'refrain from providing support, active or passive', 'deny safe haven' to persons involved in terrorism,[80] 'freeze without delay terrorist assets', criminalise terrorism and cooperate fully with other states in criminal matters, while stressing that 'those responsible for aiding, supporting or harbouring the perpetrators, organisers and sponsors of these acts will be held accountable'.[81] Additional resolutions reflect specific obligations such as not providing arms or resources to al Qaeda.[82] Reflecting existing legal obligations, these resolutions have been described as 'redefining and enlarging the requirements of due diligence to suppress and punish terrorism'.[83]

If it can be established that a state has 'harboured or supported' terrorist groups, this may well represent a breach of a range of the obligations of the state. A critical distinction exists, however, between a state being responsible for failing to meet its obligations *vis-à-vis* terrorism on its territory, and the acts of terrorists being 'attributable' or 'imputable' to the state, such that the state itself becomes responsible for the terrorists' wrongs.[84] Not only is the latter a very different international wrong, it may have very different consequences in legal and political terms.[85]

As noted above, to establish state responsibility for acts of terrorism the critical issue is often not whether a wrong has occurred but whether the test for attribution has been satisfied. By contrast, for breach of certain other obligations incumbent on a state relating to terrorism (for instance the obligation not to allow terrorists to operate from a state's territory or to freeze funds of terrorist organisations), the problem may rather be one of proving that a breach has occurred.

In part, this is because these obligations do not give rise to strict liability but rather tend to embody a 'due diligence' test requiring reasonable measures

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80 *See* SC Res. 1373, *supra* note 54 at para. 2 and Chapter 2. *See also* SC Res. 1624 (2005), UN. Doc. S/Res/1624, which also focuses on preventative measures.

81 SC Res. 1368 (2001), 12 September 2001, UN Doc. S/RES/1368 (2001). The harbouring and support language goes further than earlier UN language (*see* GA Res. 2625, *supra* note 79). *See* SC Res. 1566 (2004), UN Doc. A/Res/1566 on the definition of terrorism, and the emphasis on the obligations in respect of cooperation.

82 SC Res. 2083 (2012). On the unlawfulness of supplying arms to armed groups, *see* 'A Shared Responsibility Trap: Supplying Weapons to the Syrian Opposition', André Nollkaemper, EJIL Chat 17 June 2013.

83 Lehto, *supra* note 54, p. 383

84 Similarly, in *Nicaragua* for example, whilst the ICJ determined that the acts of Contras were not attributable to the United States this did not 'suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the contras'. *Nicaragua* case, supra note 29, paras. 110 and 115.

85 *See* para. 3.1.3 below.

of prevention.[86] If, for instance, the state did not know, and took the reasonable steps to ascertain whether terrorists were operating out of its territory, or whether an apparently innocent bank account held in its territory was in fact being used for money laundering by a terrorist group, there may be no breach of its obligations. Our understanding of the 'due diligence' obligation on states to prevent acts of international terrorism can be informed by various other areas of international law, notably the human rights field, where the notion of the state's positive obligations to exercise due diligence to prevent violations by private actors (in contexts ranging from public riots to domestic violence) is well-established and reflected in abundant jurisprudence.[87]

As noted in Chapter 2, a series of resolutions adopted by the Security Council after 9/11 have contributed to clarifying the content of the obligations to prevent, protect against and respond to terrorism; these supplement the extensive provisions of treaties dedicated to particular forms of terrorism.[88] The lack of clarity as to the nature and limits of 'terrorism' to which these obligations are directed has been discussed in that chapter. Confusion regarding the definition is compounded by the lack of clarity surrounding standards of attribution, and the meaning and relevance of terms such as 'harbouring and supporting' terrorism. Such ambiguity runs the risk of creating increased vulnerability for states, while seriously undermining the force of any such obligations. The suggestion that there is no legal difference between responsibility for acts of terrorism and for failure to meet all obligations in respect of preventing and combatting terrorism, may further contribute to uncertainty around the nature, and the implications, of state responsibility for international wrongs in this field.

3.1.3 Consequences of international responsibility for terrorism or breach of obligations relating to the prevention of terrorism

Legal consequences flow from state responsibility for an internationally wrongful act.[89] The extent to which practical consequences also ensue depends, at least in considerable degree, on the question of enforcement, the Achilles heel of the international legal system. A state that is responsible for an international-

86 Under a 'due diligence' standard, it is the act or omission on the part of the state, not the injurious act by the private actor, which constitutes the internationally wrongful act for which the state may be responsible.

87 *See* Chapter 7, Parts A.2 and A.4. Although some caution is due as the standards and contexts are not identical, *e.g.*, international terrorism takes effect abroad, and different questions of fact and proof, and different expectations as to the state's knowledge of this activity, may arise.

88 For a discussion of the regional and global conventions dealing with international terrorism, *see* Chapter 2, para. 2.1 above.

89 *See generally*, Part II, ILC Articles, *supra* note 4.

ly wrongful act is obliged to cease the act (if it is ongoing), offer assurances of non-repetition and make full reparation for material or moral injury suffered.[90] If the state denies cessation of the wrongful act or refuses to comply with its secondary obligation to make full reparation, the injured state for its part may take 'countermeasures' against the responsible state to induce it to comply with these obligations.[91]

In practice, the breach of an international obligation by a state may trigger various responses. States will often resort to diplomacy to persuade states to desist from or cease internationally wrongful conducts. In addition, they may take lawful but 'unfriendly' acts, which may include, for example the breaking of diplomatic relations, limitations on trade with the wrongdoing state or the withdrawal of voluntary aid programmes. Resort to the International Court of Justice[92] or to the organs of the United Nations to determine breaches or enforce obligations,[93] is another means to seek to induce the responsible state to comply with the obligations arising from the breach.

Such measures, which are clearly permissible, are distinct from countermeasures, however, which are measures that would normally be unlawful, but for the fact that they are taken in response to an internationally wrongful act.[94] Countermeasures may consist, for example, in the suspension of the performance of trade agreements in force between the injured state and the offending state,[95] in the suspension of air services agreements or in the freezing of the assets of the offending state or its nationals by the injured state.

Countermeasures are however subject to limits: they must, as far as possible, be reversible, they can only target the responsible state,[96] they must not be disproportionate to the injury caused by the internationally wrongful act,[97] and they cannot involve the violation of fundamental human rights, humanitarian law or peremptory norms of international law.[98] Given these limits, the lawfulness of certain countermeasures commonly resorted to by

90 *Ibid*. at Articles 30 and 31.
91 *Ibid.* at Article 49.
92 *See generally*, C. Gray, *Judicial Remedies in International Law* (Oxford: Clarendon Press, 1987).
93 In practice, the General Assembly or Security Council may determine a breach, although the Council has a unique role in determining the existence of acts of aggression under the Charter, and is uniquely empowered to authorise the use of force in response to a threat to international peace and security; *see* Chapter 5.2.2.
94 *See* ILC Articles, *supra* note 4 at Introductory Commentary to Part Three, Chapter II, para. 1.
95 *See*, *e.g.*, the collective measures adopted in 1982 by EC states, New Zealand, Australia and Canada against Argentina during the Falklands war. Those measures consisted, *inter alia*, of a temporary prohibition on all imports of Argentine goods (a course of conduct prohibited under Article XII(1) of the General Agreement on Tariffs and Trade).
96 ILC Articles, *supra* note 4 at Article 49, paras. 2 and 3.
97 *Ibid.* at Article 51.
98 *Ibid.* at Article 50.

states, such as economic sanctions, is controversial.[99] While some would argue that economic sanctions constitute lawful countermeasures, others would question their compatibility with 'obligations for the protection of fundamental human rights'.[100]

Notably, the use of force is not a permissible countermeasure.[101] The ILC's Articles do not, however, affect the right of every state to act in self-defence, nor to take measures authorised pursuant to a Security Council resolution under Chapter VII of the Charter.[102] Questions that are often raised in this context, relating to whether self-defence requires state responsibility for an 'armed attack,' are not questions related to the rules of state responsibility themselves but to the law on the use of force. Lawfulness of the use of force in self-defence will therefore depend principally on the primary rules on the use of force discussed in the next chapter.

In general, it is the state which is directly injured by an internationally wrongful act that may invoke the responsibility of the wrongdoing state, although it is important to note that in certain circumstances other states may, or must, respond to the wrongful act. This arises in cases where 'the obligation breached is owed to a group of States ... and is established for the protection of a collective interest of the group' or where 'the obligation breached is owed to the international community as a whole'.[103] At a minimum, non-directly injured states can ask for cessation of the wrongful conduct, for assurances of non-repetition and for performance of the obligation of reparation (in the

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99 *Ibid.* at Article 50(1)(a). However, sanctions under Chapter VII of the UN Charter can be, and often have been, imposed by the Security Council – such as those imposed on Iraq, Libya and Sudan for refusing to cooperate or to extradite suspected terrorists. *See* D. Cortright and G.A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder: Lynne Rienner Publishers, 2000); M. Craven, 'Humanitarianism and the Quest for Smarter Sanctions', 13 (2002) EJIL 43; M.E. O'Connell, 'Debating the Law of Sanctions', 13 (2002) EJIL 63; K. Bennoune, '"Sovereignty vs. Suffering?" Re-Examining Sovereignty and Human Rights through the Lens of Iraq', 13 (2002) EJIL 243; J. Murphy, 'International Law and the War on Terrorism: the Road Ahead', 32 (2002) *Israel Yearbook on Human Rights* 117.

100 Sanctions should, at a minimum, be conceived and enforced so as to 'take full account of the provisions of the International Covenant on Economic Social and Cultural Rights', Committee on Economic, Social and Cultural Rights, General Comment No. 8, 5 December 1997, UN Doc. E/C.12/1997/8, para. 1. *See also* ILC's Commentary to Article 50, *supra* note 4 at para. 7.

101 The ILC's Articles on State Responsibility specify that countermeasures shall not affect the 'obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations'. ILC Articles, *supra* note 4 at Article 50, para. 1(a).

102 *Ibid*. Article 59 of the ILC's Articles on State Responsibility recognises that the law of the UN Charter constitutes a *lex specialis* as regards the general rules set out in the Articles. Article 21 expressly states that '[t]he wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations'.

103 The powers of the 'non-directly injured States' are more limited than those of the states directly injured by the breach.

interest of the injured state or of the beneficiaries of the obligation breached).[104]

Moreover, the ILC Articles make clear that if the internationally wrongful act amounts to a gross or systematic breach of obligations under peremptory norms – such as serious violations of human rights or of basic rules of IHL or the unlawful use of force – states are not only entitled, but may be obliged, not to recognise the situation of unlawfulness and to act together to end it.[105] This was confirmed by the ICJ in the *Namibia* advisory opinion concerning the implications for other states of South Africa's presence in Namibia notwithstanding a Security Council resolution deciding that the situation was illegal,[106] and more recently in the *The Wall* advisory opinion concerning the Israeli construction of the so-called 'security fence' that was found by the Court to be unlawful.[107] States' obligations to respond in the face of a breach by another state of '*erga omnes*' obligations[108] – such as respecting the right to self-determination and certain core aspects of international humanitarian law – was described in the following terms:

> Given the character and the importance of the rights and obligations involved, the Court is of the view that all states are under an obligation not to recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all states, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.[109]

This notion of collective responsibility to act in face of egregious violations, which was described by the ILC in 2001 as representing the 'progressive development of the law', has gained ground since then. This may be reflected, albeit indirectly, in the political doctrine concerning 'responsibility to protect' from

104 ILC Articles, *supra* note 4 at Article 48(2)(a) and (b).

105 *Ibid.* at Articles 40 and 41. The ILC's Commentary to Article 41 recognises that Article 41(1) 'may reflect the progressive development of international law' (para. 3). The ILC Articles also specify that states must not recognise or facilitate the situation that has given rise to the wrong.

106 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion, 21 June 1971.

107 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004.

108 *Barcelona Traction case (Belgium* v. *Spain)* (Second Phase) 1970 ICJ Rep 3, para. 33.

109 *The Wall* Advisory Opinion, *supra* note 107, para. 159.

serious violations of their rights.[110] Serious breaches may therefore in principle incur serious consequences for states, from a range of states or from the international community more broadly.

3.2 Responsibility of non-state actors in international law

This chapter has thus far focused on *state* responsibility for terrorism, but does international law also recognise the responsibility of those individuals and organisations believed to have been directly responsible for 9/11 or other acts of terrorism? This raises the troublesome issue of the responsibility of 'non-state actors' in international law.

International law is state-centric, with the traditional rule that it is made by states for states. As a basic governing principle, while states are the subjects of international law, 'non-state actors' are governed instead by national law. In respect of 'terrorists' and 'terrorist organisations,' the principal source of applicable law is national law. International law for its part focuses on ensuring that the state meets its obligation to provide a national legal system that effectively prevents, represses and punishes acts of terrorism, within the framework of the rule of law.[111]

The sharpness of this dichotomy between states and non-state actors has been somewhat eroded through developments in international law. The following text highlights ways in which international law currently provides for the responsibility of non-state actors, including potentially those engaged in international terrorism,[112] and signals the prospect of future legal development in this area.

110 The responsibility to protect is enshrined in several UN documents including, the Report of the High Level UN Panel, UN Doc. A/59/565, available at: http://www.un.org/secureworld/report.pdf. The Resolutions and statements adopted at the time of the Libyan intervention in early 2011 were cited as providing significant weight behind this concept (*see* SC Res.1973 (2011), UN Doc. S/RES/1973), yet this has not been apparent in the Syrian context in 2012/13.

111 *See* Chapter 7A4. and on terrorism obligations specifically in e.g. Security Council resolutions para. 3.1 above and Chapter 2.

112 This discussion is relevant to the responsibility of non-state actors engaged in counter-terrorism also. *See* 3.2 below.

3.2.1 The 'individualisation'[113] of International Law

The Nuremberg judgment famously reminded us that as crimes are committed by human beings not by 'abstract entities',[114] only by holding individuals to account could crimes be prevented. Since Nuremberg, it has become well established that non-state actors may be criminally responsible not only under national but also under international law, as discussed at Chapter 4.

The responsibility of individuals for established crimes under international law – such as genocide, crimes against humanity and war crimes – arises irrespective of whether the perpetrator was a state official or a non-state actor. This is true of all crimes within the jurisdiction of the International Criminal Court for example,[115] and is made explicit in the definition of crimes against humanity, which must be committed pursuant to a 'state or organisational plan or policy'.[116] By contrast, aggression requires state involvement, though the individual accused may or may not be a state official.[117] As discussed, specific terrorism treaties generally cover only acts committed by non-state actors.[118] However, these treaties do not themselves impose responsibility directly on individuals, but on states, and the ability to hold the individual to account under them depends on incorporation into domestic law.[119] It remains highly doubtful that terrorism constitutes a crime under international criminal law, as explored in Chapter 2, but it is beyond reasonable dispute that certain serious terrorist attacks may constitute core crimes under international law, such as war crimes or crimes against humanity.[120]

While criminal law usually focuses on the individual responsibility of natural persons, Nuremberg also provides a precedent for holding legal persons – such as corporations, political parties or government departments – criminally liable. A similar proposal contemplated in the context of the ICC Statute was rejected, albeit for practical reasons related to the functioning of

113 L. van den Herik and N. Schrijver (eds.), *Counterterrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge: Cambridge University Press, 2013), at Ch. 1.

114 Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (London, 1950), p. 447.

115 For example. genocide requires no link whatsoever to a state or organisation, and war crimes must be committed in association with a non-international armed conflict between rebel groups.

116 ICC, Finalised draft text of the Elements of Crimes, PCNICC/2000/1/Add.2 and Chapter 4A.1.1.3.

117 *See* Chapter 4A.1.1.3.

118 *See* Chapter 2, parts 2.1.3 and 2.1.5.

119 *Ibid*.

120 *Ibid*. Chapter 4A.1.1.3.

that court, rather than on principled legal grounds.[121] While it is conceivable that a criminal process could be launched against legal persons such as political parties or corporations involved in terrorism, this is unlikely to be true of loose networks such as al-Qaeda which would presumably lack legal personality in any legal system, national or international. Persons forming even loose networks for a criminal purpose may, however, be individually criminally responsible under forms of liability such as 'conspiracy', 'acting in common purpose', or 'joint criminal enterprise'.[122]

In the terrorism context specifically, targeted sanctions raise the question of the role of the individual or organisation under international law. A growing feature of counter-terrorism practice post-9/11 has been the imposition of sanctions, by for example Security Council in Resolution 1267, with the effect of freezing assets and imposing travel bans and other restrictions on individuals designated by the UN Sanctions Committee as linked to al-Qaeda (or formerly the Taleban).[123] Making individuals directly subject to international legal regulation in this very direct way upsets traditional assumptions about the subjects of international law, as well as about the relationship between the state and the individual. The implications of, and challenges to, these sanctions lists are discussed in later chapters,[124] but their existence marks a further step in the journey towards the individualisation of international law.

3.2.2 International humanitarian law

International humanitarian law, perhaps more than any other area of international law, has long been familiar with applying legal rules to non-state

121 *See* United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, Rome, 15 June-17 July 1998, Working Group On Procedural Matters, Consideration of Part 6 of the draft Statute (UN Doc. A/CONF.183/2/Add.1 and Corr.1). K. Ambos, 'Article 25. Individual Criminal Responsibility', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden, 1999), p. 475 ff, at p. 478, suggests that the exclusion reflected concerns related to the Court's particular focus and evidence, as well as operational aspects of 'complementarity', given that corporate responsibility was not recognised in the criminal law of certain legal systems.

122 *See* Chapter 4, part 4A.1.2.1.

123 The sanctions regime against al-Qaeda and the Taleban was a pre-9/11 invention (SC Res. 1267 (1999)), and was modified and expanded post-9/11 by SC Res. 1390 (2002), 16 January 2002, UN Doc. S/RES/1390 (2002), which creates an open-ended sanctions regime of a potentially global nature. Resolution 1267 established a Security Council committee, known as 'the Al-Qaida and Taliban Sanctions Committee' (hereinafter, 'the Committee'). Resolution 1267 has been modified and extended by numerous subsequent resolutions.

124 *See* 7B3 on the Council's 'judicial role', 7B8 on the listing process and human rights and Chapter 11 for the litigation that challenged it.

entities.[125] Since 1949, specific rules have been in place governing the conduct of non-international armed conflicts, binding on both the state party to the conflict and armed groups.[126]

As discussed in Chapter 6, IHL applies only where the 'armed conflict' threshold is met, as opposed to in 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'.[127] Most acts commonly referred to as 'terrorist' are precisely those that delegates sought to exclude from the definition of armed conflict. Moreover, as discussed at Chapter 6, section B, it is highly doubtful whether an entity such as al-Qaeda could constitute a party to a non-international armed conflict.[128] If however the conduct of a non-state entity, properly understood, *is* conduct carried out as a party to a non-international armed conflict, that party will be bound by the body of IHL applicable to such conflicts.[129] Among the prohibitions of IHL, as noted in Chapter 6, is a specific prohibition on spreading terror among the civilian population, although numerous acts commonly referred to as terrorism will fall within other categories of IHL violation for which the armed group may be responsible as a matter of international humanitarian law.

One of the weaknesses in the current system of IHL is however the lack of effective mechanisms for enforcing responsibility.[130] As regards the state, human rights bodies provide one mechanism for reviewing IHL compliance, albeit indirectly, and diplomatic channels may prove particularly effective.[131] For the non-state party diplomatic avenues are less readily available or effective and there is no meaningful mechanism for holding it to account as a party, except so far as serious violations of IHL amount to war crimes and international criminal law provides such mechanisms in respect of the individuals who comprise the group.

125 *See* 'Relevance of International Humanitarian Law to Non-State Actors', 27 (Spring 2003) *Bruges Collegium*, available at: http://www.coleurope.eu/content/publications/pdf/Collegium27.pdf last visited 5 May 2013.

126 *See* Chapter 6.

127 Protocol II Additional to the Geneva Convention, *opened for signature Aug. 12, 1949*, UN Doc. 32/144 Annex 2 [hereinafter "AP II"] at Article 2.

128 On these requirements, which relate principally to the definition or identification, and level of organisation, of the entity, *see* Chapter 6.

129 *See* Chapter 6, in particular part 6B.1.1.4. *See also* J.M. Henckaerts, 'Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law', 27 (Spring 2003) *Bruges Collegium* 123.

130 *See* Chapter 6 and Chapter 7B3

131 Chapter 7A.3.4 on interplay and 7B3 on interplay in practice post-9/11.

3.2.3 International human rights law?

The development of human rights law in the aftermath of the Second World War revolutionised international law by establishing the prime exception to the rule that states are the subjects of international law. However, at least as originally conceptualised, while individuals could possess rights, only states bore obligations under human rights law. Several developments in human rights law have sought to ensure that the general rule against non-state actor responsibility under human rights law does not represent a legal void, whereby rights can be violated with impunity.

Human rights bodies have adopted a progressive approach to the obligations of states to 'respect and ensure' the rights within the human rights conventions, interpreting them as enshrining 'due diligence' obligations to take measures to prevent violations and to provide redress for them – whether committed by state entities or non-state actors.[132] Therefore, the conduct of non-state actors is regulated by human rights law indirectly, in that where 'private persons [violate rights] freely and with impunity'[133] the state itself becomes responsible under human rights law.

Moreover, the lack of *direct* responsibility of non-state actors under international law is increasingly open to question, particularly as entities such as transnational corporations, armed groups or indeed arguably terrorist organisations, assume powers and exercise authority traditionally within the exclusive sphere of state control, through which they do, in practice, violate human rights.[134] Arguably, support in principle for recognising the responsibility of non-state actors in human rights law can be found even in early human rights instruments. One commentator has noted for example that the long established Universal Declaration of Human Rights, covers:

> [e]very individual includ[ing] juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.[135]

Subsequent regional developments in Africa and the Americas, unlike the traditional Western-European approach to human rights, reflect the notion of individuals and entities as not only holders of rights but bearers of respons-

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132 *See e.g.*, *Velasquez Rodriguez* v. *Honduras*, Merits, Judgment of 29 July 1988, IACtHR, *Series C*, No. 4, or the 'due diligence' test set down by the Human Rights Committee, General Comment No. 31: [2004], UN Doc. CCPR/C/74/CRP.4/Rev.6, para. 8. *See* Chapter 7A.4.2.

133 *Velasquez Rodriguez*, *ibid.* at para. 176.

134 They commit acts which, if carried out by the state, would amount to rights violations.

135 L. Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets', 25 (1999) *Brooklyn Journal of Int'l Law* 25, 25.

ibility.[136] The intensified focus on the realisation of economic social and cultural rights in recent years has contributed to the 'softening' of the position that only states are subject to international law.[137]

A number of specific developments may suggest that there are circumstances in which a non-state actor may currently find itself directly responsible under human rights law, and/or that further developments in this field are to be expected. First, in exceptional circumstances, a non-state entity may exercise the functions of a state, and may, arguably, thus be deemed responsible as a state under international human rights law.[138] If an entity such as a political party, corporation, or for that matter an unlawful organisation, assumes control over part of a territory of a state, it may be considered to have assumed the obligations that correspond to this *de facto* exercise of authority or control. As the Committee against Torture noted, factions [that] exercise certain prerogatives that are normally exercised by legitimate governments may be equated to state officials for the purposes of certain human rights obligations.[139]

Second, there are important on-going developments towards a broader recognition of direct responsibility of non-state actors that may herald further innovations in this respect.[140] Perhaps most advanced are developments towards recognising the responsibility of transnational corporations, as 'hav[ing] the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including the rights and interests of indigenous peoples and other

136 For example, the preambles of the 1981 African Charter on Human and People's Rights and of the American Declaration on the Rights and Duties of Man. Note that human rights as a corollary of human duties does not equate with respect for rights being conditional on observance of duties.

137 Report of the International Council on Human Rights Policy, 'Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies', 2002, p. 64, available at: http://www.ichrp.org/files/reports/7/107_report_en.pdf. These developments are described as having 'plac[ed] some level of responsibility on private entities such as companies'.

138 This reflects the rules on state responsibility which recognise the exercise of elements of governmental authority as acts of state. *See* part 3.1.1, above; ILC Articles, *supra* note 4 at Article 5.

139 *Sadiq Shek Elmi* v. *Australia*, Communication No. 120/1998, UN Doc. CAT/C/22/D/120/1998 (1999), para. 6.5. In respect of warring factions in Mogadishu, the Committee against Torture found that: '*de facto*, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase "public officials or other persons acting in an officials capacity" contained in article 1 [of the Convention against Torture]'.

140 For a discussion of these developments *see*, A. Palmer, 'Community Redress and Multinational Enterprises', November 2003, p. 17, available at: http://www.field.org.uk/files/Community_redress.pdf.

vulnerable groups'.[141] Alongside developments in standards is increased monitoring of the impact of corporations on human rights, as reflected in the work of non-governmental organisations as well as the establishment of a Special Representative to the Secretary General on business and human rights.[142]

But recent practice indicates the use of the language of 'human rights' obligations as applicable to a wider range of non-state actors. This can be seen from condemnations of violence against women, including domestic violence, as a 'violation of the rights and fundamental freedoms of women'.[143] There are numerous examples, including the reports of the Sierra Leone and Guatemalan truth and reconciliation commissions, as well as decisions of international human rights bodies, on which armed groups have been referred to as responsible not only for violations of humanitarian law but also for violations of 'human rights'.[144]

A similar phenomenon is increasingly apparent in the context of an international debate, particularly since September 11 2001, in which terrorism is frequently referred to as a violation of human rights. The Security Council for example has noted that 'acts, methods and practices of terrorism ... and ... knowingly financing, planning and inciting terrorist acts are ... contrary to the purposes and principles of the United Nations, perhaps highlighting recognition of a degree of non-state actor responsibility under the UN Charter.[145] Another example is the proposal denouncing the 'gross violations of human rights perpetrated by terrorist groups,' adopted at the UN Human Rights Commission.[146] However, the unsettled nature of the issue is clear from the fact that the United States and the EU opposed the proposal on the basis that:

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141 Many of these have occurred on the national level, but they are also apparent through the UN Global Compact on Corporations and the work of the Commission on Human Rights for example. *See* 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003)), approved by the UN Sub-Committee on the Protection and Promotion of Human Rights in August 2003. *See also*, A. Clapham, *Human Rights Obligations of Non-State Actors* (New York: Oxford University Press, 2006), pp. 195-270.

142 In August 2005, the UN Commission on Human Rights adopted resolution E/CN.4/RES/2005/69 establishing the post of Special Representative of the UN Secretary General on business and human rights. See e.g. 'Protect, Respect and Remedy' A/HRC/17/31 (2011).

143 *See* M.J. Dennis, 'Current Developments: The Fifty-Seventh Session of the UN Commission on Human Rights', 96 (2002) AJIL 181.

144 *See* Clapham, *supra* note 141 at p. 38; *See also*, 'Witness to Truth', Report of the Sierra Leone Truth and Reconciliation Commission (Accra: GPL Press, 2004), and 'Guatemala: Memory of Silence', Report of the Guatemalan Commission for Historical Clarification Conclusions and Recommendations, February 1999.

145 SC Res. 1373, *supra* note 54. The UN 'purposes and principles' include the protection of human rights and the maintenance of international peace and security. *See* Chapter 5A.1.

146 *See* Dennis, 'Current Developments', *supra* note 143 at p. 183.

> a clear distinction must be made between acts which are attributable to States, and criminal acts which are not, so as to avoid conferring on terrorists any status under international law.[147]

Among academics, opinion on the human rights responsibility of non-state actors varies. One point of view suggests responsibility should depend on the capacity of an actor to bear obligations, rather than of its 'subject' status.[148] Questions on this remain, including to what extent entities such as terrorist organisations could meet this criteria, as well as broader legal and policy implications of the lack of international enforcement against non-state actors, or the risk of conferring legitimacy on certain non-states actors or detracting from the responsibilities of states.[149]

Finally, it is recalled that as human rights law is closely interlinked with international criminal law and IHL – with certain violations of human rights amounting to, for example, crimes against humanity, and humanitarian law obligations being interpreted in light of human rights law (and *vice versa*) – responsibility may arise in respect of human rights violations indirectly, through responsibility under criminal law or IHL.[150]

In conclusion, the question of the direct responsibility of non-state actors is a troublesome one, given the theoretical underpinnings of the international legal system as essentially inter-state, but also given issues of enforcement. One commentator noted post-9/11 that this has left international law at a 'rhetorical disadvantage' in the struggle against terrorism.[151]

It may be that the growing use of language apparently attributing human rights responsibility to non-state actors such as terrorist groups is no more than a rhetorical attempt to redress this perceived disadvantage, or it may be indicative of a more substantive shift towards responsibility and accountability of non-state actors. While far from settled in law, the increased evidence of the willingness of states and others to embrace the idea of 'human rights violations' by non-state actors may lead to further legal development in coming years.

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147 *Ibid.* The US and EU noted however that states' 'fight against terrorism must be carried out in accordance with international human rights law'. At the 2002 meeting of the Commission, the resolution was adopted by a vote of 33-14-6. *See also* the positions of states in Clapham, *supra* note 141 at pp. 25-58.

148 Clapham, supra note 141 at pp. 70-75.

149 *See*, *e.g.*, N. S. Rodley, 'Detention as a Response to Terrorism', in Salinas de Frias, White and Samuel (eds.), *Counter-terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012). Clapham notes that this is conceptually distinct from the question of whether non-state actors can carry legal responsibility under international law. Clapham, *supra* note 141 at pp. 70-75.

150 W. A. Schabas, 'Punishment of Non-State Actors in Non-International Armed Conflict', 26 (2003) *Fordham Int'l Law Journal* 907 at 932-3.

151 J. Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights', 14 (2003) EJIL 241.

What is clearer is that international law does speak to the responsibility of 'terrorists' and 'terror networks', including for acts such as 9/11, and international law may be enforced against individuals most notably through international criminal law but also through targeted sanctions. Beyond that, individuals and groups are unquestionably responsible under national law and provided there are effective functioning national systems, with states determined to counter terrorism within the framework of law, there is not so much a gap in the legal order as there are different spheres of regulation. As such, it may be that strengthening national systems, through focusing on the obligations of states under international law and their effective implementation[152] is the most effective way of promoting the protection of the individual from terrorist acts. But the discussion of the importance of responsibilities of non-state actors under international law will undoubtedly continue, impelled by the desire to ensure protection from international terrorism. Whether the aforementioned developments, and indications of increased openness to the idea of non-state actor responsibility, eventually crystallise into legal obligations, and have an impact on enforcement, remains to be seen.

3.3 Responsibility Arising from Counter-terrorism

The focus of this chapter has been on responsibility *for* terrorism, with the lawfulness of state responses to terrorism being addressed in subsequent chapters. It is however worth noting here certain aspects of the law of state responsibility that are relevant to the assessment of responsibility for violations committed in the 'war on terror', addressed in subsequent chapters.

3.3.1 Responsibility of the State for its Own and Other States' Wrongful conduct

While a state is generally responsible for its own international wrongs, carried out by its agents or attributable to it, the ILC Articles make clear that in certain circumstances, the state will also be responsible in connection with the wrongs of other states.[153] For example, where the state exercises 'direction or control' over the actions of another state, just as when it exercises such control over private entities,[154] or when it 'coerces' another state into international

152 *See* obligations in relation to terrorism, such as those enshrined in the 'specific conventions', set out at Chapter 2, para. 2.1.3, and the positive obligations in respect of human security under human rights law, set out at Chapter 7, part 7A.4.1.

153 ILC Articles, *supra* note 4 at Chapter IV.

154 *See Ibid*. at Article 17 and Commentary; *see also* Article 8 relating to direction and control over acts of private entities.

wrongs,[155] the former state will become responsible for the acts themselves. The state does not evade legal responsibility therefore by acting through 'proxy' states, as discussed in relation to the torture in Chapter 7 for example.

States may also contribute to wrongs through 'aiding and assisting' other states in connection with a wrongful act.[156] The International Court of Justice (ICJ) has recognised that the rules concerning aiding and assisting in the commission of a wrongful act, as enshrined in Article 16 of the ILC Articles, form part of customary international law.[157]

A number of factors qualify the circumstances in which a state's support or facilitation of wrongs by another state amount to aiding and assisting. A state may aid or assist another state in breach of its international obligations only if it does so with 'knowledge' of the circumstances of the internationally wrongful act of that state.[158] A 'close connection' is required between the actions of the states, and a causal link must exist between the states actions and the wrong.[159] As explored further in Chapter 10, the knowledge and causality requirements impose a significant threshold that may be difficult to satisfy as a matter of proof in many situations.[160] The act must be such that it would be internationally wrongful if committed by the accessory state, so depends on shared obligations.[161]

These rules are particularly relevant to ensuring that a full range of states can be held to account for wrongs that, in an increasingly interconnected world, involve cooperation between a multiplicity of states. The war on terror has been characterised by massive inter-state intelligence sharing, the use of military force by multiple states cooperating in the detention and interrogation of detainees, law enforcement coordination and evidence sharing, including with irregular criminal processes, vast international surveillance programmes, transnational targeted killing operations, among many others. Widespread international 'cooperation' and massive inter-state sharing in relation to many of the issues explored in subsequent chapters will therefore give rise to questions regarding shared responsibility, in accordance with the legal framework set down in this chapter. Particular issues of shared responsibility in relation to the most notable example, the global 'extraordinary rendition' programme

155 *Ibid*. at Article 18.
156 *Ibid*. at Article 16.
157 *See* ICJ Genocide case, *supra* note 35 at para. 420.
158 ILC Articles, *supra* note 4 at Article 16. Commentaries, *supra* note 4 at p. 149 notes that the aid or assistance is rendered 'with a view to facilitating the commission of the act…' It is debatable to what extent such knowledge can be constructive, but some support for the proposition that at least willful blindness would suffice may be provided by aiding and abetting under international criminal law discussed in Chapter 4.
159 *Ibid*.
160 *See* Chapter 10.
161 *Ibid*.

which implicates the responsibility of a broad range of states (and private entities and individuals), are addressed in more detail at Chapter 10.[162]

3.3.2 Privatising Counter-terrorism and issues of Responsibility

In recent years, there has been an exponential increase in resort to private actors to fulfil what were previously considered essentially state functions, including in the international counter-terrorism, security and armed conflict contexts.[163] The extent and scale of private contractor involvement in the 'war on terror' was made clear in, for example, a report describing 1,931 private companies at work in counter-terrorism, security and intelligence functions in the US in 2010.[164] The import and implications of this have been brought into sharp focus by reports of violations by private contractors, including hundreds of cases of unlawful use of force by private security companies in Iraq, 'private' prisons operational in Afghanistan, and interrogations by contractors resulting in torture and loss of life.[165]

Questions arise regarding legal responsibility for such conduct. Individual contractors may of course be responsible for crimes committed under applicable national or international law, and commanders or high level officials may also be responsible for ordering or instigating such crimes, or for failing to take reasonable measures to prevent *de facto* 'subordinates' from committing

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162 Questions arise as to various forms of 'complicity' including through providing information, presence during violations, and benefiting from wrongs. *See* Chapter 10 and UN Joint Study on Secret Detention, UN Doc. A/HRC/13/42 (2010), pages 4-5 on complicity in international law.

163 Well-known examples from before the 'war on terror' include the involvement of military security company Executive Outcomes during the conflict in Sierra Leone in 1995, as well as Military Professional Resources Inc.'s involvement in Croatia in the early and mid 90s.

164 D. Priest and W. Arkin, 'National Security Inc.', in 'Top Secret America: A Washington Post Investigation', *Washington Post*, 20 July 2010, available at: http://projects.washingtonpost.com/top-secret-america/articles/national-security-inc; O. Jones, 'Implausible Deniability: State Responsibility for the Acts of Private Military Firms', 24 (2009) *Connecticut J. of Int'l Law* 239.

165 Civilian contractors are accused of rape and abuse of prisoners as they provided 'intelligence' related services at the Abu Ghraib prison in Iraq. *See* the Complaint filed by Iraqi victims against L-3 Communications of San Diego, CACI International Inc. of Arlington, Virginia, its subsidiaries and three individuals. Available at: http://www.ccrjustice.org/files/Al%20Shimari%20Complaint.pdf. On its website, CACI states: 'CACI has been a strong and vital partner to the U.S. government in combating terrorist attacks and saving American lives. CACI's technological advances and skilled workforce have played a key role in thwarting terrorism and defending our homeland.' CACI, available at: http://www.caci.com/about/news/news2007/12_20_07_NR.html. *See also*, J. Borger, 'US military in torture scandal: Use of private contractors in Iraqi jail interrogations highlighted by inquiry into abuse of prisoners', *The Guardian*, 30 April 2004, available at: http://www.guardian.co.uk/media/2004/apr/30/television.internationalnews.

crimes.[166] In a few cases, individual contractors have in fact been held to account,[167] but in the majority of cases they have either enjoyed *de facto* impunity, or been protected by 'immunities' which the state has negotiated to protect its own personnel and extended to cover private actors.[168] To a large extent, the obstacles to individual accountability are similar to those arising in relation to war on terror crimes committed by regular state agents,[169] but the challenges are heightened by for example less monitoring, oversight or formal disciplinary or prosecutorial structures.

A key difference arises in the relationship between these individuals and the state, raising questions as to the extent of *state* responsibility and accountability for these private actors. The question of state responsibility is particularly germane in light of allegations of 'tactical' privatisation specifically to avoid accountability, evade monitoring responsibilities and other legislative or congressional restrictions or oversight.[170] Numerous commentators have questioned whether the current legal framework governing state responsibility covers such actors, leading to far-reaching assertions of a 'legal void' and 'regulatory gaps'.[171] This section considers briefly key provisions of the legal framework and flags some of the challenges raised.

i) De Facto Agency: Scope and Limits of Attribution?

The starting point for assessing the state's responsibility for private security operations are the rules on attribution, enshrined in Article 8 of the ILC Articles. Referred to above in the context of state responsibility for international terrorism, Article 8 provides that acts of private persons or entities are attributable

166 *See* Chapter 4A.12.

167 One such case concerns the CIA contractor who beat an Afghan detainee to death during interrogation at the Asadabad base in Afghanistan. Jones, 'Implausible Deniability', supra note 164 at p.18.

168 For example, on September 2007, Blackwater Worldwide killed 17 Iraqi citizens at an intersection in Baghdad. In accordance with the US-Iraq Status of Forces Agreement (SOFA) and Iraqi law Order 17, that, at the time, gave immunity to all US forces and contractors, Blackwater was immune from local prosecution. The Iraqi government later refused immunity for US forces or contractors in the 2008 SOFA, contributing to the removal of troops from Iraq in 2011. Contractors working with the Department of State or the CIA (Blackwater's now largest contractor) reportedly would still have immunity. *See* J. Denselow, 'The US departure from Iraq is an illusion', *The Guardian*, 25 October 2011, available at: http://www.guardian.co.uk/commentisfree/cifamerica/2011/oct/25/us-departure-iraq-illusion. *See also*, T. Williams, 'Iraqis Angered as Blackwater Charges Dropped', *New York Times*, 1 January 2010, available at: http://www.nytimes.com/2010/01/02/us/02blackwater.html; 'Iraq to end contractor "immunity"', *BBC News*, 25 September 2007, available at: http://news.bbc.co.uk/2/hi/7012853.stm.

169 *See* Chapter 4 on criminal law, and the accountability discussion in Chapter 7B14 on human rights below.

170 *See generally*, *ibid.*; F. de Londras, 'Privatized Sovereign Performance: Regulating in the "Gap" between Security and Human Rights?', 38 (2011) *Journal of Law and Society* 96, at p. 97.

171 *See* Jones, 'Implausible Deniability', *supra* note 164; *ibid.*; C. Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies', 19 (2008) E.J.I.L. 989.

to the state when the former are 'in fact acting on the instructions of, or under the direction or control of, the State in carrying out the conduct'.

A difficult question is how much control constitutes 'effective control' over conduct in this particular context. Some commentators that lament the 'juridical gap' in this field have suggested that as private security contractors (PSCs) generally act with considerable autonomy, and operations are not controlled in detail by the state, the state will not therefore generally be responsible for the conduct of PSCs under the effective control test.[172] While this may be so, it is recalled that the disjunctive test in Article 8 means that the state may give specific instructions or direction or it may, more generally, exercise 'control' over the conduct in question.[173] If it does so, the state will be responsible even where individuals go beyond or ignore specific instructions.[174] The state must exercise a considerable degree of control over the operation or activities in question,[175] though there is no apparent authority for requiring that it conducts the detailed planning of every stage of the process.[176] While the ICJ's finding that arming and supporting armed groups was insufficient for attribution in the Nicaragua case,[177] PSCs are not only armed and supported by the state, but operational and on-site specifically and exclusively by virtue of the state's authorisation and for that state's purposes. While the test is not an 'overall control' but an effective control of conduct test, the closeness and directness of the association may make it more likely that the conduct of the group would fall under the control of the state.

Particularly difficult questions arise in relation to responsibility for conduct that was not authorised by the state. According to the ILC Commentaries, if the wrongdoing was 'incidental' to the authorised conduct the state will still be responsible for it; by contrast if it was 'clearly beyond' the scope of the instructions or direction of the state, the state will not be responsible. It is ultimately a challenging question of fact and evidence – as explicit contracts permitting wrongdoing are as unlikely as a transparent relationship between a state and a terrorist organisation – as to the true relationship between the

172 *See generally* Jones, 'Implausible Deniability', supra note 164; de Londras, 'Privatized Sovereign Performance', supra note 170, p. 97; and Hoppe, 'Passing the Buck', supra note 171.

173 As noted above, the ICJ has held that this test is substantially the same as the 'effective control' test which renders the state responsible for the conduct of persons or entities irrespective of any formal link.

174 J. Crawford, *Commentaries* (2002), note14, p. 113.

175 Undoubtedly under the effective control test, the 'instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act'. ILC Articles, *supra* note 4. Compare this with 'overall control test' below.

176 For example, the ICTY in *Tadić* suggested that the state must have 'a role in organising, coordinating or planning the military actions'. *Tadić* Appeal Judgment, *supra* note 36.

177 *Ibid.* As discussed above in the *Nicaragua* case, the ICJ found that arming and supporting the contras did not meet the very high 'effective control' threshold for attribution set down by the Court.

state and private entity, and the true nature of the instructions given, explicitly and implicitly.

The rationale for not making states responsible for all of the actions of its contractors is that '*in general* the state giving lawful orders… does not assume the risk that the instructions will be carried out in an internationally unlawful way.' The state cannot then be made responsible for conduct it could not reasonably have foreseen and been expected to address. Conversely, there may be circumstances – depending on the nature of the activities or the individuals charged with carrying them out – in which a state may well have assumed such a risk of international unlawful activity arising in the course of the execution of the contract. The extent to which the state took appropriate measures to monitor, control and prevent abuses by private groups active at its behest may be relevant to determining whether the state assumed such a risk.

In conclusion, the limited responsibility of states for unlawful measures beyond the authority of the PCSs are compounded by the fact that contracts will rarely if ever explicitly authorise unlawful activity. It could be expected, consistent with the principle of effectiveness in international law, that Article 8 would not be interpreted to allow states to hide behind the façade of a 'clean' contract with an independent contractor to commit violations and escape accountability.[178] How those rules are applied will depend, however, on particular situations. Actions closely associated with the authorised activity of contractors could be considered part of the conduct over which the state exercises 'effective control'. There must for example be a distinction between certain types of purely common crimes committed by PSCs in Iraq, outside the scope of, and not incidental to, their authority, and the excessive use of force against civilians closely associated with their security functions, or the abuse of their intelligence role during interrogation.[179]

ii) 'Exercising elements of governmental authority'

Although less immediately apparent, Article 5 of the ILC Commentary is also potentially relevant to responsibility for private contractors charged with state functions. It provides that 'the conduct of a person or an entity that is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the persons or entity is acting in that capacity in the particular instance'.[180] So far as the functions that have been 'contracted out' involve for example the use of force, establishing or

178 On principles of interpretation of IHRL that may be relevant, including a purposive interpretation and one that avoids a vacuum of protection, *see* Chapter 7A Conclusion.

179 *See* Chapter 7B6.

180 ILC Articles, *supra* note 4 at Article 5.

maintaining law and order, interrogation or intelligence gathering, these would constitute the exercise of 'elements of governmental authority'.[181]

A second requirement enshrined in Article 5, however, is that the private actors are 'empowered by law' to exercise such functions.[182] While specific legislation authorising companies to exercise such authority will be rare, there is little clear authority, and some scope for interpretation, as to what form this legal empowerment might take. The ILC Commentaries suggest that specific legislation is not required where there is 'delegation or authorization by or under the law of the State'.[183] One question is whether authorisation via a contract, entered into under the law of the State, may suffice for this purpose. If that is so, and if the exercise of such official functions by private actors or contractors are covered by Article 5, then the state is responsible for their conduct whether or not it authorised or controlled such conduct: as the Commentaries note, for Article 5 'there is no need to show that the conduct was in fact carried out under the control of the state'.[184] Although the commentaries also caution that Article 5 is a 'narrow category,' this may provide an appropriate framework to consider state responsibility for private contractors to whom the state transfers key functions from state organs to private contractors, such as use of force or interrogation, despite the attendant risks involved.

In conclusion, increasing resort to private actors to carry out certain functions poses challenges for the framework of state responsibility. Resort to private actors that may lack training, expertise, monitoring and disciplinary structures increases the incidence of violations, and renders less transparent the already opaque world of counter-terrorism abroad.

Nonetheless, the regulatory gap may be less glaring than has been suggested. The state clearly has responsibility for the conduct of *de facto* agents of the state, and for those to whom it transfers elements of its governmental authority. Whether this criteria has been met depends on an evaluation of the facts of each situation, and there is scope for debate as to the correct interpretation of the law. If the rules are interpreted purposively, in line with the principle of effectiveness, potential gaps may be narrower than might at first appear, removing the incentive to use private companies to commit wrongs or to avoid oversight and accountability. Where conduct exceeds authority, which predictably happens not infrequently in certain contexts, the assessment of what is 'incidental to' or 'closely associated' with the exercise of the functions conferred or authorised by the state would take into account what was

181 The example in the commentary is of 'private security firms may be contracted to act as prison guards'. ILC Articles, *supra* note 4, Commentary at, p. 92. The ICSID tribunal has considered in what situations companies are used as 'instrument of state action'. *See* discussion of cases in Jones, 'Implausible Deniability', supra note 164 at p. 43.

182 ILC Articles, *supra* note 4 at Article 5.

183 Commentaries to the ILC Articles, *supra* note 4.

184 ILC Articles, *supra* note 4 at Article 5.

reasonably foreseeable for the state, in all the circumstances. The relationship may also be covered by Article 5 where public functions, such as the use of force or interrogation, are transferred to private hands through legal agreements.

3.4 Conclusion

A state is responsible for an act of terrorism by private actors where it exercises effective control over the act, or subsequently endorses it as its own. States may also be responsible for other internationally wrongful acts related to acts of terrorism, such as failing to take reasonable measures to prevent their territories being used by terrorists. As a matter of law, state responsibility has serious implications for the wrong-doing state and, potentially, for the rights and obligations of other states.

Yet there has been little clarity as regards assessments of state responsibility for 9/11 and the significance thereof.[185] Was Afghanistan alleged to have been responsible for 9/11 or for a different wrong and was it thought to matter? What were the lawful consequences of its wrong-doing? In practice, while little clarity has attended allegations of responsibility post-9/11, vague suggestions have emerged that the attacks on Afghanistan, and to some degree Iraq,[186] were justified at least in some part due to the relationship between those states and terrorism. The dramatic consequences for those states may illustrate the importance of greater clarity in the future around the nature and scope of states' obligations in respect of terrorism, the consequences of breach thereof, and permissible responses on the part of other states.

Understanding responsibility for the September 11 attacks and other acts of international terrorism is an important process in itself. If the law is to be taken seriously, responsibility must have at least potential consequences for the wrongdoing state. Confusion as to whether there is responsibility, what the standard of attribution is, and whether it matters at all, therefore has

185 Uncertainties as to the law include the issues related to 'terrorism' discussed in Chapter 2, and those relating to the status and content of different formulations relating to obligations in respect of terrorism, such as those relating to 'harbouring and support' highlighted above.

186 On 31 January 2003, President Bush, asked about proof of 'Iraq's guilt', stated: 'Secretary Powell will make a strong case about the danger of an armed Saddam Hussein ... He will also talk about al Qaeda links, links that really do portend a danger for America and for Great Britain, and anybody else who loves freedom'. 'President Bush Meets with Prime Minister Blair. Remarks by the President and British Prime Minister Tony Blair', White House Press Release, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2003/01/20030131-23.html. On 8 September 2003, US National Security Advisor, Condoleezza Rice, during an interview on NBC, argued that US involvement in Iraq 'is going to be the death knell for terrorism'. *See* G. Miller, 'Iraq-Terrorism Link Continues to Be Problematic', *Los Angeles Times*, 9 September 2003. On lack of evidence of any such link, *see* 9/11 Commission Report, supra note 61.

broader, serious implications for international law enforcement. The same principle applies to state responsibility resulting from wrongs committed through terrorism or counter-terrorism, whether committed directly by organs of the state or through other states or private actors.

Claims or proposals have sprung up around the emergence of new or different legal standards for attributing conduct to states. Although some claim the nature of post-9/11 practice – whether through 'instant custom' or otherwise – has given rise to new binding law, for the most part commentators provide a skeptical assessment of current law and proposals for more 'flexible' rules for the future (*lex ferenda*). While other standards, including notably the 'overall control' test, or perhaps a broader causation based model, may provide a framework which more readily allows for the attribution of conduct of terrorist groups, and indeed of PSCs, to a state, they remain doubtful as statements of the law as it currently stands. The challenges to state responsibility in the particular contexts of international terrorism, or of the responsibility of private contractors, are however relevant to the interpretation and application of the legal framework to the particular facts. Caution is doubtless due before discarding the law of state responsibility developed over many decades, and claims of new standards having emerged may be overstated. Legal standards should certainly be applied in a manner that is mindful of the reality in which the law operates and the need to ensure that the law can be effective and meet its purpose, particularly where the result would otherwise be a juridical gap.[187]

The law of responsibility is controversial, and arguably in flux, but it does provide important parameters for assessing and responding to international wrongs. The greatest challenge to injured states – and to others that, as the above framework reflects, share responsibility to act in the face of serious wrongs[188] – is to ensure that international law is upheld and enforced against those responsible for 'terrorism' or for unlawful responses thereto.

187 For states obligations extra-territorially under IHRL, which usually involve control of territory or acting through agents, *see* Chapter 7A2. *See* however the progressive approach of the Human Rights Committee in the Concluding observations on the sixth periodic report of Germany, 2 November 2012, para. 16 on the possibility of German responsibility for companies domiciled on its territory but active abroad.

188 As discussed above, depending on the status of the norm infringed (*i.e.*, on whether the norm is a 'peremptory norm of international law') and on the seriousness of the breach, the commission of an internationally wrongful act may give rise to an obligation of every state of the international community to react to the wrongful conduct. As will be seen, this is relevant to various aspects of the framework of international law relevant to responses to 9/11, from the use of force to violations of international humanitarian law and human rights law.

PART II

4 Criminal justice

> 'We will direct every resource at our command ... every instrument of law enforcement ... to the disruption and defeat of the global terror network.'
>
> (President Bush, September 2001)[1]

> 'In undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law ....'
>
> (US Supreme Court, *Hamdan* v. *Rumsfeld*)[2]

To the extent that acts of international terrorism constitute crimes under international – or relevant national – law, those responsible, directly or indirectly, are susceptible to international and/or domestic investigation and prosecution.[3] States not only have the right under international law, but also the duty,[4] to bring criminal law to bear on individuals who commit serious crimes.[5] This corresponds to the right of victims of terrorism to have the violations of their rights investigated and those responsible held to account.[6]

Criminal law enforcement may serve multiple additional goals, ranging from those embraced by traditional theories of retribution, deterrence or redress,[7] to providing historical narratives of wrongdoing and 'debunking

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1 Former U.S. President George W. Bush, 'Address to a Joint Session of Congress and the American People', 20 September 2001, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html

2 *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 635 (2006).

3 Only individual criminal responsibility is addressed here. On state responsibility for internationally wrongful acts, *see* Chapter 3. On the controversial idea of 'state crimes', international law remains unsettled. *See generally*, *Oppenheim's International Law* (Oxford: Oxford University Press, 2008), 9th ed., pp. 534-35. *See also* J. Dugard, 'Criminal Responsibility of States', in M. C. Bassiouni (ed.), *International Criminal Law* (New York, 1999), vol. I, 2nd ed., p. 239-53.

4 *See*, *e.g.*, Preamble to the Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9 (hereinafter 'ICC Statute'); Questions Concerning the Obligation to Prosecute or Extradite (*Belgium* v. *Senegal*), ICJ Judgment, 20 Jul. 2012; SC Res. 1373 (2001).

5 *See* Chapter 7.A.42 'Positive Human Rights Obligations' and Chapter 7B.14.

6 *Ibid.*

7 Some query whether *e.g.* the 'rational actor cost-benefit analysis' of deterrence is apposite to international terrorism. The 2006 National Security Strategy of the United States notes that 'the hard core of the terrorists cannot be deterred or reformed'. *See also* M. A. Drumbl,

the glorification of violence'.[8] Directly and indirectly, the criminal process may contribute to the prevention of terrorism.[9] Critically, while criminal law is only one of the international legal tools against terrorism, the expressive function of criminal trials can play a role in restoring or strengthening the rule of law.[10] Conversely, the neglect of criminal law enforcement may itself have an expressive function in suggesting that counter-terrorism is less about 'justice' than it is about other goals.[11]

The ability of criminal law to deliver on its 'rule of law promise' depends on it meeting certain conditions, a number of which have proved challenging in the counter-terrorism context post-9/11.[12] These include the challenge of effective criminal investigation and prosecution, including ensuring international cooperation and enforcement, in respect of international crimes. It depends also on criminal law being crafted, and implemented, within a rule of law framework that respects fundamental principles – legality, individual responsibility, the presumption of innocence and due process – upon which the legitimacy of criminal law enforcement depends.[13]

Individual criminal responsibility under international law, like terrorism itself, is not a new phenomenon.[14] In recent decades, however, a system of international justice, with national and international components, has crystallised from the experience of addressing atrocities on the domestic and

'The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law', 75 (2007) G.W.L.R. 1165.

8 For analyses of the range of functions performed by criminal justice systems, *see* Drumbl, *ibid. See also* A. du Plessis, 'A Snapshot of International Criminal Justice Cooperation in the Fight against Terrorism,' pp. 111-14, in L. van den Herik and N. Schrijver (eds.), *Counterterrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge: Cambridge University Press, 2013).

9 It has also long been recognised that criminal law can be used to disrupt networks before they complete their crimes *e.g.* by prosecuting conspiracy. See the stretching of these concepts and preventive role of criminal law post-9/11, discussed in Part B.

10 *See* Drumbl, 'The Expressive Value', *supra* note 7; *see also* du Plessis, 'A Snapshot', *supra* note 8.

11 The implications of the neglect of criminal law in the aftermath of 9/11 are noted in Part B, below.

12 *See* B. Saul, 'Criminality and Terrorism', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), Ch. 6.

13 On challenges to a rule of law approach post-9/11, *see* Part B.

14 In 1945, the Nuremberg Military Tribunal observed: 'That international law imposes duties and liabilities on individuals as well as upon states has long been recognised ... crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (London, 1950), p. 447.

international planes. The work of the International Criminal Court ('ICC')[15] and the *ad hoc* international criminal tribunals for the former Yugoslavia ('ICTY') and Rwanda ('ICTR'),[16] or hybrid national-international courts and bodies including the Special Court for Sierra Leone have been the principal contributors.[17] These have been accompanied by innovations in domestic law[18] and burgeoning practice.[19] The experience of national and international justice in prosecuting apparently impenetrable networks engaged in organised crime as well as a growing body of practice on terrorism prosecutions specifically, leaves little doubt as to the viability (as well as the challenges) of prosecutions in the context of large scale international offences.[20] More recently, attention

15 The ICC Statute provides more elaboration on crimes, legal principles and procedures than ever before on the international level. *See also* Report of the Preparatory Commission for the International Criminal Court, Addendum, Part I, Finalized draft text of the Rules of Procedure and Evidence ('Rules of Evidence and Procedure'), 2 November 2000, UN Doc. PCNICC/2000/1/Add.1; and Part II, Finalised draft text of the Elements of Crimes ('Elements document'). As of May 2013, 122 states are party to the ICC Statute.

16 ICTY, established by SC Res. 827 (1993), 25 May 1993, UN Doc. S/RES/827 (1993); ICTR, established by SC Res. 955 (1994), 8 November 1994, UN Doc. S/RES/955 (1994). Also known as 'the *ad hoc* tribunals', the jurisprudence of which has made a detailed contribution to the codification and development of law in this area.

17 The Statute of the Special Court for Sierra Leone (annex to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002), available at: http://www.sc-sl.org/index.html.

18 Law reform efforts in national systems have been impelled in large part by ratification of the ICC Statute, *supra* note 4; *see e.g.* C. Kreß and F. Lattanzi (eds.), *The Rome Statute and Domestic Legal Orders: Volume 1* (Baden-Baden, 2000).

19 There is an increasingly active role of national courts in the prosecution of international crimes based various forms of jurisdiction. Among many examples *see*, *e.g.*, 'The Spanish Indictment of High-Ranking Rwandan Officials', (2008) 6(5) *Journal of International Criminal Justice* 1003; Ugandan International Crimes Division of the High Court's prosecution of Thomas Kwoyelo, a member of the Lord's Resistance Army (Human Rights Watch, *Justice for Serious Crimes before National Courts: Uganda's International Crimes Division* (2012); the Argentinian officer convicted for crimes against humanity in Spain (A.G. Gil, 'The Flaws of the Scilingo Judgment', (2005) 3 *Journal of International Criminal Justice* 1082); Belgian prosecutions for the Rwandan genocide (L. Reydams, 'Prosecuting Crimes Under International Law on the Basis of Universal Jurisdiction: The Experience of Belgium', in H. Fischer, C. Kreß and S.R. Lüder (eds.), *International and National Prosecution of Crimes Under International Law: Current Developments* (Berlin, 2001), pp. 799 ff. *See generally* W. Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7(4) *Journal of International Criminal Justice* 723; S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia, 2006). There are also recent examples, including in Argentina and Guatemala, of trials within the state for atrocities committed many decades before. These developments have contributed to the body of international criminal law.

20 Many international trials have ended in conviction for large-scale crimes in recent years. *See*, *e.g.*, *Prosecutor* v. *Charles Taylor*, Case No. SCSL-03-01-T, Judgment (Trial Chamber), 18 May 2012; ICTY judgments include in respect of the Srebrenica massacre and genocide in the former Yugoslavia (*Prosecutor* v. *Kristić*, Case No. IT-98-33-T, Judgment (Trial Chamber), 2 August 2001). A former member of the Presidency of the Republica Srpska, Biljana Plavšić was convicted in 2003 following a guilty plea (*Prosecutor* v. *Plavšić*, Case No. IT-00-39

dedicated to enhancing cooperation has improved the prospect of meeting the international enforcement challenge.[21] This is complemented by the human rights framework discussed in Chapters 7 and 8 which provides considerable experience in addressing rights applicable in the criminal process.

Part A of this chapter sets out the relevant legal framework that provides the basis for criminal law responses to terrorism. It sketches out crimes under international and national law that may be committed in the course of what we commonly refer to as acts of 'terrorism', relevant principles of criminal law, and where jurisdiction over such offences can be exercised. It will explore the extent to which the international community is armed with a substantial body of substantive and procedural international criminal law, and a range of jurisdictional options to implement it, as well as a framework for international cooperation in respect of domestic criminal laws, that provide an adequate framework for criminal law enforcement responses to the challenges of international terrorism.

Part B, as in other chapters that follow, explores the application of the legal framework in practice post-9/11. Despite the launch in 2001 of what was billed as the most significant law enforcement operation in history,[22] resort to the criminal law framework in the wake of the September 11 attacks has taken a curious and circuitous path. As will be noted, criminal law was de-emphasised in the immediate aftermath of 9/11, but this neglect has gradually given way to an invigorated approach to using criminal law, not only as a tool to respond to but (increasingly) to prevent acts of international terrorism. Examples of practice and development are highlighted in three main areas: expanded terrorism related offences and modes of liability, modified principles and procedures in the investigation and prosecution of terrorism, and innovations in international cooperation. It will explore trends in the use of criminal law in the terrorism context, notably towards the preventive use of criminal law and exceptionalist approaches to law and process, and their implications for effective law enforcement and the rule of law.

Finally, the criminal law paradigm is, of course, relevant not only to acts of terrorism but also to responses to them, so far as they constitute crimes

& 40/1, Sentencing Judgment (Trial Chamber), 27 February 2003), while former Bosnian Serb politician Momčilo Krajišnik is currently serving a twenty year sentence for crimes against humanity (*Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Judgment (Appeals Chamber), 17 March 2009). Trials of fomer military and political leaders Mladić and Karad_ić continue at time of writing in 2013. *See also* the ICTR judgment in the case of the former Prime Minister of Rwanda for genocide in that country (*Prosecutor* v. *Jean Kambanda*, Case No. ICTR-97-23, Judgment (Trial Chamber), 4 September 1998). The first ICC judgment was handed down in 2012: *Prosecutor* v. *Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment, ICC, 14 March 2012.

21 Addressed below, Section 4B3.

22 J. Harris, 'President Outlines War on Terrorism, Demands Bin Laden be Turned Over', *Washington Post*, 21 September 2001.

under international law for which individuals may be held to account.[23] The chapter concludes by highlighting the scant practice in the application of the criminal law framework to counter-terrorism, and the implications of the stark contrast to its application *vis-à-vis* terrorism itself.

4A THE LEGAL FRAMEWORK

4A.1 CRIMES, PRINCIPLES OF CRIMINAL LAW AND JURISDICTION

4A.1.1 Crimes under international and national law

Crimes under international law are particularly serious violations of norms that are not only prohibited by international law but also entail individual criminal responsibility.[24] Crimes can be established under customary or treaty law. Customary law is binding on all states and, so far as criminal responsibility is concerned, on all individuals.[25] Among the sources that can be looked to for the purposes of identifying the content of customary law in this field are the jurisprudence of international *ad hoc* tribunals, the ICC Statute and supplementary documents[26] and national court practice. Treaties by contrast are only binding on those states party to them.[27] Although treaties bind states, they may also, as in the case of treaties governing international criminal law, affect individuals. Although international tribunals usually prosecute for crimes considered prohibited by customary law, the ICTY has indicated that individuals may be convicted on the basis of treaty law.[28] The principles of legality and

23 *See* the many allegations of serious violations during the 'war on terror' that may amount to international crimes at Chapters 6-10; *see specifically* Chapter 7B14.

24 Only certain serious violations of human rights and humanitarian law carry individual criminal responsibility. *See Prosecutor* v. *Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995 (hereinafter '*Tadić* Jurisdiction Appeal Decision'), paras. 94-5.

25 See Chapter 1 on customary law as general and consistent practice of states accompanied by a sense of legal obligation; Article 38 of the Statute of the International Court of Justice.

26 ICC Statute (1998), entered into force 1 July 2002. The ICC does not have jurisdiction to prosecute crimes committed before its entry into force (Article 11) but it may concerning terrorist attacks or crimes committed in response that fall within its jurisdiction. Negotiated over more than five years by some 160 states, the Statute may also provide guidance on customary law, although the negotiating process that gave rise to the Statute means that the instrument may in several respects be more restrictive than customary law. The Statute itself notes, at Article 10, that 'nothing in this part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'.

27 'Treaty crimes' include terrorism and hijacking.

28 The Appeals Chamber of the ICTY has said that 'the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict

non-retroactivity require that the accused's conduct was clearly proscribed, under international or national law, at the time of its commission.[29]

This part of the chapter will focus on crimes under international law that may, in certain circumstances, be committed when acts of terrorism occur. It focuses on core international crimes, notably crimes against humanity, war crimes and aggression, before returning to the question of 'terrorism' and its doubtful status as *per se* a crime under international law, discussed in Chapter 2, and concluding by reference to the most obvious basis for criminal responsibility, domestic crimes.[30]

4A.1.1.1 Crimes against humanity

One question that arises is whether acts that we commonly refer to as terrorism can constitute crimes against humanity and if so in what circumstances. 'Crimes against humanity' consist of certain acts – such as murder, torture or inhumane acts – directed against the civilian population as part of a widespread or systematic attack. Although the first legal instrument referring to 'crimes against humanity' is the Nuremberg Charter of 1945, their prohibition in international law long predates the Second World War.[31] It is now well established that crimes against humanity are crimes under customary international law, hence prohibited irrespective of the suspect's nationality or of national laws.[32]

Unlike many other international crimes, such as war crimes or specific forms of terrorism, this group of crimes has never been the subject of a binding convention to which reference can be made to determine their specific content.

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with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law'. *Tadić* Jurisdiction Appeal Decision, *supra* note 24, paras. 94-5. The ICTY affirmed in the *Galić* Judgment and Appeal decision that international criminal conviction may be based solely on the commission of treaty crimes, although *see* the dissenting judgment of Judge Nieto: *Prosecutor* v. *Galić*, Case No. IT-98-29-T, Judgment (Trial Chamber), 5 December 2003, paras. 97-105; *Prosecutor* v. *Galić*, IT-98-29-A, Judgment (Appeals Chamber), 30 November 2006, paras. 79 and 85. Complex questions as to how treaties become 'binding' on individuals provided one of the reasons why treaty crimes were ultimately excluded from ICC jurisdiction.

29 While jurisdiction over the crime can be conferred or established after the fact (*see* this Chapter 4A.1.3 below), *ex post facto* criminalisation would amount to a violation of the basic principle of legality – *nullum crimen sine lege* – enshrined in systems of criminal law and Article 15 of the ICCPR. *See* para. 4A.1.2 below and Chapter 7A.5.5.

30 The Chapter does not purport to address the full range of national and international crimes that may be committed in the course of terrorist attacks, still less in the responses thereto.

31 Bassiouni, 'Crimes against Humanity', *supra* note 3 at pp. 522 ff. *See also* D. Robinson 'Crimes against Humanity' in R. Cryer, H. Friman, et al., *An Introduction to International Criminal Law and Procedure*, 2nd ed. (Cambridge: Cambridge University Press, 2010). Robinson describes it as 'controversial' whether the Charter created new law in this respect.

32 *Ibid.*; *see also*, S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law* (3rd ed. Oxford, 2010), Ch 3.

However, regard can be had to the ICC Statute, the first treaty to set out comprehensive definitions of these crimes[33] and to earlier international instruments.[34] There is also ample jurisprudence emanating from prosecutions for these crimes[35] that identifies key elements of the definition of crimes against humanity relevant to determining whether particular acts labelled international terrorism might amount to such crimes.

a) Underlying acts: Murder, inhumane acts, persecution

It is uncontroversial that there is a close link between terrorism and a number of the underlying acts that can, in certain circumstances, give rise to crimes against humanity. Murder, inhumane acts and persecution are among those acts.[36] Murder is a familiar term in domestic laws,[37] and has been held in an international context to consist of killing with 'an intention on the part of the accused to kill or inflict serious injury in reckless disregard of human life'.[38] 'Inhumane acts', a broad term found in various international instruments and domestic laws,[39] covers the infliction of severe bodily harm[40] and serious 'cruel treatment'.[41] As the ICTY has noted, the 'terrorisation' of

33 The definitions of all ICC crimes are for the purposes of the Statute only. ICC Statute, *supra* note 4 at Article 10.

34 *See*, *e.g.*, the ILC's Draft Code of Crimes against the Peace and Security of Mankind, Report of the ILC on the work of its 48th session, 6 May-26 July 1996, GAOR, 51st session, Supp. No. 10, 30, UN Doc. A/50/10, p. 97 (hereinafter 'ILC's Draft Code of Crimes').

35 *See supra* note 20 for examples of recent prosecutions. *See also*, *e.g.*, the judgment and the proceedings of the Nuremberg International Military Tribunal, published in *Trials of Major War Criminals before the International Military Tribunal*, 42 vols., (Nuremberg, 1946-50).

36 For a full range of acts that may amount to crimes against humanity, including torture, enforced disappearance and persecution, *see* ICC Statute, *supra* note 4 at Article 7; Article 5 ICTY Statute and Article 3 ICTR Statute (which enumerate fewer acts than the ICC). Various such acts, such as torture and deprivations of liberty, are relevant to crimes committed in the 'war on terror'; *see* para. 4.B.5. below.

37 *See* Report of the ILC on the work of its 48th session, p. 96: 'Murder is a crime that is clearly understood and well-defined in the national law of every State'.

38 *Prosecutor* v. *Delalić et al.*, Case IT-96-21-T, Judgment, 16 November 1998, para. 439 and *Prosecutor v. Akayesu*, Trial Judgement, ICTR-96-4-T, ICTR, 2 September 1998, paras. 589-90; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment (Trial Chamber), 1 September 2004, para. 381; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T (Trial Chamber), 18 December 2008, para. 442.

39 Inhuman(e) acts or treatment are referred to in the four Geneva Conventions of 1949 (Article 50, GC I; Article 51, GC II; Article 130, GC III; Article 147, GC IV); in the 'International Convention on the Suppression and Punishment of the Crime of Apartheid', 30 November 1973, GA Res. 3068 (XXVIII); in the ICCPR (Article 7); in the ECHR (Article 4); in the Convention (No. 29) Concerning Forced Labour, adopted by the ILO on 28 June 1930, in the Slavery Convention of 25 September 1926; and in the ICC Statute, *supra* note 4 at Article 7.

40 Article 18(k) of the ILC's Draft Code of Crimes mentions severe bodily harm and mutilation.

41 The ICTY has stated that: 'the notions of cruel treatment within the meaning of Article 3 and of inhumane treatment set out in Article 5 of the Statute have the same legal meaning'. *Prosecutor* v. *Jelisić*, Case No. IT-95-10, Judgment, 11 December 1998, para. 52. The Tribunal

a group may also amount to persecution,[42] which consists of fundamental rights violations on political, national, racial, religious or other grounds.[43]

b) Widespread or systematic

One of the distinguishing features of crimes against humanity is that they are widespread or systematic. While this threshold has not always been considered necessary,[44] developments have confirmed and the vast majority of commentators now accept, that under current international law, crimes against humanity must take place in the context of a widespread and systematic attack or campaign.[45]

It should be noted that the conduct of the particular perpetrator need not be widespread or systematic. Even a single act by a perpetrator may constitute a crime against humanity, provided it forms part of a broader (widespread or systematic) attack or campaign.[46] Conversely, the acts in question may themselves constitute the widespread or systematic attack; there is no requirement of a separate or pre-existing attack.[47] The requirement that the occurrence of crimes be widespread or systematic is disjunctive;[48] while either would suffice, 'in practice, these two criteria will often be difficult to separate,

refers to international standards on human rights, 'to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity'. *Prosecutor* v. *Kupreškić et al.*, Case No. IT-95-16, Judgment, 14 January 2000, para. 566. The underlying act must be 'of a seriousness similar to that' of other crimes against humanity: *Prosecutor v. Lukić and Lukić*, Case No. 98-32/1-T, Judgement (Trial Chamber), 20 July 2009, para. 960.

42 *Prosecutor v. Popović et al.*, Case No. IT-05-88, Judgment (Trial Chamber), 10 June 2010, para. 999; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment (Trial Chamber), 17 January 2005, para. 589.

43 *See* ICC Statute, *supra* note 4 at Articles 7(1)(h) and 7(2)(g). Discriminatory animus is not required for crimes against humanity generally, but for persecution only.

44 This requirement was not included in the Nuremberg Charter, or other post Second World War legal instruments that provided the basis for prosecution of crimes against humanity.

45 The jurisprudence of the ICTY, the ICTR Statute, the ICC Statute and national laws implementing the Statute all confirm this requirement which was uncontroversial at the ICC conference; *see* D. Robinson, 'Developments in International Criminal Law: Defining 'Crimes against Humanity' at the Rome Conference', 93 (1999) AJIL 43 at 47 and in ICTY and ICTR jurisprudence: *see Prosecutor* v. *Akayesu*, *supra* note 38 at para. 579; *Prosecutor* v. *Kayishema and Ruzindana*, para. 123 and *Blaskić*, *supra* note 48 at para. 202.

46 *Prosecutor* v. *Mrkšić, Radić and Šljivančanin*, Case No. IT-95-13-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996, para. 3; *Prosecutor* v. *Tadić*, Case No. IT-94-1, Judgment (Trial Chamber), 7 May 1997.

47 Dixon, 'Article 7. Crimes Against Humanity', p. 124.

48 ICC Statute, *supra* note 4 at Article7 requires attacks to be widespread *or* systematic. As does ICTY jurisprudence: *see*, *e.g.*, *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2, Judgement (Trial Chamber), 26 Feb. 2001; *Prosecutor* v. *Kupreškić et al.*, Case No. IT-95-16, Judgment, 14 January 2000; and *Prosecutor* v. *Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, para. 71, para. 207 (stating that for 'inhumane acts to be characterised as crimes against humanity, it is sufficient that one of the conditions be met').

since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation'.[49]

There is no one source that identifies a precise definition of these terms under customary international law, and the ICC 'Elements document', although providing detailed elements of the crimes, does not include a definition of the terms. However, they have been considered and applied in numerous cases, particularly by the ICTY and ICTR. As formulations vary somewhat within the jurisprudence, perhaps reflecting in part the particular factual circumstances to which they were applied, the key aspects of that jurisprudence are set out below. What is clear is that both the concepts 'widespread' and 'systematic' are intended to import a considerable element of seriousness,[50] and to 'exclude isolated or random acts'.[51]

The 'widespread' requirement may be satisfied in a range of ways.[52] Most commonly, the term is understood to refer to the *scale* of the crime. An earlier formulation of this criterion referred to 'large scale' instead of 'widespread', defining it as 'meaning that the acts are directed against a multiplicity of victims'.[53] Following this approach, the ICTY has stated that 'widespread ... refers to the number of victims',[54] and has defined the term as meaning acts committed on a 'large scale' and 'directed at a multiplicity of victims'.[55] Consistent with this, the term as used in the ICC Statute has been described as follows: '[t]he term widespread requires large-scale action involving a substantial number of victims'.[56]

While 'scale' will often involve a series of acts, it need not, as 'widespread' refers also to the *magnitude* of the crime. It is noteworthy that the ICC Statute contains an additional element requiring the commission of 'multiple acts' against the civilian population, but it is questionable whether this is a requirement of customary law in light of conflicting jurisprudence from the *ad hoc* tribunals suggesting that one single egregious act of sufficient scale or magnitude may suffice. As the ICTY noted, a crime may be 'widespread' by the 'cumulative effect of a series of inhumane acts or the singular effect of an

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49 *Blaškić*, *supra* note 48 at para. 207.

50 *See*, *e.g.*, the Secretary-General's report, UN doc. S/25704, para. 48 (cited in *Prosecutor* v. *Tadić*, *supra* note 46, para. 646, n. 141), that crimes against humanity cover 'inhumane acts of a very serious nature'.

51 *Prosecutor* v. *Tadić*, *supra* note 46 at para. 646. *Prosecutor* v. *Dragan Nikolic*, Case No IT-94-2, Review of Indictment, para 26. *See also* Robinson, *supra* note 145 at p. 236. Dixon, 'Article 7. Crimes against Humanity', p. 123.

52 *See*, *e.g.*, the *Musema* and *Akayesu* cases of the ICTR which refer to widespread as covering 'massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims'.

53 ILC's Commentaries to the Draft Code of Crimes, Commentary to Article 18(4).

54 *Prosecutor* v. *Tadić*, *supra* note 46 at para. 648.

55 *Blaski*, *supra* note 48, para. 206. Situation in Darfur (Al Bashir arrest warrant case) ICC PTC-I, 4.3.2009, para. 81.

56 Robinson, *supra* note 45 at p. 47.

inhumane act of extraordinary magnitude'.[57] The *ad hoc* tribunals' jurisprudence therefore also indicates that 'widespread' does not necessarily imply geographic spread. This is supported by a finding in one case that crimes against humanity had been committed against part of the civilian population of just one town.[58]

With regard to the requirement of 'systematicity', several cases have held that this can be satisfied by the repeated, continuous nature of the attack or campaign,[59] a 'pattern' in its execution[60] or the existence of an underlying plan or policy.[61] The ICTY confirmed in 2010 that the organised, as opposed to random, nature of an attack will be critical to an assessment of its systematicity.[62] The ICTY drew these factors together, noting that any of the following may provide *evidence* of a systematic attack: (1) the existence of a plan or political objective; (2) very large scale or repeated and continuous inhumane acts; (3) the degree of resources employed, military or other; (4) the implication of high-level authorities in the establishment of the methodical plan.[63] Consistent with this, it has been noted that the term 'systematic' in the ICC Statute 'requires a high degree of orchestration and methodical planning.'[64] The ICC, like the ICTR, has in recent years made clear that systematicity relates to the 'organized nature of the acts of violence and the improbability of their random occurrence.'[65]

c) Attack against the civilian population and the controversial 'Policy Element'

The ICC Statute imposed a different threshold than found elsewhere in international law, by requiring that (in addition to being either widespread or systematic) there be an 'attack'[66] against the civilian population, involving a 'course of conduct' and 'multiple acts', carried out 'pursuant to or knowingly

57 *Blaškić*, *supra* note 48 at para. 206.

58 In *Prosecutor* v. *Jelisić*, Case No. IT-95-10-T, Judgment (Trial Chamber), 14 December 1999, the ICTY convicted the accused of crimes against humanity that were committed as part of 'the attack by the Serbian forces against the non-Serbian population in Brko' (para. 57).

59 *Tadić*, *supra* note 46 at para. 648 (citing the ILC's Draft Code of Crimes).

60 *Prosecutor* v. *Akayesu*, *supra* note 38 at para. 580.

61 Report of the ILC on the work of its 45th session, 51 UNGAOR Supp. (No.10), p. 9, UN Doc. A/61/10 (1996).

62 *Prosecutor v. Popovic*, *supra* note 42 at para. 756.

63 *Kordić, supra* note 48 at para. 179.

64 Robinson, 'Developments in International Criminal Law', *supra* note 45, p. 67.

65 *Nahimana et al.* v. *The Prosecutor*, Case No. ICTR-99-52-A, ICTR, Appeals Chamber, 28 Nov. 2007, para. 920, and *Bashir* arrest warrant case, *supra* note 54 at para 81. Robinson suggests the exclusion of random attacks is more correctly seen as inherent in the concept of attack.

66 The concept of 'attack' in relation to crimes against humanity (unlike in relation to the use of force, *see* Chapter 5B.2.1.1 below) has no technical meaning. *See* S. Boelaert-Suominen, 'Repression of War Crimes through International Tribunals', International Institute of Humanitarian Law, 77th Military Course (1999) (on file with author). *See*, however, the more restrictive approach taken to the interpretation of 'attack' in the ICC context, below. Robinson, *supra* note 45 at p. 235.

in furtherance of a governmental or organisational policy'.[67] In so doing, in practice the widespread or systematic test becomes less firmly disjunctive than it otherwise would be. As an innovation,[68] it is questionable to what extent this definition should be considered customary international law of relevance beyond the ICC context.[69]

Even according to this quite stringent definition of crimes against humanity in the ICC Statute, there is no requirement that the acts be attributable to a state, but rather that there be a 'state or organisational' policy to commit an attack.[70] The 'policy' need not be formalised and may be inferred from all the circumstances.[71] Some controversy surrounds the meaning of 'organisational policy' and the key question for present purposes is whether it may exclude acts of non-state actors, and specifically those of international terrorist groups.

Significant international authority supports the view that, in principle, non state actors may be responsible for crimes against humanity. This view is reflected on the work of the *ad hoc* international tribunals,[72] the ILC Draft Code of Crimes against the Peace and Security of Mankind[73] and more recently the ICC's decision to open an investigation into crimes against humanity

67 Article 7(2)(a) ICC Statute defines 'attack' as 'attack directed against any civilian population' and as 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'. This was introduced to satisfy certain states engaged in the ICC negotiating process (that wanted to *see* a conjunctive not a disjunctive standard). *See* Robinson, *supra* note 45 at p. 67.

68 The term 'attack' is not used either in Article 5 of the ICTY Statute, nor in Article 6(c) of the Nuremberg Charter. Although the word appears in Article 3 of the ICTR Statute, only in Article 7 of the ICC Statute, *supra* note 4, is it defined so as to raise the threshold in the manner explained in this paragraph.

69 In the *Kordić* judgment, and the *Kunerac* Appeal Decision, the ICTY specifically rejects the idea that there is no 'policy' requirement for crimes against humanity, despite the ICC formulation below. *See Kordić*, supra note 48 at para. 182; *Prosecutor* v. *Kunerac*, ICTY Appeals Chamber, 12 June 2002. *See also* G. Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', (2002) *43 Harvard Journal of International* Law, at 237-316.

70 ICC Statute, *supra* note 4 at Article 7.

71 *See* Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalised draft text of the Elements of Crimes, 2 November 2000, PCNICC/2000/1/Add.2.

72 *See* reference to the position of the prosecutor and defence on terrorism as potentially within the scope of such crimes in *Tadić*, *supra* note 46. For a critical appraisal of the diminishing importance placed on the criteria this practice, *see* Kaul Dissenting Decision, below.

73 The Draft Code of Crimes against the Peace and Security of Mankind of the International Law Commission (ILC), notes that 'criminal gangs or groups' may constitute the collective entities behind crimes against humanity.

committed during the eruption of (essentially non-state actor) violence in post election Kenya.[74] The ICC's Decision in that case states that:

> Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether the group has the capability to perform acts which infringe on basic human values.[75]

The issue remains controversial, however, as seen from the dissenting opinion on this point,[76] and academic commentary,[77] whether a loose network like al Qaeda can have an organisational policy at all. This reflects, in part, a desire to ensure that crimes against humanity are distinguished from serious crimes under national law, which should be addressed at the national level.[78]

What is clear is that, at a minimum, the policy element excludes the 'random' outbreak of crime, even on a massive scale; as such the requirement has been described as imposing a 'modest threshold that excludes random action'.[79] It is a question of fact whether a terrorist act would meet this thres-

74 *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, paras. 115-128. Those primarily responsible for widespread violence in Kenya in 2007-08 were described as gangs of young men with varied forms of support from leaders of, and businessmen associated with, the main political parties, 'quite distinct from state-like entities with some form of territorial control or at least with the minimal organizational structure of a party to a non-international conflict'. Claus Kress, On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision *Leiden Journal of International Law*, 23 (2010), pp. 855-873.

75 *Situation in the Republic of Kenya*, *ibid.*, paras. 90 and 93.

76 *See* dissenting Opinion of Judge Kaul, noting *e.g.* that 'a gradual downscaling of crimes against humanity towards serious ordinary crimes ... might infringe on State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute'. *Ibid.*, para. 10.

77 In support of the majority approach, *see* D. Robinson, 'Essence of Crimes against Humanity Raised by Challenges at ICC', EJIL Talk, 27 September 2011, available at: http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc. Against the majority approach, *see* Kress, *supra* note 74 at pp. 855-873. Van de Herik and Schrijver, Counter-Terrorism and International Law, *supra* note 8 at p. 70. More generally discussed in M. Di Fillipo, 'Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes', (2008) 19 EJIL, 533, at 564-70; W. Schabas, 'State Policy as an Element of International Crimes', 98 J. of Crim. L. and Criminology 3; and W. Schabas, 'Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes', 23 (2010) Leiden Journal of International Law 04, pp. 847-53.

78 The reasons given include that such acts can be, and are more appropriately, addressed on the national level (*e.g.*, Schabas and Kress, *ibid.*), or the relationship between crimes against humanity and human rights law, which non-state actors have no responsibility (Kress, *ibid.*).

79 Robinson, *supra* note 45 at p. 240.

hold: an organised and coordinated terrorist attack such as 9/11 is the antithesis of a random attack, but many if not most other terrorist acts may not meet the threshold.[80]

Finally, while the meaning to be attributed to the term 'population' is open to question,[81] it is well-established that crimes against humanity, unlike war crimes, must be directed against a *civilian*, as opposed to military, population.[82] The ICTY has determined that a civilian population must be the 'primary' (as opposed to exclusive) object of the attack.[83] It has affirmed that non-civilians may also be victims of crimes against humanity, provided they are victimised in the context of an attack that is primarily directed against the civilian population.[84] Thus, while it has been pointed out that different considerations may therefore arise as between clearly civilian targets (such as the World Trade Center in New York), and those that may have a military role (such as the Pentagon), these various targets could be considered part of one attack, the primary object of which was the civilian population.[85]

d) No link to armed conflict

Crimes against humanity can be committed in times of armed conflict or in times of 'peace'. While crimes against humanity originated as an extension of war crimes,[86] the idea that such crimes can only be committed in times

80 *See* Chapter 6 on the isolated nature of many terror-related attacks and the lack of apparent organisational command or control. Those unlikely to meet the 'attack' threshold may well not be widespread or systematic in any event.

81 The ICTY suggests crime against humanity involving attacks against 'identifiable populations', whereas the ICC Statute and Elements do not. Nuremberg treated the term as indicative of scale.

82 The population must be 'predominantly', not exclusively, civilian. *See*, *e.g.*, *Naletilić and Martinović* (Trial Chamber), 31 March 2003, para. 235, and *Prosecutor* v. *Kupreškić et al.*, Case No. IT-95-16 (Trial Chamber), 14 January 2000, para. 549. For standards applicable to determining the civilian nature of the population, reference can be made to IHL, *see* Chapter 6, para. 6A.3.1.

83 *Blaškić*, *supra* note 48 at para. 208, ff. 401, and para. 653.

84 *Prosecutor* v. *Martić*, Case No. IT-95-11-A, Judgment (Appeals Chamber), 8 October 2008, paras. 30, 313.

85 Questions may arise as to whether these were components of one (predominantly civilian) attack, or were separate attacks. In either case the 'means' of attack – using civilian aircraft as bombs – itself involved targeting civilians.

86 Bassiouni, 'Crimes against Humanity', *supra* note 3 at 524. The Nuremberg Charter (Charter of the International Military Tribunal, Annex to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of 8 August 1945 (reprinted in 39 (1945) AJIL Supplement 258)) and Charter of the Tokyo Tribunal (Charter of the International Military Tribunal for the Far East, 19 January 1946) contained such a link.

of war has been unequivocally rejected through developments since Nuremberg.[87]

In conclusion, whether acts of terrorism might amount to crimes against humanity is a question to be determined on the facts in a particular situation. While a coordinated, systematic attack as devastating in nature as 9/11 would appear to fit readily with the purpose and definition, many of the more isolated attacks that have unfolded since then may not meet the high threshold reserved for these serious crimes under international law.

4A.1.1.2 War crimes

Unlike crimes against humanity, war crimes must (as the name suggests) take place in association with an armed conflict.[88] Once there is an armed conflict, the basic principles of international humanitarian law, including accountability, must apply.[89] Serious violations of international humanitarian law carrying individual responsibility include deliberate or indiscriminate attacks against civilians, the use of weapons that cause unnecessary suffering, and torture or cruel treatment of persons taking no part in hostilities, as discussed more fully in Chapter 6.[90]

The classification of acts of terrorism as war crimes depends on them constituting the initiation of, or taking place in the context of, an armed conflict. If they do, the rules of international humanitarian law apply to those acts – which has consequences for rules on permissible targeting and the detention of persons in connection with an armed conflict[91] – and serious violations of those rules may be prosecuted as war crimes. As explained more fully in Chapter 6, however, acts of international terrorism will only rarely give rise to armed conflict. Armed conflict is defined by the ICTY as:

87 Neither the ICTR nor the ICC Statute contain this element and although the ICTY Statute does, as the Appeals Chamber has noted, this is merely a jurisdictional limitation on the tribunal.

88 *See* Chapters 6 (IHL) 7 (international human rights law and the interplay between the two bodies of law).

89 Long-established principles, reflected *e.g.* in the Martens Clause 1899 (Preamble to the Hague Convention Respecting The Laws and Customs of War on Land), provide that certain basic standards of conduct apply irrespective of the nature of the conflict.

90 For the most comprehensive list of war crimes, *see* ICC Statute, *supra* note 4 at Article 8, Articles 2 and 3 ICTY Statute.

91 If *e.g.* 9/11 had been considered to trigger an armed conflict, IHL considers legitimate the targeting of military objectives. The Pentagon attack is likely to fall into this category of legitimate target (though note it would still fall foul of the law in respect of the manner of its execution – *see* Chapter 6A.3.2 below).

> resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[92]

While this definition was thought to be broad-reaching,[93] as explained in Chapter 6 it cannot be convincingly sustained that there is an 'armed conflict' between the United States and 'al Qaeda and associates', contrary to the position maintained by the US administration.[94] Had there been state responsibility for 9/11 for example,[95] the use of force involved may have given rise to an international armed conflict.[96] However, the structure, organisation and modus operandi of al Qaeda (and the associated groups or terrorist networks purportedly also engaged in the conflict with the US), suggest that it lacks the characteristics of an 'organised armed group' capable of itself constituting a party to a non-international armed conflict.[97] Attacks by al-Qaeda such as that of September 11, and the London, Bali or Madrid bombings that followed, are therefore not generally considered to have triggered an armed conflict or to constitute ware crimes as such. While acts of terrorism by al-Qaeda cannot in general be referred to as acts of war, there is little dispute that armed conflicts arose for example in Afghanistan on 7 October 2001 and in Iraq on 20 March 2003. Acts committed in the context of those conflicts, by parties or others fighting alongside them, falls to be considered against IHL and serious breaches may constitute war crimes.

To the extent that there *is* an armed conflict properly so-called, particular acts within it that exploit 'terrorist' tactics or methods may amount to several

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92 *Tadić* Jurisdiction Appeal Decision, *supra* note 24, para. 70.

93 This definition by the ICTY Appeals Chamber was thought innovative and sufficiently broad to cater for the full range of scenarios (given that the ICTY was addressing a conflict that had national and international components), thus ensuring the broadest application of international humanitarian law.

94 *See* Chapter 6.

95 This would have to be established according to the 'effective or overall control' test discussed at Chapter 31.1.1 – then September 11 may amount to the initiation of international armed conflict between states. If so, the acts of violence may amount to grave breaches of the Geneva Conventions, which consist of certain very serious crimes, including 'wilful killing', committed in international armed conflict against protected persons such as civilians.

96 The consequences would include that the obligations incumbent on all states in respect of grave breaches – to seek out those responsible for such breaches – would be triggered. GC I, Article 49 and Article 50; GC II, Article 50 and Article 51; GC III, Article 129 and Article 130; GC IV, Article 146 and Article 147. *See* M. Scharf, 'Application of Treaty Based Universal Jurisdiction to Nationals of Non-Party States', 35 (2001) *New England Law Review* 363. Instead the conflict began with the US intervention in Afghanistan.

97 *See* Chapter 6 on the nature of parties to a non-international armed conflict. Armed conflict must also be distinguished from a lesser level of sporadic violence. There is insufficient support at present in the overwhelming state practice rejecting the global conflict with al-Qaeda as set out at length in Chapter 6B.1.1.

war crimes. These may include 'violence to life or person',[98] 'willful killing', 'willfully causing great suffering' or 'serious injury to body or health', 'extensive destruction of property'[99] or intentionally directing attacks against the civilian population or civilian objects.[100]

Most obviously, they may also constitute 'acts of terrorism'[101] or 'acts or threats of violence the primary purpose of which is to inflict terror on the civilian population', specifically prohibited by IHL in respect of both international and non-international armed conflicts, as discussed in Chapter 6.[102] The inclusion of this prohibition as a 'war crime' in international criminal instruments has, however, been irregular. It was notably omitted from the ICC Statute and the Statute of ICTY, yet included in the Statutes of the ICTR and the Sierra Leone Tribunal for example. Its omission from the ICTY Statute did not, however, preclude the ICTY from prosecuting this crime (for the first time in history), leading to the conviction of General Stansilav Galić for inflicting terror on the civilian population in the context of the siege of Sarajevo.[103] The ICTY trial chamber did so based on terrorising the civilian population as an IHL treaty crime,[104] though on appeal, the tribunal held that it constituted a crime under customary international law, despite strong dissenting opinions on the issue at both Judgment and Appeal stages.[105] This view has been upheld since, at the ICTY[106] and in a series of cases from the Special Tribunal for Sierra Leone.[107] It would seem to now be well-established that the deliberate infliction of terror on the civilian population in armed conflict is a war crime under treaty or customary law.[108]

98 ICC Statute, *supra* note 4 at Article 8(2)(c). Violations of Article 3 in non-international armed conflict.

99 *Ibid.* at Article 8(2)(a) on Grave Breaches.

100 *Ibid.* at Article 8(2)(b) and (e). Other serious violations in international armed conflict and non-international armed conflict respectively.

101 Art 33(1) GC IV; J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I (Cambridge: Cambridge University Press, 2005); *see also* and Chapter 6 International Humanitarian Law.

102 Art 51(2) API; Art 13 (2) APII; Henckaerts and Doswald-Beck, *ibid*.

103 *Prosecutor* v. *Galić*, *supra* note 28.

104 *See Galić*, *ibid*.

105 *See* dissenting opinion of Judge Nieto Navia to the Judgment, and Judge Schomburg to the Appeals Chamber decision in *Galić*, *supra* note **28**. *See also* critique in A. Bianchi and Y. Naqvi, *International Humanitarian Law and Terrorism* (Hart, 2012), p. 222 et seq.

106 *Prosecutor* v. *Dragomir Milosević*, Case No. IT-98-29/1-T, Judgment (Trial Chamber), 12 December 2007, paras. 873 et seq.

107 *Prosecutor v. Brima, Alex Tamba et al,* Case No. SCSL-04-16-T, Judgment (Trial Chamber), 20 June 2007, para. 666; *Prosecutor v. Fofana, Moinina and Kondewa*, Case No. SCSL-04-14-T, Judgment (Trial Chamber), 2 August 2007, para. 169; *Prosecutor v. Seasy Gallon and Gbao*, Case No. SCSL-04-15-T, Judgment (Trial Chamber), 2 March 2009, para. 112.

108 Henckaerts and Doswald-Beck, *supra* note **101**, p. 8-11. Note this is not true of terrorism a crime *outside armed conflict* where greater diversity of opinion and practice remains. *See* below part 4A.1.1.4 and Chapter 2.

As regards the elements of the war crime, inflicting terror is a 'specific intent' crime, requiring that the primary (though not necessarily the exclusive) purpose was to spread terror among the population.[109] While some controversy surrounds the precise meaning of 'terror' in this context, it has been described as 'extreme fear' of a certain intensity or duration[110] or 'intentional deprivation of a sense of security' from people who have nothing to do with combat.[111] The material element may consist of attacks directed against the civilian population, or those that are indiscriminate or disproportionate (provided the mental element is satisfied); it may therefore be identical to the material element of the other war crimes of direct or indiscriminate attacks against civilians. Terror in armed conflict has therefore been described as 'an aggravated form of unlawful attack on civilians'.[112]

In conclusion, for the purpose of accountability for terrorist attacks in the 'war on terror' context, the war crimes category is likely of very little relevance. Navigating these controversial waters is, in any event, unnecessary, to the extent that acts of terrorism amount to other crimes such as crimes against humanity (defined above) or crimes under domestic law (below). Serious terrorist attacks may well fall within these definitions, and can be prosecuted as such in an appropriate forum. By contrast, the commission of war crimes has been a key issue in the armed conflicts launched following 9/11 as discussed later in this chapter.[113]

4A.1.1.3 Aggression

Aggression was defined as a 'crime against peace' under the Agreements establishing the Nuremberg International Military Tribunal and the International Criminal Tribunal for the Far East,[114] and described by the Nuremberg tribunal as 'the supreme international crime'.[115] The status of aggression as a crime has been reiterated by the General Assembly[116] and the Inter-

109 *Galić*, *supra* note 28 at paras. 103 and 104.

110 *Ibid.* at para 137. The Appeals chamber in that case described 'extensive trauma and psychological damage,' from the acts designed to inflict a state of terror (para. 102).

111 *Dragomir Milosević*, *supra* note 106 at para 886.

112 *Ibid.* at para. 882.

113 *See* Chapter 6B1 on armed conflicts post-9/11 and serious violations of IHL.

114 *See* Article 6 of the Charter of the Nuremberg Tribunal and Article 5, Charter of the International Military Tribunal for the Far East.

115 Judgment of the Nuremberg International Military Tribunal, 30 September 1946, reprinted in *The Trial of German Major War Criminals before the International Military Tribunal*, vol. 20 (Nuremberg, 1948), p. 411.

116 The 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations' (GA Res. 2625 (XXV). *See also* UN GA Res. 3314 (XXIX), 'Definition of Aggression', 14 December 1974, UN Doc. A/RES/3314 (XXIX). The 'principles of international law recognized by the Charter of the Nuremburg Tribunal and the judgment of the Tribunal' were also 'affirmed' in Reso-

national Law Commission.[117] More recently, the ICC Statute allowed for ICC jurisdiction over aggression once an acceptable definition of the crime could be agreed.[118] Such agreement was reached at the 2010 ICC Review Conference which adopted a new Article *8bis* defining the crime of aggression,[119] although ICC jurisdiction over the crime is not yet effective.[120]

For ICC purposes, the proposed definition provides that an act of aggression is 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State'. The crime of aggression is committed by the 'planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression'.[121]

According to the ICC approach, a criminal act of aggression is therefore an unlawful use of force in violation of the Charter of the United Nations which necessarily involves force by or on behalf of a state, as opposed to non-state actors. As discussed in relation to state responsibility in Chapter 3, states may act directly, or indirectly through irregulars or others,[122] but absent attribution to a state, terrorist attacks cannot properly be referred to as acts, or crimes, of aggression.

4A.1.1.4 Terrorism

The thorny issue of terrorism in international law is discussed in Chapter 2. Of note is the lack of a global terrorism convention and absence of an accepted

lution 95(I), 'Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal', 11 December 1946.

117 Article 16 of the ILC's Draft Code of Crimes. *See also* the ILC's Commentary to Article 16 of the Draft Code, in Report of the International Law Commission on the work of its 48th session, 6 May-26 July 1996, GAOR Supp. No. 10, UN Doc. A/51/10, at p. 83.

118 'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.' ICC Statute, *supra* note 4 at Article 5(2).

119 RC/Res 6., 13th plenary meeting of the ICC Review Conference, 11 June 2010, Annex 1. on 11 June 2010, the Review Conference of Rome Statute (held in Kampala, Uganda between 31 May and 11 June 2010) adopted by consensus amendments to the Rome Statute which include a definition of the crime of aggression and a regime establishing how the Court will exercise its jurisdiction over this crime.

120 The conditions for entry into force decided upon in Kampala provide that the Court will not be able to exercise its jurisdiction over the crime until after 1 January 2017 when a decision is to made by States Parties to activate the jurisdiction. The amendment allows for a state party to declare that it does not accept the ICC's jurisdiction over the crime of aggression.

121 ICC Statute, *supra* note 4 at Article 8*bis*, para. 2.

122 Chapter 3 on International Responsibility. *See also* UN GA Res. 3314 (XXIX), Article 3(g).

generic definition in customary law,[123] despite the issue having been the focus of international attention since long before 9/11 and with far greater intensity since.[124] As the previous section on 'war crimes' foreshadows, a distinction must immediately be drawn between the crime of terrorism in international law *per se*, and the war crime of inflicting terror on the civilian population. Inflicting terror on a civilian population in the context of conflict as a war crime is well established in IHL treaties, and international practice. Beyond the specific war crime, there remains relatively little practice in support of terrorism having attained the status of a crime under customary law.

The Statutes of the ICTR and of the Special Court for Sierra Leone[125] include terrorism as one of the crimes within their respective jurisdictions, but those provisions in fact cover the specific prohibition on terrorism in armed conflict.[126] The ICC negotiators for their part rejected multiple proposals to include 'treaty crimes' such as terrorism within its jurisdiction.[127]

Indeed, the only international criminal tribunal to have jurisdiction over terrorist acts is the Lebanon tribunal, established specifically to investigate and prosecute a particular terrorist incident and with jurisdiction that in large

123 *See* Chapter 2 on the definition of terrorism and customary international law. *See also* Resolution E adopted by the Rome Conference on the ICC: 'Regretting that no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion within the jurisdiction of the Court'. As noted above, the ICTY and other tribunals have noted on numerous occasions that individual criminal responsibility under international law can arise from certain serious violations of customary law or applicable treaty law.

124 *See* the Convention for the Prevention and Punishment of Terrorism (Geneva, 1937), League of Nations Doc. C.546M.383 1937 V. *See also* M.C. Bassiouni, 'International Terrorism', in Bassiouni *supra* note 3, pp. 765 ff, and the discussion of recent deliberations towards a global convention in Chapter 2, para. 1.2 above.

125 For the first judgment of the Sierra Leone tribunal, including on the crime of terrorism, *see Prosecutor v. Brima, Alex Tamba et al,* Case No. SCSL-04-16-T, Judgment (Trial Chamber), 20 June 2007, *See also*, *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Judgment (Trial Chamber), 18 May 2012.

126 The Statute of the Special Court for Sierra Leone (annex to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002), available at: http://www.sc-sl.org/index.html) and the Statute of the ICTR, in both cases in Article 3 ('Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II') at (d) cover 'acts of terrorism'. To date, there has been no judgment from the Rwandan Tribunal which interprets or further defines the word terrorism under Article 4(e). However, the Special Court has detainees awaiting trial charged with acts of terror under Article 3(e).

127 For a proposal by several states for inclusion *see*, *e.g.*, UN Doc. A/CONF.183/C.1/L.27 (1998) and UN Doc. A/CONF.183/C.1/L.27/Rev.1 (1998), but these were rejected and the issue deferred for consisderation by a future Assembly of State Parties (*see* Res. E appended to the ICC Statute).

part covers crimes under Lebanese law.[128] Likewise, the one example of international practice where terrorism has been held to constitute a crime under customary law is a decision of the Lebanon tribunal's Appeals Chamber.[129] However, that decision has been subject to considerable and detailed criticism, and to continuing challenge before that Tribunal itself.[130] Although some respected academic commentators assert that terrorism *is* a customary law crime (of whom Professor Cassese, who was also the President of the Lebanon Tribunal, stood out as the foremost proponent), others contest such a view.[131]

The existence of the crime of terrorism under customary law may well evolve in the future, perhaps impelled by ongoing developments on the national and international planes.[132] So long as significant differences remain as to key elements of the definition of the crime, as sketched out in Chapter 2, it is difficult to assert, consistent with the cardinal principles of *nullem crimen sine lege* (requiring that crimes be defined with clarity and specificity, referred to below), that terrorism *per se* is currently a crime under international law.

As a matter of treaty law, it was noted in Chapter 2 that particular manifestations of terrorism or forms of support for it are defined in numerous specific terrorism conventions. These cover crimes ranging from attacks on internationally protected persons to terrorist bombings to the financing of terrorism for example, contain their own definitions of the acts covered by them and oblige states parties to criminalise the conduct in domestic law and, in certain circumstances, to exercise jurisdiction.[133] However, these treaties

128 The Special Tribunal for Lebanon was established at the request of the government of the Republic of Lebanon following attacks in Beirut on 14 February 2005. Its mandate is to prosecute persons responsible for the attack on 14 February 2005 that killed former Lebanese Prime Minister Rafiq Hariri and 22 others, and other connected attacks in Lebanon spanning 1 October 2004 and 12 December 2005. *See* Security Council Resolutions 1664 (2006) and 1757 (2007).

129 Special Tribunal for Lebanon (STL) Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (hereinafter 'STL Interlocutory Decision'), STL-11-01-I, 16 February 2011; *see* discussion in Chapter 2.2.3.

130 B. Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', (2011) 24(3) *Leiden J. of Int'l Law* 677.

131 *See*, *e.g.*, A. Cassese and P. Gaeta, Cassese's International Criminal Law (3rd ed., Oxford University Press 2013) at p. 139, and cf. B. Saul, *Defining Terrorism in International Law* (New York City: Oxford University Press, 2006); and Saul, 'Legislating from a Radical Hague', *ibid*. *See also*, *e.g.*, J. Paust, 'Addendum: Prosecution of Mr. bin Laden *et al*. for Violations of International Law and Civil Lawsuits by Various Victims', *ASIL Insights* No. 77, 21 September 2001

132 Since 9/11, and SC Res. 1373 (2001), (28 September 2001, UN Doc. S/RES/1373 (2001)), there has been intense activity on the national as on the international level – *see* Chapter 2.

133 *See* Chapter 2.1.3 and 2.1.4 regarding specific conventions. *See also* Bassiouni, 'International Terrorism' (referring to 16 Conventions dealing with specific means of terror violence). The Special Rapporteur on terrorism and human rights, Ms Kalliopi K. Koufa, in her Progress Report to the Fifty-Third Session Sub-Commission on the Promotion and Protection of Human Rights', UN Doc. E/CN.4/Sub.2/2001/31, 27 June 2001, cites 19 Conventions.

impose obligations on states party to them, rather than themselves establishing criminal responsibility. Unless the state has implemented the treaty provisions, it is subject to question whether individuals could be prosecuted on the sole basis of such a treaty. Thus, an important distinction is due between such crimes of international concern or relevance, which the state must criminalise,[134] and 'core crimes' (or *crimina juris gentium*) under international law.[135]

However, where the specific terrorism treaty *has* been incorporated into the domestic law of a state with jurisdiction, this issue is avoided. On 28 September 2001 the Security Council called on 'all States to ... [i]ncrease co-operation and fully implement the relevant international conventions and protocols relating to terrorism'[136] and to ensure that 'terrorist acts are established as serious criminal offences in domestic laws and regulations'.[137] This call has led, in practice, to an increase in ratification and implementation of these conventions.[138] Domestic systems often therefore provide the basis for prosecution of these crimes, though significant gaps remain.[139] As noted above, one additional sub-category of treaties that give rise to criminal responsibility for terrorism under international law are those IHL treaties prohibiting 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population', in international and non-international armed conflict.[140]

Finally, another offence of relevance to some terrorist attacks, notably including the 9/11 attacks, which is at times treated as a form of terrorism and at others as a separate treaty crime, is hijacking. There are a number of

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134 Belonging to this category of treaties, for instance, are the conventions relating to the suppression of terrorism (above), and international instruments related to drug trafficking.

135 *See* R. Cryer, H. Friman, *et al.*, *supra* note 31. The core crimes concern conduct considered to amount to 'most serious crimes of concern to the international community as a whole,' embracing the crimes within the jurisdiction of the ICC Statute, as well as the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (New York, 10 December 1984, UN Doc. A/39/51 (1984)) (hereinafter 'Convention Against Torture') for example.

136 SC Res. 1373 (2001), *supra* note 132 at para. 3.

137 SC Res. 1373 (2001), *ibid.*, also requires 'that the punishment duly reflects the seriousness of such terrorist acts'. This Resolution also established a Committee to monitor its implementation. SC Res. 1377 (2001), 28 November 2001, UN Doc. S/RES/1377 (2001), sets out the tasks for the Committee.

138 Chapter 2.

139 *See* du Plessis, 'A Snapshot', *supra* note 8. The non-retroactivity principle inherent in the *nullum crimen sine lege* principles precludes prosecution for offences that were not crimes at the time of commission but may permit conferral of jurisdiction *ex post facto*, *see* para. 4A.1.3 below. Regarding new terror legislation, much of it is problematic from the perspective of the *nullum crimen* principle and other human rights concerns. *See* Chapter 7A55 and 7B5.

140 Article 51 AP I and Article 13 AP II. *See also* Article 33(1) of the Fourth Geneva Convention which provides that 'terrorism is prohibited' without defining the phenomenon.

conventions relating to hijacking,[141] some of which oblige states parties to enact legislation criminalising the conduct and to exercise jurisdiction over suspects in specified circumstances.[142] Like the terrorism conventions, certain of those relating to hijacking have been incorporated into United States domestic law[143] and the US has in the past exercised jurisdiction in a number of cases on the basis of those treaty provisions as incorporated into domestic law.[144]

4A.1.1.5 Common crimes

Finally, it should be noted that murder and the infliction of serious physical harm are crimes in most if not all domestic jurisdictions. The most straightforward approach in relation to these crimes is therefore prosecution in a domestic court as a common crime.[145]

The fact that acts of international terrorism might amount to crimes under international law is however significant not only as an indicator of their egregious nature, and international character, but also as crimes under inter-

141 *See*, *e.g.*, the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970), 860 UNTS 105, in force 14 October 1971 ('The Hague Convention'), and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971), 974 UNTS 178, in force 26 January 1973 ('The Montreal Convention'). While these Conventions may be relevant to the hijacking and subsequent destruction of the four aircraft, as one commentator notes, 'extending the scope of these treaties to cover the destruction of the World Trade Center and part of the Pentagon, as well as the massive loss of life in those buildings and the causing of a state of terror in the general public, could only be done with difficulty'. A.N. Pronto, 'Terrorist Attacks on the World Trade Center and the Pentagon. Comment', *ASIL Insights* No. 77, 21 September 2001.

142 The states of nationality of the alleged perpetrator or the victim or the state of territory have jurisdiction under many of these treaties.

143 Paust, 'Prosecution of Mr. bin Laden', *supra* note 131, notes: 'Prosecution in US is also possible under US legislation implementing the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, (which in Article 7 thereof also requires all signatories to bring into custody those reasonably accused of international crimes covered by the treaty and either to initiate prosecution of or to extradite such persons, without any exception or limitation of such duty whatsoever)'.

144 *United States* v. *Fawaz Yunis*, 924 F.2d 1086 (DC Cir. 1991). The Court upheld the US court's subject matter jurisdiction, (924 F.2d at 7, 12-13), on the basis that the victim's state of nationality may exercise jurisdiction under the Hague Convention and the International Convention Against the Taking of Hostages. The Court held this to be consistent with customary international law (924 F.2d at 8).

145 Some assert that murder is a crime that attracts universal jurisdiction, and all states should be able to exercise their jurisdiction over international terrorism simply on this basis. Many states could exercise jurisdiction over mass murder based on other bases of jurisdiction set out below.

national law lay greater claim to be governed by relevant principles of international law, as highlighted in the following section.[146]

4A.1.2 Relevant principles of criminal law

4A.1.2.1 Direct and indirect individual criminal responsibility

Criminal responsibility must be individual, based on the culpability of the particular person accused. That it cannot be 'collective', or 'objective', is an essential principle of criminal law in legal systems across the globe, as reflected in international law.[147] Thus, while for example the Nuremberg process extended responsibility to cover 'conspiracy' to commit crimes of peace (reflecting practice in common law states), and introduced the novel notion of 'membership' of a criminal organisation,[148] the fact of association with a prohibited group or organisation may raise concerns as a basis for criminal responsibility,[149] and cannot *per se* render the individual responsible for the actions of that group. Certain novel and expanded approaches to crimes and modes of liability introduced since 9/11, including crimes of 'association' or of 'expression'[150] such as 'material support' for or 'glorification' of terrorism, discussed under Part B, may further jeopardise this notion of individual criminal responsibility.

The individual should be punished only in respect of his or her own conduct, commensurate with his or her culpability. International criminal law

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146 The principles will generally be determined by the system in which jurisdiction is exercised. However, it can be argued that, for example, certain obstacles to jurisdiction must not apply to international crimesor to serious human rights violations discussed in Chapter 7A4.

147 *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para. 186. This principle of criminal law is reflected in international human rights and humanitarian law. *See* 'Specific Human Rights Issues: New Priorities, in Particular Terrorism', Additional Progress Report by the Special Rapporteur on Terrorism and Human Rights, Ms Kalliopi Koufa, 8 August 2003, UN Doc. E/CN/Sub2/2003/WP.1, paras. 68 ff.; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, 22 October 2002, OAS/Ser.L/V/ll.116, Doc. 5 rev. 1 corr., para. 227. On the prohibition on collective punishments in IHL, *see* Article 33 GC IV, Article 75 AP I, Article 6(2) AP II.

148 *See* M. Lehto, *Indirect Responsibility for Terrorism Acts: Redefinition of the Concept of Terrorism Beyond Violent Acts* (Leiden: Koninklijke Brill NV, 2010), p. 113 et seq.

149 IACHR *Report on Terrorism, supra* note 147: 'no one should be convicted of an offense except on the basis of individual penal responsibility, and the corollary to this principle [is] that there can be no collective criminal responsibility ... This requirement has received particular emphasis in the context of post-World War II criminal prosecutions, owing in large part to international public opposition to convicting persons based solely upon their membership in a group or organization.' *See also* E. David, *Eléments de droit pénal international – Titre II, le contenu des infractions internationales*, 8th ed. (Brussels 1999), p. 362. *See* Chapter 4.B.2.1 below and Chapter 7B.8 on concerns where criminal organisations are 'listed' according to procedures that lack transparency and judicial supervision.

150 *See* Saul, 'Criminality and Terrorism', *supra* note 12.

and practice reflects the fact that this responsibility may, however, be direct and indirect, and the participation of individuals in the commission of a crime may take many forms. Direct responsibility attaches to those who order, plan, instigate, aid and abet, or otherwise contribute to the commission or attempted commission of crime by a group acting with a 'common purpose'. It also involves the joint commission of the crime by multiple actors forming a 'joint criminal enterprise' and/or acting as co-perpetrators pursuant to a common plan.[151] As regards acts of terrorism, those directly responsible are not only those who implement the attack (who in cases of suicide missions may obviously no longer be subject to criminal prosecution) but, potentially, also the full networks of persons involved in various ways in planning, orchestrating and assisting in their execution.

Through notions such as 'co-perpetration' or acting in 'common purpose' under the ICC regime,[152] or the creative development of the notion of 'joint criminal enterprise' through ICTY jurisprudence,[153] international criminal law has developed to provide a spectrum of forms of responsibility. International criminal law therefore anticipates a potentially broad range of individuals who may contribute collectively to international crimes.[154] But as treaty and jurisprudential developments have expanded the net of inchoate crimes and accomplice liability, they have also limited their reach, by insisting for example

151 *See* Article 7(1) Statute of the ICTY; Article 6(1) Statute of the ICTR; ICC Statute, *supra* note 4 at Article 25. Formulations vary somewhat between statutes *e.g.* joint criminal enterprise has developed through practice, notably of the ICTY, and common purpose doctrine is enshrined in Article 25 of the ICC Statute. ICC nascent practice has developed the notion of co-perpetration (direct and indirect), structured around the elements of 'common plan' and 'joint control over the crime' (*see Prosecutor v. Lubanga*, *supra* note 20, paras. 976 et seq). Some modes of liability, i.e. conspiracy or direct and public incitement, apply only in respect of genocide, *see* Genocide Convention 1948, Art 111 (c). *See* Lehto, *Indirect Responsibility for Terrorism Acts*, *supra* note 148 at p. 120.

152 Article 25(3) (d) is akin to complicity and has been used in recent anti-terrorism conventions. The mental element requires a contribution 'to the commission or attempted commission' of a crime, made in knowledge of the criminal objective of the group. The nature of that potential contribution remains unclear, in particular whether such contribution must be 'significant' or whether any contribution made to the group with the requisite intent suffices. *See Prosecutor* v. *Mbarushimana*, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the Confirmation of Charges', ICC-01/04-01/10 OA4, 30 May 2012, Separate Opinion of Judge Silvia Fernández de Gurmendi.

153 Joint criminal enterprise relates to a group of individuals with 'some kind of interaction,' acting pursuant to a joint criminal purpose, which actually results in the commission of a crime. It requires at a minimum recklessness as to the risk and a substantial contribution to the commission of an offence which (by contrast to conspiracy, for example) does in fact take place. *See Prosecutor* v. *Brđanin*, Case No. IT-99-36-A, Judgement (Appeals Chamber), 3 April 2007.

154 For analysis of these developments *see* B. Goy, 'Individual criminal responsibility before the International Criminal Court. A Comparison with the *Ad Hoc* Tribunals' (2012) 12(1) *International Criminal Law Review* 1-70.

that accomplice liability requires a 'significant causal relationship' between the individuals accused's act and the commission of the crime, and rejecting the notion that any contribution whatever may draw the individual into the web of criminality.[155]

National laws and doctrine vary considerably as to principles of criminal law and terminology used. There has been little attempt to develop a general approach to grounds of responsibility and modes of liability, other than for the purposes of international criminal jurisdictions, such as the codification of a 'general part' through the ICC Statute or through ongoing international criminal law jurisprudence.[156] While there is therefore much diversity on the national level, criminal law systems do, however, tend to encompass a range of forms of criminal responsibility. These commonly cover participation in the commission of a crime as well as planning and preparation, from common law notions of conspiracy to civil law doctrines of 'association de malfaiteurs' for example.[157]

As discussed in Part B, since 9/11, new laws have been grafted onto domestic systems, expanding both crimes and modes of liability, so as to criminalise membership of terrorist organisations and various forms of association with, or expression for, certain terrorist activities, as well as more traditional forms of participation. It remains to be seen to what extent these 'preventive' criminal laws, the implications of which are discussed in Part B, may ultimately influence international legal standards.

In the context of international terrorism, and subsequently of allegations of criminal conduct in the context of the 'war on terror,' much attention has been focused on the need for a criminal law response that reaches behind the executioners to the architects, including those at the highest levels in the chains of command. Under international criminal law certain people may be responsible not only for what they do – such as ordering or instigating crimes – but also in certain circumstances for what they fail to do under the doctrine of 'superior responsibility'.[158] While this doctrine is most readily applied in the context of clearly established military structures, it applies to military or

155 *See*, *e.g.*, *Prosecutor v. Tadić*, *supra* note 46 at paras. 670-672 rejecting the prosecution's arguments that any connection would suffice.

156 Lehto, *supra* note 148 at p. 109; Kai Ambos, La Parte General de Derecho Penal Internacional, 2010.

157 *See*, *e.g.*, UNODC Handbook on Criminal Justice Responses to Terrorism 2009, available at: https://www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf (focusing on the use of criminal law 'preventively'); K. Ambos, 'Article 25. Individual Criminal Responsibility', in Triffterer (ed.), *Commentary on the Rome Statute*, pp. 475 ff. Domestic legal orders may also include other forms not included specifically in the international documents, such as conspiracy (covered as such in ICTY and ICTR practice, and the ICC Statute, only in respect of genocide.

158 ICC Statute, *supra* note 4 at Article 28.

civilian leaders.[159] A military commander or a civilian in a position of authority may be liable if he or she knew or should have known that a crime would be committed by subordinates under his or her effective control, and fails to take necessary and reasonable measures to prevent or punish the crime, despite the material ability to do so.[160]

This superior responsibility applies not only to those with formal legal authority, but also to superiors according to informal structures.[161] The ICTY for example has made clear that non-state actors may in principle be liable as superiors on the basis of *de facto* authority,[162] and 'effective control'.[163] The ICTR has likewise convicted non-state actors on this basis, in the *Musema*[164] and *Nahimana*[165] 'media' cases, and in the *Serashago* case which apparently concerned paramilitary leaders.[166] The Special Court for Sierra

159 *Prosecutor v. Delalić et al ('Celebici case')*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, para. 214; *Prosecutor v. Delalic et al ('Celebici Appeal')*, Case No. IT-96-21-A, Judgment (Appeals Chamber), para. 266. The ICTY noted that control, not simply decisive influence, is required.

160 *Celebici case* at para. 256; Celebici Appeal at paras. 647, 378.

161 ICRC Commentary (Additional Protocol I), para. 3544, and case law below.

162 *Celebici case* at paras. 377-78. *See also Celebici Appeal* at paras. 189-94.

163 *Celebici Appeal* at paras. 196-98. Several other cases noted the key question of whether a superior's *de facto* is formal authority: *see*, *e.g.*, *Prosecutor v. Aleksovski*, Case No. IT-05-14/1-T, Judgement (Trial Chamber), 25 June 1999, paras.75-78; *Prosecutor v. Naletelić et al,* Case No. IT-98-34-T, Judgement (Trial Chamber), 31 March 2003, paras. 65-69; *Prosecutor* v. *Oric,* Case No. IT-03-68-T, Judgement (Trial Chamber), 30 June 2006 ('*Oric* case'), paras. 309-311; *Prosecutor* v. *Musema*, ICTR-96-13-T, Judgement (Trial Chamber), 27 January 2000, para. 135; *Bagilishema* AJ, paras. 50-55; *Nahimana et al.* AJ, para.605; *Kajelijeli* AJ, paras. 85-87.

164 *Prosecutor* v. *Musema*, ICTR-96-13-T, Judgement (Trial Chamber), 27 January 2000 ('*Musema*'), para. 143-44, paras. 936, 950-51 where the Director of Gisovu Tea Factory was guilty of genocide and crimes against humanity based upon *de jure* power and *de facto* control over his employees (para. 12). These findings were not appealed: *Prosecutor* v. *Musema*, Case No. ICTR-96-13-A, Judgement (Appeals Chamber), 16 November 2001

165 *Prosecutor* v. *Nahimana*, Case No. ICTR-99-52-T, Judgement, 3 December 2003 ('*Nahimana* TJ'), paras.973, 1063, 1081-1082, 1106, upheld on appeal. The ICTR Trial Chamber in the cases of *Musema* and *Nahimana* ('Media case') convicted the Director of a tea factory, managers of a Radio Station, and the leader of a political party, as superiors. All three cases relied upon the post-WWII cases of *Roechling* and *Flick* in which non-state civilian industrial leaders were found criminally liable for failing to prevent and punish their employees for their crimes, and provide rare examples of convictions of non-state actors pursuant to superior responsibility.

166 *Prosecutor* v. *Omar Serushago*, Case No. ICTR-98-39-S, Sentencing Judgment (Trial Chamber), 5 February 1999. Subject to the guilty plea, the accused was convicted of genocide and crimes against humanity pursuant to superior responsibility. Neither the Trial nor Appeals Chamber needed to determine whether the Interahamwe was a paramilitary non-state actor, or a state actor by virtue of its affiliation with the government.

Leone has also convicted paramilitary commanders of the ousted AFRC pursuant to superior responsibility.[167]

Arguably, although the facts of these cases are all quite distinct, the same principle could potentially apply to persons in positions of authority within terrorist criminal networks. The requirements of a clear superior-subordinate relationship, with adequate control over subordinates that made it possible to prevent and to punish their criminality, may be unlikely to be met by an entity such as al-Qaeda, described as comprising a loose network of cells and individuals under a broad shared ideology.[168] Where such requirements are met, however, the experience of international criminal law suggests that this could become a relevant basis of liability for those who control terrorist organisations in different circumstances in the future. This may prove particularly important where access to evidence of high level orders sufficient to demonstrate the direct responsibility of those in the highest echelons proves elusive.

Clearly superior responsibility is also relevant to crimes committed in the context of state responses to terrorism. As noted below the dearth of such prosecutions to date means the application of the principles in this context remains unexplored.

4A.1.2.2 Certainty and non-retroactivity in Criminal Law: nullum crimen sine lege

As a fundamental principle of law, persons are protected from prosecution for conduct that was not criminal at the time of its occurrence. This principle, reflected in domestic and international criminal law and human rights, is enshrined in, for example, Article 15 of the ICCPR.[169] It explicitly does not, however, preclude the prosecution of conduct that was criminal under international but not domestic law at the relevant time.[170]

The *nullum crimen* rule also requires that criminal conduct must be defined according to clear, accessible and unambiguous law. The definition of a crime must in turn 'be strictly construed and shall not be extended by analogy'.[171] Any ambiguity should be interpreted in favour of the person being investi-

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167 *Prosecutor* v. *Brima*, Case No. SCSL-04-16-T, Judgement, 20 June 2007 ('*Brima* TJ'), paras. 2114, 2118 and 2122. The Trial Chamber's findings were upheld on Appeal. As a former government body, the AFRC had a functioning chain of command and structures to facilitate effective control. *See also Prosecutor* v. *Sesay*, Case No. SCSL-04-15-T, Judgement (Trial Chamber), 25 February 2009.

168 *See* Chapter 6 where the idea of al-Qaeda as an organisation that might constitute a party to a conflict, as claimed by the US administration, is questioned.

169 Article 15(1) of the ICCPR states: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.' For a detailed discussion of the guarantees enshrined in Article 15, *see* below, Chapter 7A.4.3.4.

170 Article 15(2) ICCPR.

171 ICC Statute, *supra* note 4 at Article 22(2).

gated, prosecuted or convicted.[172] Thus, for example, a person can be prosecuted for direct or indirect responsibility for crimes against humanity entailed in widespread or systematic terrorist attacks, even if there were no specific offence provisions in place under domestic law at the time of the commission of the offence. If domestic law requires a legislative base for the crimes or for jurisdiction, the necessary legislation can also be adopted with retrospective effect without any infringement of the *nullum crimen* rule as a matter of international law. By contrast, prosecution for membership of a terrorist organisation or rendering material support to terrorists – not themselves crimes under international law – is likely to fall foul of the *nullum crimen* rule unless that crime was proscribed in clear and accessible domestic law at the relevant time.[173]

4A.1.2.3 Bars to prosecution: amnesty, immunity and prescription

Domestic legal systems may, and often do, impose obstacles to prosecution, among them amnesty laws or statutes of limitation that preclude criminal process. The legitimacy of such national measures depends on their consistency with international law obligations to effectively investigate and prosecute serious crimes.[174]

Human rights bodies have consistently found measures that act as a bar to investigation or criminal process to be inconsistent with the positive obligations of the state under human rights treaty law to investigate and, if appropriate, prosecute serious rights violations.[175] This is reflected for example in statements of the UN,[176] the work of human rights bodies[177] and the

172 *Ibid*. at Article 22(3). The subsidiary principle of *nulla poena sine lege* (no punishment without law) demands that more serious penalties should not be imposed than those applicable at the time of the commission of the offence; *see* Article 15(2), ICCPR.

173 *See*, *e.g.*, the US Supreme Court determination in *Hamdan*.

174 These obligations are found principally in human rights law, but reflected increasingly in international criminal law. Chapter 7A 'Positive Obligations'; ICC Statute Preamble, *Belgium* v. *Senegal*, *supra* note 4.

175 *See* Chapter 7A.

176 *See*, *e.g.*, Seventh Report of the Secretary-General on the United Nations, Observer Mission in Sierra Leone, UN Doc. S/1999/836, 30 July 1999, para. 7; UN Commission on Human Rights Resolutions including 2004/72, 21 April 2004, para. 3; 2005/44, 19 April 2005, para. 7; 2004/72, 21 April 2004, para 3; 2004/48, 20 April 2004, para. 6 (adopted without a vote).

177 *See*, *e.g.*, CCPR General Comment 20, HRI/GEN/1/Rev.1, p. 30; Human Rights Committee, General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004); Bahrain (2005), CAT/C/CR/34/BHR, para. 6(g). Chile (2004), CAT/C/CR/32/5, paras. 6(b) and 7(b); Peru (2006), CAT/C/PER/CO/4, para. 16; Spain (2009), CAT/C/ESP/CO/5, para. 21; *Chumbipuma Aguirre et al*. v. *Peru*, Merits, Judgment of 14 March 2001, IACtHR, *Series C*, No. 75.

ICTY.[178] Momentum may be gathering behind the position that granting amnesty for serious crimes is now proscribed by customary law, such a development.[179] Linked to the inconsistency of broad amnesty laws with particular human rights obligations, international criminal law authorities increasingly recognise that, whatever the effect of amnesty or prescription in the home state as a matter of domestic law, it does not impede prosecution either before international or foreign courts.[180] Likewise statutes of limitations or rules on prescription that are a common feature of national systems, for common crimes, cannot however apply to core crimes under international law.[181]

While domestic laws and constitutions may also provide immunity from criminal prosecution – for example of heads of state, government officials or parliamentarians[182] – the lawfulness of such measures is again limited by the international obligations referred to above. The Nuremberg Charter's recognition that 'the official position of defendants, whether as heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment'[183] is reflected in the statutes of subsequent *ad hoc* tribunals and of the ICC.[184] International law recognises certain immunities from prosecution by foreign courts, for

178 *See Prosecutor* v. *Furundžija*, Case No. IT-95-17/1-T 10 (Trial Chamber), Judgment of 10 December 1998, para. 155: 'It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition on torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.' More recently, the ICTY Appeals Chamber tated that 'Individuals accused of such crimes can have no legitimate expectation of immunity from prosecution.' *Prosecutor v. Radovan Karadžić*, Case No IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber decision on the alleged Holbrooke Agreement, 12 October 2009, para 50.

179 Cassese, *International Criminal Law*, *supra* note 131, pp. 314-15. State practice of granting amnesty may be becoming more restrictive over time, and accountability norms are strengthening, indicating a possible shift in customary law in this field. *See e.g.*, Expert Opinion in *Garzon* v *Spain*, ECHR 2011, available at: www.interights.org/Garzon.

180 Article 10, Statute of the Special Court for Sierra Leone and Article 40, Cambodian Law for the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea expressly exclude the possibility of amnesty as a bar to prosecution. National court cases have likewise clarified that amnesty does not preclude prosecution abroad (*see, e.g.*, references to the prosecutions of Chile's Pinochet and Argentina's Galtieri in Cassese, *International Criminal Law*, *supra* note 131, pp. 314-15) and in many cases at home (*e.g.*, Guatemalan courts rejected amnesty in the Rios Montt case in 2012/3; *see* survey of earlier practice in *Garzon* v. *Spain* expert opinion, *supra* note 179).

181 *Furundžija*, TC 1998, para 157. *Barrios Altos* v. *Peru*, para. 41. *See* the survey of international and national sources on Amnesty and Prescription, in *Garzon* v. *Spain*, *supra* note 179.

182 *See* H. Duffy, 'National Constitutional Compatibility and the International Criminal Court', 11 (2001) *Duke Journal of Comparative and International Law* 5.

183 Article 7, London Agreement of 8 August 1945.

184 Articles 6(2) of the ICTY and ICTR Statutes. ICC Statute, *supra* note 4 at Article 27.

sitting heads of state or foreign ministers for example,[185] though the reliance on immunities to protect persons charged with the most egregious crimes against the human person is controversial.[186]

The law relating to amnesty, and immunity may be of limited relevance to the prosecution of 'terrorist' networks such as al Qaeda that are unlikely to benefit from state-conferred protection from prosecution. It came briefly into the international frame in the context of purported offers of 'immunity' to Saddam Hussein in early 2003, and may revive in the context of for example state sponsored terrorism in the future.[187] Where it is likely to be of greater relevance is in respect of crimes committed in the name of the 'war on terror' where there has yet to be meaningful accountability of state agents, including high level officials, but where attempts to ensure their '*de facto*' immunity are already apparent.[188]

4A.1.3 Jurisdiction to prosecute

International law and practice point to numerous possible fora for the investigation and prosecution of serious terrorist offence, or responses thereto that amount to serious offences under international law. This section will explore these jurisdictional possibilities, and the relationship between them.

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185 *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo* v. *Belgium*), Judgment of 14 February 2002. The case – concerning a Belgian arrest warrant issued against the incumbent foreign minister of the Democratic Republic of the Congo – found that the immunity of a sitting foreign minister from prosecution in domestic courts is absolute.

186 For a critique s*ee* A. Clapham, 'Human Rights, Sovereignty and Immunity in the Recent Work of the International Court of Justice', 14.1 (2002) *INTERIGHTS Bulletin* 29. The significance of the case is limited to prosecution before national (as opposed to international) courts and, most importantly, to sitting (as opposed to former) foreign ministers, providing at most partial, short-term refuge for persons who abuse high office to commit serious crimes. The judgment does not suggest that other high-ranking officials, or other ministers such as Defence Ministers, are similarly protected.

187 The law on amnesty brings into question, e.g., the lawfulness of reported offers of amnesty to Saddam Hussein made by the American administration prior to the Iraq invasion. Questions of immunities may also have arisen if a foreign national court had sought to prosecute him while a sitting head of state, but not once deposed, or if he had been tried by an an international tribunal.

188 Immunities were argued in the Italian prosecution, in absentia, of several CIA officials in the Abu Omar case. *See* B.5 below 7B.14 and Chapter 10. The Military Commissions Act of 2006 (4) has been described as enshrining 'de facto immunity', for U.S. officials' conduct that may violate Common Article 3 but that falls short of the MCA definitions of grave breaches'. For condemnation of a state affording impunity to its officials responsible for counter terrorism, *see*, *e.g.*, Concluding observations of the Human Rights Committee: Russian Federation, UN Doc. CCPR/CO/79/RUS (2003).

4A.1.3.1 National courts and crimes of international concern

International law recognises the right of certain states to exercise criminal jurisdiction. These are principally the state where the crime occurred, the state of nationality of suspects, the state of nationality of the victims and, for certain serious international crimes, all states, based on universal jurisdiction.[189] To take the example of the September 11 crimes, the courts of the United States provide the natural forum, based on the fundamental principle that jurisdiction can be exercised by the state on whose territory a crime is committed. Nationals of several states are suspected of having been involved in the perpetration of the attacks and many other states lost nationals, in particular in the World Trade Centre attack, on the basis of which international law allows them to exercise nationality or passive personality (victim nationality) jurisdiction respectively.[190]

Under international law, any state may exercise jurisdiction over certain serious crimes, such as crimes against humanity or war crimes, on the basis that they injure not only individual victims but the international community as a whole.[191] Customary international law has long provided for jurisdiction over such crimes[192] and certain international agreements explicitly so pro-

189 As noted below, under universal jurisdiction, a state can prosecute certain serious crimes irrespective of any link between the state and the offence. The principle *aut dedere aut judicare* – the obligation to extradite or prosecute – found in numerous treaties, is a sub-species of universal jurisdiction conditioned on the presence of the suspect on the state's territory. *See generally* Kress, 'Universal Jurisdiction over International Crimes and the Institut de droit international', (2006) 4 JICJ 561.

190 Some treaties embrace broad universal jurisdiction while numerous terrorism related treaties anticipate prosecution by states beyond the territorial state, such as the state of the perpetrator's or victim's nationality: *see*, *e.g.*, the 1970 Hague Convention; the 1971 Montreal Convention; the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents; the 1994 Convention on the Safety of United Nations Peacekeepers, and the 1998 International Convention for the Suppression of Terrorist Bombings.

191 *See* C. Hall and H. deRelva, *Universal Jurisdiction:* Updated preliminary survey, Amnesty International, (IOR 53/019/2012), available at: http://www.amnesty.org/en/library/info/IOR53/019/2012/en (providing a thorough survey of universal jurisdiction laws in states around the world).

192 Restatement (Third), Foreign Relations Law of the United States (1987), § 702, includes, as subject to universal jurisdiction, murder as well as causing the disappearance of individuals, prolonged arbitrary detention and systematic racial discrimination. O. Schachter, *International Law in Theory and Practice* (Dordrecht, 1991) (listing 'slavery, genocide, torture and other cruel, inhuman and degrading treatment' as falling into this category); *see also* Scharf, 'Application of Treaty-Based Universal Jurisdiction', at 363 (including piracy, war crimes and crimes against humanity). The 1949 Geneva Conventions provisions on universal jurisdiction are customary. *See also* Hall and Relva, *ibid*.

vide.[193] If terrorist attacks amount to crimes that carry universal jurisdiction, notably crimes against humanity or war crimes, states may exercise universal jurisdiction in respect of these serious offences. Many states have universal jurisdiction laws in place,[194] to ensure that they can exercise this form of jurisdiction.[195] National courts have relied on this jurisdiction to prosecute a range of crimes under international law, including war crimes and crimes against humanity.[196]

Moreover, states that do not yet have such legislation in place[197] affording them jurisdiction when a major attack arises, could enact legislation to confer universal jurisdiction provided the conduct pursued was criminal at the date of commission. The cardinal human rights principle of legality and non-retroactivity in criminal law requires that the *conduct* be criminal at the date when it was carried out, not that *jurisdiction* over the conduct be established at that time.[198] The international criminal tribunals established *ex post facto* have themselves addressed this question and found that legality did not necessarily require that the court was 'pre-established' but that it was established 'in

193 *See*, *e.g.*, the grave breaches provisions of the Geneva Conventions on 'the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches … and … bring such persons, regardless of their nationality, before its own courts Convention Against Torture.

194 Through the implementation of the ICC Statute, a number of states have enacted universal jurisdiction legislation which enables those that could not previously to exercise such jurisdiction over genocide, crimes against humanity and war crimes:*see, e.g.*, International Crimes and International Criminal Court Act 2000 (New Zealand), available at: http://rangi.knowledge-basket.co.nz/gpacts/public/text/2000/an/026.html ; and Crimes Against Humanity and War Crimes Act 2000 (Canada), available at: www.parl.gc.ca/36/2/parlbus/chambus/house/bills/government/C_19_C-19_4/C-19_cover-E.html.

195 *See* Amnesty International, *Universal Jurisdiction*, *supra* note 191. As a matter of international law, states can and in some cases must exercise jurisdiction, but domestic law may require a legislative basis for the exercise of jurisdiction.

196 *See*, *e.g.*, *re Demjanjuk* or *United States* v. *Otto*, *Attorney General of Israel* v. *Eichmann*; case of Ntezimana, Higaniro, Mukangango and Mukabutera, decision of 8 June 2001 of the *Court d'Assise* of Bruxelles among others concerning the Rwandan genocide (http://www.asf.be/AssisesRwanda2/fr/fr_VERDICT_verdict.htm); *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [1999] 2 WLR 272 (H.L.), reprinted in 38 (1999) ILM 430; 'Universal Jurisdiction: Strengthening this essential tool of international justice', Amnesty International, 9 October 2012, IOR 53/020/2012, available at: http://www.amnesty.org/en/library/info/IOR53/020/2012/en ; *see also* 'Universal Jurisdiction in Europe: The State of the Art', HRW, 2006, available at: http://www.hrw.org/reports/2006/06/27/universal-jurisdiction-europe.

197 Amnesty International indicates that 166 of the 193 UN member states have defined one or more of four crimes under international law (war crimes, crimes against humanity, genocide and torture) as crimes in their national law. In addition, the update notes that 147 out of 193 states have provided for universal jurisdiction over one or more of these crimes. Amnesty International, *Universal Jurisdiction*, *supra* note 191.

198 *See* Article 15(2) ICCPR. *See also Streletz, Kessler and Krenz* v. *Germany* (App. Nos. 34044/96, 35532/97 and 44801/98), Judgment of 22 March 2001, ECtHR, *Reports 2001-II*. *See* Paust, 'Prosecution of Mr. bin Laden', *supra* note 131.

keeping with the relevant procedures' and that it 'observes the requirements of procedural fairness'.[199] The development of universal jurisdiction has not been linear, with periods of expansion and recent examples of a more restrictive approach to the circumstances in which this jurisdiction can or should be exercised by states.[200]

As reflected perhaps in the fact that universal jurisdiction has not emerged as a central theme in discussions around the prosecution of terrorism post-9/11, there is support, in principle, for the priority of the territorial state's right and responsibility to exercise jurisdiction. The relevance and utility of universal jurisdiction, like other jurisdictional bases, is most apparent in circumstances where the territorial state cannot or will not exercise jurisdiction,[201] or arguably where it cannot or will not prosecute according to basic standards of international justice that justify international support and cooperation.[202] As stated by the OAS '[T]he principle of territoriality must prevail in the case of a jurisdictional conflict, provided that there are adequate, effective remedies in that state to prosecute such crimes and guarantee the application of rules of due

199 *See Tadić* Jurisdiction Appeal Decision, *supra* note 24 at para. 45. For an analysis of the principle of the pre-established or 'natural' judge, including its historical development, *see* J.B.J. Maier, *Derecho Procesal Penal. Tomo I* (Buenos Aires, 1996), pp. 763 ff and Article 26(2) American Declaration of the Rights and Duties of Man.

200 On the 'decline of universal jurisdiction', *see* R. Cryer, H. Friman, *et al.*, *An Introduction to International Criminal Law and Procedure*, *supra* note 31 at p. 55-58 (noting the expansive approach taken by some states, such as Belgium and Spain, in recent years having lead to attempts to restrict the laws). A relevant factor for the former was the *Arrest Warrant* case, *supra* note 185. In October 2009 the Spanish Senate restricted the country's extra-territorial jurisdiction to crimes that have a demonstrated link with Spain and are not investigated or prosecuted by another competent country or international tribunal. *See also* 'Universal Jurisdiction: Strengthening this essential tool of international justice', Amnesty International, *supra* note 191.

201 Note that unlike the ICC, which will only exercise jurisdiction where no national court is willing or able to do so, there is no established rule of subsidiarity for universal jurisdiction. However, a similar approach is increasingly evident in practice. *See*, *e.g.*, OAS Resolution 1/03 notes 'that the principle of territoriality should prevail over that of nationality in the event that the state where the international crimes occurred wishes to bring them to justice, and that it offers due guarantees of a fair trial to the alleged perpetrators' (para. 5). *See also* the decision of the Criminal Decision of the Spanish National Court on genocide, terrorism and torture allegedly committed in Guatemala during the 1980s, and the comment by M. Cottier, 'What Relationship Between the Exercise of Universal and Territorial Jurisdiction? The Decision of 13 December 2000 of the Spanish National Court Shelving the Proceedings Against Guatemalan Nationals Accused of Genocide', in Fischer, Kreß and Lüder (eds.), *Prosecution of Crimes*, pp. 843 ff.; *see also* the *Princeton Principles on Universal Jurisdiction* (Princeton University, 2001), available at: http://www.princeton.edu/~lapa/unive_jur.pdf. On undue deference to US authorities on this basis in the war on terror context, *see* below and Chapter 7B14.

202 For discussion of the limits imposed by human rights law on cooperation in criminal matters *see* below, Chapter 7A.4.3.8.

process for the alleged perpetrators, and that there is an effective will to bring them to justice'.[203]

As discussed in the context of post-9/11 practice below and in other chapters, the neglect of criminal law in some contexts as well as the politicisation and lack of due process in terrorism trials may however serve as a reminder of the importance of such 'alternative' jurisdictions. Where denial of justice ariese within the territorial state, prosecution of international crimes may arise before the courts of other states willing to see justice done or, as discussed in the next section, international alternatives.[204]

So far as national courts do exercise jurisdiction over international crimes under international law, it has been suggested that they are normally 'under an obligation to interpret the domestic provisions in accordance with the interpretation of equivalent international provisions, including those made by international criminal tribunals'.[205] What has been described as a 'bizarre and unfortunate' exception to that is the US Military Commissions Act of 2006 which prohibits courts from relying on international legal sources in relation to war crimes.[206]

4A.1.3.2 International alternatives

Where national courts do not or cannot assume the investigative and prosecutorial role, recent history provides several alternative international, or quasi-international, models for the investigation or prosecution of international crimes.

a) The ICC, terrorism and counter-terrorism

The Statute establishing the International Criminal Court (ICC) was adopted in Rome on 17 July 1998, entering into force on 1 July 2002. The Court does not have retrospective jurisdiction, and cannot therefore prosecute crimes committed before the Statute's entry into force,[207] although the Security Council could, at least theoretically, confer jurisdiction on the ICC over offences before entry into force, in accordance with its Chapter VII powers.[208]

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203 Preamble OAS Resolution 1/03 on 'Trial for International Crimes', Washington DC, 24 October 2003.

204 *See* Chapters 10 and 7B14.

205 *See* Cryer & Friman, *supra* note 31 at p. 77 (citing the *Jorgic* case at the German constitutional court, 12.12.2000).

206 *Ibid.*, citing Matheson, 'The Amendment of the War Crimes Act', AJIL 2007.

207 ICC Statute, *supra* note 4 at Article 11.

208 This would mirror the establishments of *ad hoc* criminal tribunals in the past. If the Security Council so decided, it has been questioned whether the ICC would be able to accept such jurisdiction: *see*, *e.g.*, C. Greenwood, 'International Law and the "War against Terrorism"', 78 (2002) *International Affairs* 301. In relation to 9/11, this was not a realistic option given *inter alia* US opposition and its veto power within the Council.

While the relevance of the ICC in the 'war on terror' is considered in Part B of this chapter,[209] certain characteristics of the ICC, pertinent to an assessment of its relevance to terrorism and counter-terrorism in the post-9/11 world, are worthy of note here. The Court has jurisdiction over genocide, crimes against humanity and war crimes committed in international or non-international armed conflict and, with effect from 2017, the crime of aggression.[210] Moreover, while not presently covered by the ICC Statute, it is also at least conceivable that 'terrorism' as a specific crime, comprising a broader ambit of conduct, may come to be included within the ICC Statute at some future date.[211]

In order for offences to be tried by the ICC, however, the Court's jurisdiction must be triggered in accordance with the Statute, which can be done in several ways.[212] The Security Council, which has repeatedly called for justice responses to international terrorism post- September 11, could confer jurisdiction on the Court as it has in other cases, unless the veto power prevented this.[213] Absent Council referral, the Court's jurisdiction depends on the state on whose territory the atrocities were committed, or a state whose nationals are suspected of responsibility, having ratified the Statute or accepted the Court's jurisdiction.[214] Nationals of a state party are therefore potentially subject to the Court's jurisdiction.[215] Jurisdiction over nationals of non-states

209 *See* Chapter 4, para. 4B.1.2.2 below.

210 *See* Article 8*bis* of the amended Statute. *See* above, para. 4A.1.1.3 for discussion of the exercise of jurisdiction over aggression. Although the ICC review conference approved the amendment, it requires a further decision to activate the amendment, which will take effect only after 1.1 2017. *See also* Article 15*bis* for the special conditions attaching to the exercise of jurisdiction over aggression.

211 SC Res. 1377 (2001) called for such inclusion; *see* 'The ICC: 9/11, Afghanistan, Iraq and Beyond', Chapter 4, para. 4B.1.2.2 below.

212 ICC Statute, *supra* note 4 at Article 13 'Exercise of Jurisdiction', which provides for referral by (a) the Security Council or (b) by a state party or (c) a *propio motu* investigation by the Prosecutor as triggering jurisdiction. In respect of the last two, however, the 'preconditions for the exercise of Jurisdiction' in Article 12 must be satisfied, namely that the state of territory or of nationality is a state party.

213 ICC Statute, *supra* note 4 at Article 13. The Security Council used its powers to refer several situations to the Court in the first decade of its life: Libya (SC Res. 1970 (2011), 26 February 2011, UN Doc. S/RES/1970); and Sudan (SC Res. 1593 (2005), 31 March 2005, UN Doc. S/RES/1593). By contrast, the failure to refer Syria in 2011-12 has drawn harsh criticism. The Court does not depend on SC referral or approval (Article 13), provided there is a link via the state of territory or nationality as discussed below (Article 12: preconditions for the exercise of Jurisdiction).

214 ICC Statute Article 12. Cote d'Ivoire fell into the latter category, being the first non-state party to the state to accept the courts jurisdiction. *See* 'Declaration Accepting the Jurisdiction of the International Criminal Court', ICC, http://www.icc-cpi.int/NR/rdonlyres/FBD2D966-93CF-4A86-B590-46293E819A65/279844/ICDEENG5.pdf. For the Cote d'Ivoire litigation, *see Prosecutor* v. *Gbagbo*, ICC-02/11-01/11.

215 *See* P. Sands, 'Our Troops Alone Risk Prosecution', *The Guardian*, 15 January 2003.

parties would depend on the state on whose territory the crime is committed being a party or accepting jurisdiction.[216]

Critically, however, ICC jurisdiction will only operate where the state itself does not take necessary and reasonable measures to investigate or prosecute allegations of serious crimes.[217] The design of the ICC regime is thus, in significant part, to act as a catalyst to effective national prosecutions.

b) The role of other international, regional or hybrid ad hoc tribunals

Under Chapter VII of the UN Charter, the Security Council has broad powers to take measures for international peace and security, as discussed in Chapter 5, below. In 1994 it exercised those powers to establish two international criminal tribunals for Rwanda and the former Yugoslavia. It is therefore possible for the Security Council to establish a tribunal or, as has been suggested, to extend the jurisdiction of an existing tribunal, to prosecute serious offences of international concern.[218]

International experience also points to hybrid models of quasi-international justice that have emerged from negotiation and agreement. The approach of the Nuremberg tribunal suggests that several states can agree together to establish an international tribunal, conferring on it the power to do 'what any one of them might have done singly', namely prosecute on the basis of one of the grounds of jurisdiction mentioned above.[219] Similarly, an agreement between the UN and Sierra Leone led to the Statute of the Special Court for Sierra Leone,[220] which combines elements of national law, procedure and personnel with international components.[221] Other examples that might be described as predominantly domestic tribunals, but with an international

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216 As noted above, before the ICC can act, the state of territory or nationality of the accused must be a party to the ICC treaty or accept the Court's jurisdiction. Article 12, ICC Statute.

217 *See* the relationship of 'complementarity' between the ICC and national tribunals in ICC Statute, Preamble and Articles 17-19. Whether ICC jurisdiction should be conditioned on national courts meeting certain standards of justice is a matter for debate and subject of ICC litigation in relation to Libya. The '*ad hoc* tribunals for the Former Yugoslavia and Rwanda, by contrast, established the 'primacy' of the international tribunals over national courts but they may have been premised implicitly on the unavailability or ineffectiveness of national courts in the former Yugoslavia and Rwanda at the time in question.

218 G. Robertson, 'There is a legal way out of this ... ', *The Guardian*, 14 September 2001 (calling for an international or quasi-international tribunal abound in the context of Iraq). The ICC could also be afforded jurisdiction by the Security Council.

219 The Nuremberg Judgment reasoned that: 'The signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. *In doing so, they have done together what any one of them might have done singly*' (emphasis added), 'International Military Tribunal (Nuremberg), Judgment and Sentences', 41 (1946) AJIL 216.

220 Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc. S/2000/915.

221 *See* Statute of the Special Court for Sierra Leone, 2178 UNTS 138, 145; 97 AJIL 295; UN Doc. S/2002/246, appendix II.

aspect, are the human rights court established by the United Nations in East Timor[222] or the tribunal established by the Cambodian government to prosecute the crimes related to the Cambodian genocide.[223]

The Special Tribunal for Lebanon has a similarly hybrid nature, but is noteworthy as a tribunal established by agreement between the government and the Security Council to investigate and prosecute those responsible for a specific terrorist incident, namely the killing of former Prime Minister Harari in Beirut on 14 February 2005.[224]

The *Lockerbie* court presents an unusual model that emerged from the diplomatic impasse over the refusal to extradite suspects in the 1988 bombing.[225] It took the form of a national court sitting on foreign soil, applying mostly national law, with the exception that there was no jury. This arose as a compromise solution in the face of allegations as to the inability of the Scottish courts to dispense fair and impartial justice in the particular case. While unlikely to gain traction in practice in the future, this scenario could similarly be invoked to address concerns as to the potential prejudice to the fairness of trials, of relevance in a world where 'terrorism' trials have often come to be synonymous with abusive processes.[226]

Whether the establishment of any of the models of *ad hoc* jurisdiction remains a feature of international practice in the future is uncertain, as the rationale for them should in principle be undermined by functioning national courts capable and willing of doing justice, supplemented by a permanent ICC.

Other proposals for future jurisdictions have emerged, though these are of less apparent significance, at least as yet. Worthy of note are proposals for a future African regional criminal jurisdiction, an expansion of the nascent African Court on Justice and Human Rights, which have essentially been triggered by tension between the African Union and the ICC over the indictment of president Bashir of Sudan. Whether the proposal will survive and the expanded jurisdiction ever become a reality remains far from certain, but it is noted that terrorism is one of the crimes that proponents suggest would

222 The United Nations Transitional Administration in East Timor (UNTAET) established such a system in the Dili district to investigate international crimes that had occurred during 1999.

223 The Cambodian government agreed to create a hybrid court in which Cambodian judges would be in the majority, with international judges having a right of veto.

224 Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, S/2006/176, 21 March 2006.

225 Flight Pan Am 103 was bombed in the airspace over Lockerbie, Scotland, killing 259 people on board and 11 residents of Lockerbie.

226 *See* Chapter 7 on fair trial and Chapter 8 on Guantánamo Bay and military commissions specifically.

fall within any such jurisdiction.[227] While discussions have also unfolded in an academic context as to merits of an alternative 'international terrorism court', practice post-9/11 reveals little appetite for such a development, and tend by contrast to underscore the importance of the role of national courts, bolstered by more effective international cooperation, as discussed further in Part B below.[228]

4A.2 IMPLEMENTING JUSTICE: INTERNATIONAL COOPERATION AND ENFORCEMENT IN CRIMINAL MATTERS

The international criminal justice approach to international terrorism depends, naturally, on international enforcement.[229] International cooperation, in matters of extradition and 'mutual assistance' between states, is essential for the purposes of, for example, arresting and transferring suspects, freezing assets and securing evidence.[230] As discussed below, rules governing cooperation are, in general, set out in multilateral and bilateral arrangements. These are supplemented by other obligations – imposed for example by the Security Council or assumed in international treaties including the sectoral terrorism treaties. They sit alongside other provisions of international law, notably international human rights law which reflects such obligations, but imposes conditions on cooperation.

4A.2.1 Extradition

The duty to extradite may arise from bilateral or multilateral extradition treaties, which also enshrine exceptions to this duty.[231] Crimes under international law are considered so serious that states are obliged to extradite persons found on their territory, or to submit them for prosecution in their

227 D. Deya, 'Is the African Court worth the Wait', 22 March 2012, available at: http://allafrica.com/stories/201203221081.html. The AU has defined terrorism in its Counter-terrorism Convention, which may pave their way for agreement on the scope of the expanded jurisdiction of the Court in relation to terrorism in Africa.

228 *See*, *e.g.*, discussion of proposls set out in E. Creegan, 'A Permanent Hybrid Court for Terrorism', 26 (2011) *American Univ. Int'l Law Rev.* 2, p. 237.

229 The enforcement considered here is for the purposes of ensuring effective criminal prosecution, as opposed to enforcement of judgments and sentences.

230 Cooperation arises also in relation to, for example, the transfer of sentenced persons, transfer of proceedings, protection of victims and witnesses and effecting compensation.

231 States may, and increasingly do, extradite on the basis of national law without a treaty or arrangement, in accordance with the desire to improve international cooperation in respect of serious offences.

own state (*aut dedere aut judicare*).[232] Several of the sectoral terrorism treaties similarly so provide.[233] Moreover, Security Council resolutions dealing with counter-terrorism post September 11 asserted a clear duty on UN member states to deny safe haven to terrorists and to bring them to justice.[234] In 2006 the UN General Assembly also reiterated this imperative in its Global Counter-Terrorism Strategy.[235] As discussed further below, alongside this duty, is the duty under human rights law not to extradite where there is a real risk that the fugitive would be subject to certain serious human rights violations in the state requesting extradition.[236] A state's obligations in respect of extradition must therefore be understood not only by reference to extradition treaties, but also to other provisions of international law.

4A.2.1.1 Key features of extradition law

Most problems with international cooperation relate to variable degrees of political will to cooperate. However, extradition regimes have also often been criticised for their complexity, resulting in obstacles, delay in justice enforcement, and potentially denial of justice, which in turn provide a disincentive to states to respect the legal process.[237] Attempts to reform and modernise law and procedures, including the removal of domestic obstacles to extradition and streamlining procedures were underway before September 11 and were further impelled by those events, as discussed in part B of this chapter.[238] Alongside these developments have been others in human rights law that seek to ensure protection for the person whose extradition is requested. Together

232 This duty *aut dedere aut judicare* – to extradite or prosecute – is enshrined explicitly in various human rights instruments, such as the Convention against Torture, Article 5, and interpreted as implicit in the positive duty to ensure rights under more general human rights instruments: *see* Chapter 7A.4 'Positive Obligations'.

233 The principle is also reflected in specific terrorism conventions: *see, e.g.*, Article 7, Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970, 860 UNTS 12325, in force 14 October 1971); Article 5(2), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971, 974 UNTS 14118, in force 26 January 1973); Article 7, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (New York, 14 December 1973, 1035 UNTS 15410, in force 20 February 1977); Article 8(1) International Convention against the Taking of Hostages (New York, 18 December 1979, 1316 UNTS 21931, in force 3 June 1983).

234 SC Res. 1373, *supra* note 132.

235 UN Global Counter-Terrorism Strategy, 8 September 2006, UN Doc. A/RES/60/288.

236 *See* this chapter, para. 4A.2.1.2.

237 For a discussion of some of those obstacles *see* Koufa, 'Progress Report', *supra* note 133, para. 127 (citing evidence requirements, '*forum non conveniens*' concerns, including defendants' rights issues). Generally, and on exceptions such as 'nationality' and 'political offences', *see also* C. Van den Wyngaert, *The Political Offense Exception to Extradition* (Dordrecht, 1980), pp. 148-9. For efforts to enhance cooperation *see* 'Developments' below; and du Plessis, 'A Snapshot', *supra* note 8.

238 *See* in particular para. 4B.2.

they have significantly changed the shape of extradition law in recent years; these developments are to be welcomed so far as they enhance effectiveness, minimise arbitrariness and safeguard essential human rights protection.

While multiple bilateral and multilateral extradition treaties exist, each with their own specific provisions, among the traditional principles of extradition law that can be identified from common features of extradition treaties and practice are the following.[239]

– *Double criminality and 'Extraditable Offences'*: most extradition arrangements have traditionally provided that an act is only extraditable if it is punishable as a crime according to the laws of both the requesting state and the requested state, or according to international law. In general, the crime need not itself be identical – if the request is for extradition for 'terrorism' offences for example the requested state need not also have an offence of terrorism in domestic law – but the conduct that forms the basis of the offence must be punishable in both states, often by a minimum specified penalty.[240] It is open to debate whether this requirement poses an obstacle to efficient cooperation in terrorism matters, or an important safeguard against abuse in the context of the amorphous and/or politicised nature of some 'terrorism' prosecutions.[241]

– *Specialty and re-extradition*: it is a general rule that, once extradited, a suspect must be tried only for the crime or crimes covered in the extradition request, and only in the requesting state, unless the consent of the extraditing state is secured.

– *Ne bis in idem* (double jeopardy): as a person may not be tried twice in respect of the same offence, in certain circumstances the state need not extradite if there has been a final judgment against the suspect in respect of the conduct in question. Different manifestations of this principle appear in extradition and human rights treaties.[242]

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239 *See also* UN Model Treaty on Extradition, GA Res. 45/116, annex, UN Doc. A/45/49 (1990), 30 ILM 1407. For a discussion *see* R. Cryer, H. Friman, *et al.*, *An Introduction to International Criminal Law and Procedure*, *supra* note 31, pp. 89-93. Others, such as the non-extradition of nationals in some constitutions are not addressed here. Duffy, 'Constitutional Compatibility', *supra* note 182 at p. 20.

240 In recent years some States have moved from a 'list approach' to extradition which eliminates the need to set out all the relevant offences in a subsidiary document and replaces it with a test based on the applicable penalty.

241 See changes in 4B222. It would be important to have a substantive rather than listing approach if the principle is to protect from prosecuting legitimate activity, as discussed in Chapter 7B.11.

242 Surprisingly, human rights treaties would appear only to protect only against prosecution twice in the same state;*see* M.J. Bossuyt, *Guide to the 'travaux préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht, 1987), pp. 316-18 and the decisions of the Human Rights Committee in *ARJ* v. *Australia* (Comm. No. 692/1996), Views of 28 July 1997 and *A.P.* v. *Italy* (Comm. No. 204/1986), Decision of 2 November 1987, UN Doc. CCPR/C/31/D/204/1986. However, a broader application of the *ne bis in idem* principle to extradition

– *Non-extraditable offences and the political offence exception*: to protect against extradition for politically motivated prosecution, and the potential involvement of foreign states in domestic political entanglements, an exception to obligations to extradite developed for crimes considered to be political in nature.[243] This exception has however increasingly been removed from international and national extradition provisions, in particular in respect of certain types of serious crimes such as the crimes under international law discussed above.[244] In relation to terrorism specifically, modern treaties generally exclude the political offence exception,[245] and indeed the Security Council, in Resolution 1373 (2001) insisted that states ensure 'that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists'.[246]

– *Prima Facie Evidence*: while extradition procedures vary considerably, not least between common law and civil law countries, often in extradition practice a request for extradition is accompanied by a warrant and basic evidence, sometimes referred to as '*prima facie*' evidence, or a showing of 'probable cause'.[247] Extradition proceedings are not a mini-trial and the evidence required is clearly much less than would be required to satisfy the requested state of the guilt of the suspect; clearly the investigation need not be complete before the extradition is requested (nor need all available evidence be provided to the requested state). However, extradition (and the detention which accompanies it) should not be requested unless or until the evidence provides reasonable grounds to suspect the individual of having committed the offence,[248] and the requirement of sharing a basic degree of evidence was considered

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is contained in many extradition treaties including, for example, Article 9 of the European Convention on Extradition, Paris, 13 December 1957, ETS No. 24, in force 18 April 1960.

243 For background *see* Van den Wyngaert, *The Political Offense Exception to Extradition* (Dordrecht, 1980).

244 It is commonly recognised that the political offence exception does not cover crimes under international law, and international agreements expressly so provide. *See*, *e.g.*, the 1979 Additional Protocol to the 1957 European Extradition Convention; UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 8; UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 18; Inter-American Convention on the Forced Disappearance of Persons, Article 5. *See generally*, C. Van den Wyngaert, *The Political Offense Exception*, pp. 134 ff.

245 The European Convention on the Suppression of Terrorism, Strasbourg, 27 January 1977, ETS No. 90, excludes the political offence exception as do the United Nations Convention for the Suppression of Terrorist Bombings and the United Nations Convention for the Suppression of the Financing of Terrorism, 9 December 1999, UN Doc. A/RES/54/109 (1999).

246 SC Res. 1373, *supra* note 132 at para. 3(g).

247 This is, traditionally, the position in common law countries while some civil law jurisdictions require a judicial order and sufficient information to establish dual criminality, rather than 'evidence' as such.

248 Proceedings must be consistent with the right to liberty and related safeguards, *see*, *e.g.*, Article 9 ICCPR and Chapter 7A.5.3 and 7.7.

one way of ensuring that this is the case. However, as described in relation to developments post September 11 below, in certain contexts the requirement has been watered down in the name of streamlining the extradition process and effectively countering terrorism.[249]

– *Non-inquiry*: The principle that states will not inquire into the good faith of another state's request is long established in many states,[250] but is subject to qualification as a matter of national and international law.[251] At its strictest, such a rule might preclude the requested state from considering any evidentiary questions and require it to be blind to the circumstances of the trial and treatment of the suspect in the requesting state, neither of which reflect current international law and practice. While domestic courts are not obliged (nor necessarily well placed) to actively engage in a detailed assessment of another state's system, they are obliged under human rights law not to extradite where there are substantial grounds for believing that the person's rights would be violated in the requesting state, as explained below.[252]

4A.2.1.2 Extradition and human rights

In its totality, the legal framework governing extradition seeks to accommodate the essential balance between ensuring an effective system of inter-state co-operation and protecting the rights of the individual.[253]

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249 *See* Chapter 4B.2.3, in relation to the European Council Framework Decision on the European Arrest Warrant and the Surrender Procedure between Member States, 13 June 2002 (2002/584/JHA), OJ L 190/5, 18 July 2002 (hereinafter 'European Arrest Warrant'). *See also* the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America (Washington, 31 March 2003) (hereinafter 'US-UK Extradition Treaty').

250 It is described as a rule of customary law in I. Bantekas, M. Nash and S. Mackarel, *International Criminal Law* (London, 2001), p. 149. *See* Cryer & Friman, *et al.*, *supra* note 31 at p. 94 (describing it as a feature of common law states); and J. Dugard and C. van den Wyngaert, 'Reconciling Extradition with Human Rights', 92 (1998) *AJIL* 188, 190 (noting that the rule traditionally applied in, *e.g.*, US, UK and Canada, but not in continental European countries).

251 On national restrictions, *see* Dugard and Van den Wyngaert, 'Reconciling Extradition', *ibid.* at pp. 190-91. On international legal restrictions *see* Chapter 7A5.10.

252 When extradition is requested a minimal duty of inquiry may be implicit in human rights obligations to ensure the individual will not be transferred in face of real risks of serious violations. This duty may arise before extradition or – where extradition is granted subject to assurances for example – thereafter (*see*, *e.g.*, Concluding observations of the Human Rights Committee: Sweden, UN Doc. CCPR/CO/74/SWE (2002), para. 12; *Othman (Abu Qatada)* v. *UK*, (Appl. No. 8139/09), ECHR Judgment of 12 January 2012.

253 'To require such a review [by courts in the extraditing state] of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned. *The Contracting States are, however, obliged to refuse their cooperation if it emerges that the conviction is the result of a flagrant denial of justice*.' *Drozd and Janousek* v. *France and Spain* (Appl. No.

While most general human rights treaties do not address extradition explicitly, it is well established that the obligations of states to protect and ensure the human rights of individuals within their jurisdiction extend to declining to extradite (or otherwise deport or expel) persons to states where certain of their rights are at serious risk of violation.[254] As discussed more fully in Chapter 7, human rights treaties and the decisions of human rights bodies interpreting obligations on a case-by-case basis, indicate a prohibition on extradition where there is substantial risk of, *inter alia*, torture, inhuman and degrading treatment or punishment, in certain contexts the application of the death penalty, prolonged arbitrary detention or a 'flagrant denial' of fair trial rights.[255]

Many of these prohibitions have developed from violations arising commonly in the terrorism context. They may arise from the criminal process itself – the lack of fundamental fair trial guarantees or independence of the tribunal for example – or the conditions of pre-trial or post-conviction detention. It falls to be determined case-by-case whether there is a 'real and personal' risk of a serious rights violation in the receiving state.[256]

Extradition documents broadly reflect these obligations, although not consistently or systematically. The Inter-American Convention on Extradition, for example, precludes extradition 'when the offense in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment' unless sufficient assurances have been obtained previously,[257] while the European Convention on Extradition makes explicit

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12747/87), 26 June 1992, ECtHR, *Series A*, No. 240, para. 110 (emphasis added). The obligation not to transfer to flagrant denial of justice was found to constitute a violation in *Othman* v. *UK*, *supra* note 252.

254 This principle of 'non-refoulement' is discussed in detail in Chapter 7A.4.5.10 B5.10.

255 It remains open whether the same principle applies to other rights violations under these conventions, as discussed in Chapter 7. The express prohibition of extradition or surrender in cases where some of the rights protected would be likely to be infringed in the requesting state is also contained in certain human rights treaties or instruments. *See*, *e.g.*, ACHR (Article 22(8)), UN Convention against Torture (Article 3), and European Charter of Fundamental Rights (Article 19). See also Art. 33 Convention Relating to the Status Refugees (Geneva, 28 July 1951, 189 UNTS 150, in force 22 April 1954) expressly prohibiting *refoulement* of asylum seekers to a country where '[their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion.'

256 *See, e.g.*, *Othman*, *supra* note 252, where the ECHR found that the transfer to trial of the applicant in Jordan by a military commission which admitted evidence obtained through torture, would amount to a flagrant denial of justice. Cf extraditing terrorist suspects to imprisonment in a super-max prison in the US did not amount to inhuman treatment: *Case of Babar Ahmad and Others* v. *The United Kingdom*, Appl. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Judgment, 10 April 2012, paras. 200-215.

257 Inter-American Convention on Extradition, Caracas, 25 February 1981, *OAS Treaty Series* No. 60, in force 28 March 1992, Article 9 prohibiting transfer absent sufficient assurances that the death penalty, life imprisonment, or degrading punishment will not be imposed or, if imposed, not enforced.

reference only to the death penalty or discriminatory proceedings.[258] The UN Model Treaty on Extradition suggests that extradition be precluded where the requested State has substantial grounds to believe human rights norms on (a) discrimination, (b) torture, cruel and inhuman treatment and punishment, (c) minimum guarantees in criminal proceedings as contained in the ICCPR would not be respected, or (d) that the judgment of the requesting State has been rendered *in absentia* without the accused having the opportunity to present a defence.[259] While these provisions generally derive from – and must be interpreted by reference to – human rights jurisprudence, they may also include other issues, such as the ban on life imprisonment, peculiar to particular constitutional traditions.[260]

States may seek to reconcile their commitment and obligations in respect of cooperation with human rights protection in various ways. Not uncommonly, states seek 'assurances' from the requesting state that it will act or refrain from acting in a certain way, but as human rights bodies have recently noted, this only meets their obligations so far as accompanied, in all the circumstances, by genuine post-transfer safeguards for the persons extradited, including effective monitoring by the sending state. It is thus emphasised that the sending state's responsibility for the rights of the person continues after extradition, by virtue of the act of expulsion. States may, alternatively, be in a position to prosecute rather than extradite, in accordance with the *aut dedere aut judicare* principle applicable to certain serious offences discussed above; to this end states may take legislative measures to ensure that domestic law recognises jurisdiction over serious crimes committed outside the state's territory.[261]

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258 Article 11 of the European Convention on Extradition of 1957 addresses the right to refuse extradition in the context of the death penalty. See also Article 3(2) excluding extradition where it is 'for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons'.

259 *See* UN Model Treaty on Extradition 1990, Article 3, which precludes extradition where the requested state has substantial grounds to believe human rights norms on (a) discrimination, (b) torture, cruel and inhuman treatment and punishment, (c) minimum guarantees in criminal proceedings would not be respected or (d) 'the judgment of the requesting State has been rendered *in absentia*, [and] the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence'. Article 4 adds optional grounds for refusing extradition including in relation to the death penalty.

260 For example, life imprisonment is prohibited in several constitutions, particularly but not exclusively in Latin America, so certain extradition treaties treat life imprisonment. *See, e.g.*, Inter-American Convention on Extradition above. While not prohibited by human rights law *per se*, life imprisonment where there is no prospect of early release may raise an issue of inhuman treatment, e.g., under Article 3 of the ECHR: *see Einhorn* v. *France* (Appl. No. 71555/01), Admissibility decision, 16 October 2001, para. 27; *Babar Ahmed v UK* (Appl. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09)), 10 April 2012

261 *See* 4A.1.3 above.

4A.2.2 Mutual assistance

Mutual assistance is the process used to obtain evidence and other forms of information and legal cooperation from a foreign country, and as such is critical to effective international enforcement of criminal law in relation to terrorism. The broad legal framework of obligations incumbent on states to cooperate in criminal matters in respect of international terrorism is increasingly apparent through the Security Council's resolutions,[262] and through the specific terrorism conventions which commonly impose a general obligation of cooperation with the investigations of other states.[263] This framework does not, however, provide specific modalities or procedures for such cooperation, and the challenges to effective cooperation in information and evidence sharing remain great.[264] It has been suggested that the legal framework for cooperation in combating terrorism would benefit from strengthening through a multilateral convention on mutual assistance.[265]

Like for extradition, there are however mutual assistance treaties on a bilateral or multilateral basis which provide procedures for the exchange of evidence and examples of the grounds on which requests can be refused.[266] These arrangements are often less formal or rigid than in the case of extradition, with states generally enjoying a larger measure of discretion to grant or decline requests for assistance.[267] As discussed in the human rights chapter, the human rights obligations of states are less clear in respect of mutual assistance than they are in respect of extradition of persons physically present on the extraditing state's territory,[268] although, arguably at least, the same

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262 SC Res. 1373 (2001), *supra* note 136.

263 Cryer & Friman, *et al.*, *supra* note 31 at p. 103-04. *See also* Chapter 2.

264 *See* du Plessis, 'A Snapshot', *supra* note 8; Kim Prost, 'The Need for a Multilateral Cooperative Framework for Mutual Legal Assistance,' in *Counterterrorism Strategies*, *supra* note 8.

265 Prost, 'Need for a Multilateral Cooperative Framework', *supra* note 264.

266 *See*, *e.g.*, Council of Europe Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959, ETS No. 30, in force 12 June 1962; Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, adopted by the European Council on 29 May 2000, OJ C 197/1 of 12 July 2000; Scheme Relating to Mutual Assistance in Criminal Matters between Commonwealth Countries; UN Model Treaty on Mutual Assistance in Criminal Matters, GA Res. 45/117, 14 December 1990, UN Doc. A/RES/45/117.

267 Mutual assistance may be rendered on the basis of domestic law without resort to a treaty. Whereas, traditionally, extradition was predicated on a treaty, the UK *e.g.* will in principle grant assistance to any requesting state: C. Nicholls, C. Montgomery and J. Knowles, *The Law of Extradition and Mutual Assistance in Criminal Matters: Practice and Procedure* (London, 2002)..

268 States have well-established duties to investigate violations within their territory or jurisdiction; seeChapter 7A.4.2. In *Rantsev v Cyprus & Russia*, the ECHR referred to the duty of Russia to *cooperate* in the investigation of crimes on Cypriot territory.

underlying principles may be held to apply.[269] While still not the norm, several mutual assistance agreements do specifically exclude cooperation where, for example, the requested state has substantial grounds for believing that the request for mutual assistance has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that that person's position may be prejudiced for any of these reasons.[270] Some others suggest that other human rights concerns,[271] including the death penalty,[272] also provide a basis for refusal to cooperate.[273] The practice of states, and the reluctance of some to cooperate in the face of risks of rights violations in the war on terror is discussed at Part B.

4A.2.3 Cooperation and the Security Council

In certain circumstances, states may consider that such 'cooperative' procedures would be futile or ineffective. Examples may include where a state whose cooperation is needed is believed to be involved in committing or concealing the crimes in question (as addressed by the ICJ in *Lockerbie*),[274] or where the urgency of the situation – due for example to well founded fear of repetition – demands swifter action than the normal cooperation process would provide. States may not however simply circumvent the cooperation process and unilaterally embark on coercive 'enforcement' action directly on another state's territory, without falling foul of international legal obligations owed to the

269 While extradition involves persons within the territory or jurisdiction of the extraditing state, in respect of mutual assistance the person affected may have not at any time been physically within the state's territory or subject to its 'jurisdiction,'upon which the applicability of human rights treaties depends: *see* Chapter 7A2. However, assistance rendered in the knowledge that it may contribute to a violation of human rights in another state may offend 'the general spirit' of human rights conventions (*Soering* v. *United Kingdom* (Appl. No. 10438/88), Judgment of 7 July 1989, *Series A*, No. 161, para. 87) or amount to aiding or assisting, as discussed in Chapters 3 and 10.

270 Article 8 of the European Convention on the Suppression of Terrorism confirms that there is no obligation to afford mutual assistance in these circumstances.

271 *See also* UN Model Treaty on Mutual Assistance in Criminal Matters, which envisages refusal to cooperate in case of persecution, double jeopardy (*non bis in idem*) and unfair measures to compel testimony, Articles 4(1)(c)-(e).

272 The commentary to Article 4 of the UN Model Treaty on Mutual Assistance in Criminal Matters notes that states may wish to add other grounds for refusal, *e.g.*, 'the nature of the applicable penalty (*e.g.*, capital punishment)'.

273 Some treaties and legislation have a much reduced basis for refusal in mutual assistance, limited solely to 'where execution of the request would be contrary to national security, public interest or sovereignty'.

274 *Questions of the Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libya* v. *United Kingdom*), Provisional Measures, Order of 14 April 1992, *ICJ Reports 1992*, p. 3.

other state (assuming it did not consent)[275] and to individuals under human rights law.[276] In such circumstances, it should be recalled that, if faced with a situation in which normal cooperation procedure would be ineffective, states can call upon the Security Council to authorise criminal law enforcement action in the name of international peace and security,[277] including where necessary through the use of force.[278] Force employed must always be no more than necessary to achieve the objective, in this case the apprehension of suspects or securing vital evidence.

The experience of the ICTY provides an example of Security Council authorisation for NATO enforcement of arrest warrants internationally. Although that experience concerned the transfer of persons to an international tribunal established by the Council, there is nothing to preclude the Council doing the same in the future in respect of another national or international court seeking to ensure that justice is done and international peace and security respected.[279] In the context of international terrorism, in which the Council has called on all states to cooperate, such action would constitute a form of enforcement of its own resolutions.[280]

The enforcement of international law is never perfect, and international criminal law is no exception. However, the unprecedented international consensus generated post-9/11 as regards the need to combat international terrorism and render more effective international cooperation in criminal matters, if directed towards the apprehension of suspects and effective collective enforcement of international criminal law, could have had – or could yet have – potentially positive repercussions for the international legal order.

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275 If a state seeks to effect law enforcement on another state's territory without its consent, it may violate the principle of non-intervention and the prohibition on the use of force: *see* Chapter 5. On the unlawfulness of such enforcement including 'hot pursuit' see *Oppenheim's International Law*, *supra* note 3 at p. 387.

276 If individuals are transferred for the purposes of criminal process in a way that simply circumvents the extradition process, violations of individual rights as well as obligations owed to other state parties to the extradition treaties may arise. *See* Chapter 10 for examples.

277 The exceptions or grounds for refusal in extradition proceedings do not apply to transfer to international tribunals. *See* Duffy, 'Constitutional Compatibility', *supra* note 182, p. 20.

278 The Council has authorised coercive action to apprehend suspects to the ICTY. *See also* SC Res. 837 (1993), 6 June 1993, UN Doc. S/RES/837 (1993) in relation to Somalia. *See* Chapter 5, para. 5A.2.2.

279 Alternative provision would be made by the Council for human rights protection if extradition were to be circumvented – as was the case, *e.g.*, to surrender before the ICTY.

280 *See*, *e.g.*, SC Res. 1373 (2001), *supra* note 132.

4B CRIMINAL JUSTICE AND INTERNATIONAL TERRORISM POST-9/11

The second part of this chapter sketches out international practice in relation to criminal law responses to international terrorism since 9/11.[281] In light of the legal framework set out in the first section of this chapter, it is indisputable that egregious crimes under international and national law were committed on September 11, 2001 and have been committed through other serious acts of international terrorism since then.[282]

Most straightforwardly, mass murder and other serious bodily offences contravened US and other domestic criminal laws. While dispute may arise as to whether certain acts of terrorism meet the criteria for crimes against humanity, it is submitted that attacks such as the September 11 attacks epitomise the sort of massive, systematic and ultimately devastating attack on civilians embodied in the concept of crimes against humanity.[283] Much more doubtful is the possibility of them constituting war crimes, given the failure to establish or even assert an 'armed conflict' legally speaking,[284] or even aggression, given the lack of state responsibility.[285] However, specific treaty crimes, such as hijacking or terrorist bombing, may provide another source of applicable criminal law, at least so far as they are implemented into the prosecuting state's domestic law.[286] Serious doubts would surround the legitimacy of any prospective prosecution for terrorism on the basis of its status as a crime under international – as opposed to domestic – law.[287] Prosecution for terrorism offences may proceed under national law, though this depends

281 The criminal justice framework as set out in the foregoing chapter applies also potentially to serious crimes committed in the name of counter-terrorism. This chapter focuses on the prosecution of terrorism itself, *but see* 4B5 below and Chapters 6-10 for examples of criminality in the war on terror, especially 7B14 and 10.

282 Cf less serious acts that have been prosecuted as 'terrorism': *see* Chapter 2 on lack of clarity as to terrorism and Chapter 7B5 for examples.

283 Despite the controversies around the policy element discussed in Part A, it is submitted that the level of coordination and intent attending the September 11 attacks would meet any ordinary interpretation of the term 'organisational policy'. This may be less clear as regards disparate attacks in the name of a dissipated al-Qaeda more than a decade on, however, or the isolated acts of terrorism by individuals pursuant to the broad ideology underpinning al-Qaeda. *See* Chapter 6B.1.

284 *See* Chapter 6B.1 addressing in more detail the difficulty under current international law of conceptualising the relationship between states and international criminal networks as 'armed conflict', and on 9/11 as not initiating an armed conflict. On war crimes, *see* above A.1.1.2.

285 *See* Chapter 3 on the absence of state responsibility for these crimes. On aggression as a crime, *see* 4A.1.13 above.

286 *See* Chapter 2 for the treaty crimes relating to terrorism. *See also Galić* Appeals Decision, *supra* note 103.

287 On the lack of clarity around a definition, *see* Chapter 2. On the legality issues arising, *see* '*Nullem crimen sine lege*', *see* Chapters 4A.1.2.2 and 7A.4.3.5. Issues relating to respect for human rights principles in the criminal context post-9/11 are highlighted in Chapter 7B.4.

on offences being clearly defined in domestic law, and the accused's individual responsibility being established.

As regards questions of jurisdiction, it is also relatively uncontroversial that many, or indeed all, states are entitled to exercise jurisdiction over certain acts of international terrorism that amount to crimes under international law.[288] Various national and international jurisdictional possibilities exist for the prosecution of these crimes. Principles of criminal law preclude certain bars to prosecution, and facilitate the accountability of the full range of perpetrators of those attacks. In short, the normative framework highlighted in Section A provides a promising starting point for addressing crimes such as the September 11 atrocity through the international enforcement of criminal law.

The practice of criminal justice post-9/11 is as diverse as the legal systems within which it unfolds, and meaningful generalisations are, as ever, difficult. What this chapter seeks to do is to highlight developments in several states and on the international level which, it is suggested, may indicate certain features of the evolving criminal justice response to terrorism since the beginning of the 'war on terror,' and raise questions as to its implications.

It considers first the remarkable paucity of high level prosecutions and the apparent neglect of criminal justice in the immediate aftermath of 9/11, which has given way to a more active role for criminal justice, and a burgeoning body of terrorism trials, around the globe. The preference in practice for national over international judicial responses is explored together with the potential relevance of international justice for international terrorism in the future.

The changes and innovations in criminal laws around the globe, pursuant to an emphasis on the 'preventive' utility of criminal law in the struggle against terrorism, have included new terrorism and 'associated' offences (such as 'membership' of a terrorist organisation, 'support' or 'apology'), as well as the loosening of modes of liability, raising numerous questions regarding implications for the criminal law. These developments have been coupled by the introduction of exceptional procedures and approaches to principles of criminal law in the terrorism context. An area of considerable constructive legal industry, but where challenges remain acute, is in relation to the law and practice of international cooperation. These issues are considered in turn below.

Finally, contrasting starkly to the activity in relation to the prosecution of international terrorism stands the extremely limited application of criminal law to hold to account those responsible for crimes committed in the name of the 'war on terror'. The chapter ends with brief consideration of the 'other

288 *See* the various theories of jurisdiction discussed above, Chapter 41.3. Note also that in certain circumstances states may be obliged, not simply entitled, to exercise jurisdiction.

side of the coin' in terms of the application of criminal law to international crimes committed in the name of security and counter-terrorism.

4B.1 Prosecutions in practice post-9/11

4B.1.1 Paucity of prosecutions post-9/11

Of the features of international criminal practice in the immediate aftermath of 9/11, perhaps the most noteworthy was its scarcity. In late September 2001 President Bush stated that: 'We will direct every resource at our command, every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war to the disruption and defeat of the global terror network.'[289] Particular emphasis was lent by other leaders to the objective of ensuring that 'justice' is done.[290] The Security Council, for its part, underscored the justice objective in the immediate wake of 9/11 and has reiterated it repeatedly since then.[291] However, despite the international commitment in principle and widespread detentions in practice, there were strikingly few prosecutions.

In the United States, the natural forum for criminal prosecutions in relation to 9/11, it is well known (and explored elsewhere in this study), that thousands of persons were detained pursuant to the broadly framed 'war on terror' and described, *inter alia,* as dangerous criminals,[292] yet in the years following 9/11 there were relatively few charges and less completed trials. It was several years after the attacks, in April 2004, that the first conviction in respect of 9/11 was handed down (which was subsequently quashed).[293] At least at first,

289 J. Harris, 'President Outlines War on Terrorism, Demands Bin Laden be Turned Over', *Washington Post*, 21 September 2001.

290 *See*, *e.g.*, the UK Prime Minister describing the UK's role as to 'construct a consensus behind a broad agenda of justice and security' (Speech in Sedgefield constituency, 5 March 2004). *See* T.R. Reid, 'Blair Embraces a New Role as a Chief of War on Terror', *Washington Post*, 9 October 2001, reporting UK Prime Minister: 'It is a fight for freedom ... And I want to make it a fight for justice, too ....' See the use of the language of 'justice' in the context of the Bin Laden killing at Chapter 9.

291 *See*, *e.g.*, SC Res. 1368 (2001), 12 September 2001, UN Doc. S/RES/1368 (2001), para. 3, where the Security Council '[c]alls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks'.

292 *See*, *e.g.*, Former Defense Secretary Donald Rumsfeld describing Guatánamo detainees as 'terrorists, trainers, bomb makers, recruiters, financiers … would be suicide bombers, probably the 20th 9/11 hijacker'. *See* S. Taylor Jr., 'Opening Argument – Falsehoods About Guantanamo', 4 February 2006 (updated 22 March 2011), available at: http://www.nationaljournal.com/magazine/opening-argument-falsehoods-about-guantanamo-20060204.

293 Mounir al-Motassadek was convicted and sentenced in 2005 to seven years in jail for membership of al-Qaeda. He appealed, and in November 2006 was convicted of being an accessory to over 3,000 counts of murder. Abdelghani Mzoudi was cleared of all charges in 2004. 'Profile: Mounir al-Motassadek', *BBC*, available at: http://news.bbc.co.uk/1/hi/

it seemed that the criminal law had effectively been displaced by security detention as the normal procedure for dealing with persons suspected of involvement in international terrorism.[294]

A decade on, the picture is considerably different, with many terrorism trials underway or having concluded, as discussed in the next section. However, it remains the case that strikingly few of the many persons responsible for planning and executing the enormous and complex September 11 attacks, and none of the highest level architects, are among the persons prosecuted and convicted to date,[295] either in the US or elsewhere. While the neglect of criminal law was far more pronounced in the first few years after 9/11, it would be overly optimistic to relegate the issue as one of purely historical significance.[296]

Many factors may contribute to the dearth of prosecutions, in particular at the highest levels. Among them are the undoubted investigative and evidentiary challenges that cases such as these pose. Illicit transnational networks are difficult to penetrate, and intelligence reports, gathered for different purposes, often lack the evidentiary credentials to prove guilt beyond reasonable doubt and pose security challenges. Other challenges relate to the international nature of the crimes and difficulties encountered in securing effective international cooperation, explored further below.[297] However, at times questions have arisen as to whether all investigative and prosecutorial avenues have been exhausted. An example from within the US is in the 2010 'Guantanamo Task Force' report which highlighted various potential sources of evidence that had not been tested or evaluated in relation to 9/11.[298] A key factor in the paucity of proceedings must surely be the apparent lack of political will – particularly evident at the early stages of the war on terror – to address international terrorism as a criminal law enforcement challenge, and the emphasis that has been placed on the military nature of the (thus named) war

world/europe/2223152.stm.

294 *See* comments on the relationship between criminal law and other areas below.

295 *See*, *e.g.*, 'Khalid Shaikh Mohammed (Guantánamo 9/11 Attacks Trial)', *The New York Times*, available at: http://topics.nytimes.com/top/reference/timestopics/people/m/khalid_shaikh_mohammed.

296 *See* concerns regarding a de-emphasis of criminal law in resort to the 'alternatives' of targeted killings, military detention or other measures discussed below.

297 *See* 4.B.1. 2 'Terrorism Trials' below.

298 Guantanamo Task Force Report, 2010: '[T]he Task Force identified a number of avenues for strengthening important cases and developing them for prosecution. For example, the Task Force determined that there were more than a thousand pieces of potentially relevant physical evidence (including electronic media) seized during raids in the aftermath of the September 11 attacks that had not yet been systematically catalogued and required further evaluation for forensic testing. There were potential cooperating witnesses who could testify against others at trial, and key fact witnesses who needed to be interviewed. Finally, certain foreign governments, which had been reluctant to cooperate with the military commissions, could be approached to determine whether they would provide cooperation in a federal prosecution....'

on terror.[299] Many of those suspected of involvement in the September 11 attacks were – and continue to be – treated as enemy combatants and either killed or subjected to 'security' detention on uncertain legal bases.[300] Detention of allegedly high-level al-Qaeda operatives focused on intelligence gathering not on securing criminal trials,[301] in line with the priority role afforded to intelligence agencies rather than law enforcement agencies, with implications for admissible evidence.[302] This intelligence-gathering focus led one German intelligence source to note that 'we are more focused on prosecuting terrorists while the United States is mainly concerned with preventing terrorism.'[303]

Although, as the practice below illustrates, there are now increasing attempts by the US to use criminal law in counter-terrorism, the military paradigm continues to cast a long shadow. Most obviously this is seen in the 'military' justice of military commissions in use in the US and a number of other states.[304] It is also clear from the increasing numbers of targeted killings of alleged high-level al-Qaeda suspects, which suggests a continued de-emphasis, or a by-passing, of the criminal law enforcement machinery for those alleged to have the greatest level of responsibility for terrorism but will never be put on trial.[305] Long term military or 'security' detention lurks as an alternative to criminal law where, as the 'Guantanamo Task Force' determined in 2010, prosecutions are not 'feasible' (in most cases, due to lack of available evidence, which would normally lead to an individual's release, not indefinite detention).[306] In the event that individuals are subjected to criminal process

299 This was particularly so post-2001 but remains the case to some extent at time of writing in 2013 light of widespread targeted killings. *See*, *e.g.*, John Brennan, Assistant to the President for Homeland Security and Counterterrorism, 'The Ethics and Efficacy of the President's Counterterrorism Strategy', April 2012, text available at: http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100.

300 This is the definition of the situation of the Guantánamo detainees given by the UK Court of Appeal in *R (Abbasi and another)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 159 (hereinafter '*Abbasi*'), para. 64.

301 For those detainees who may, eventually, be tried, the willingness to detain for extended periods without normal respect for the right to trial without undue delay has reduced the momentum that usually attends the criminal investigative and prosecutorial process.

302 *See*, *e.g.*, Report of the Special Rapporteur, M. Scheinin, Intelligence agencies and their oversight in the fight against terrorism A/HRC/10/3 (paras. 25-78); and A/HRC/14/46, and 'Assessing Damage, Urging Action', Report of the Eminent Jurists Panel, 2009 (hereinafter 'Eminent Jurists Report'). *See also* Chapter 10 on rendition and B.4 below on the implications of human rights abuses for the criminal process.

303 *See* 'Terror Case sets Washington and Berlin at Odds', *Christian Science Monitor*, 9 February 2004.

304 *See* 4B.2.2 below.

305 Chapter 6B.2.2.

306 'While the reasons vary from detainee to detainee, generally these detainees cannot be prosecuted because either there is presently insufficient admissible evidence to establish the detainee's guilt beyond a reasonable doubt in either a federal court or military commission, or the detainee's conduct does not constitute a chargeable offense in either a federal

and eventually released, official statements from within the US administration have made clear they may then still be subject to administrative detention as enemy combatants thereafter.[307]

Widespread use of detention without (or in lieu of) trial for suspected terrorists, and other non-criminal law 'alternative' preventative measures, has been pervasive far beyond the US, as explored in other chapters of this study.[308] The side-stepping of criminal law and the protections that it entails has been criticized in numerous states in the context of counter-terrorism.[309] Reflections of this approach are seen in Australia, where control orders have been used on an individual after his criminal sentence was served, raising questions of double punishment.[310]

While criminal law is clearly not the only approach that may be used against terrorists, one of the implications of the overuse of a 'wartime' detention regime or other measures in lieu of criminal law has been a decline in the perceived significance of criminal law from both the authorities' perspective and that of affected individuals.[311] If evidence is not (or not yet[312]) available, or if individuals are found not guilty, or are sentenced and have served out their sentences, they have nonetheless been held, in some cases with less

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court or military commission.' Guantanamo Task Force Report 2010, p. 24.

307 *E.g.*, Hamdan, who lent his name to the Supreme Court decision *Hamdan* v. *Rumsfeld*, *supra* note 2, was charged with 'conspiracy and providing material support for terrorism.' Charges were dropped on June 5, 2007 and he was then held, without being charged, as an enemy combatant. He was then re-charged on July 21, 2008, and found guilty of 'providing material support' to al-Qaeda, and was sentenced to five-and-a-half years of imprisonment, having already served five years of the sentence at the time, before this conviction was set aside. A Pentagon spokesman promptly noted that Hamdan may still be considered an 'enemy combatant' upon completing his sentence and detained indefinitely. Despite the threat to detain him indefinitely, the U.S. in November 2008 transferred him to Yemen to serve out the remainder of his sentence and he was released January 8, 2009. *See, e.g.*, 'Bin Laden driver could be held by U.S. after sentence', *CNN*, 7 August 2008, available at: http://www.cnn.com/2008/CRIME/08/07/hamdan.trial/index.html.

308 *See* Chapter 7B.7 'Detention' and 'Control Orders'.

309 *See*, *e.g.*, in the UK, speech by David Davis, MP in the House of Commons: 'Let me recap. Rangzieb Ahmed should have been arrested by the UK in 2006, but he was not. The authorities knew that he intended to travel to Pakistan, so they should have prevented that; instead, they suggested that the ISI arrest him. They knew that he would be tortured, and they arranged to construct a list of questions and supply it to the ISI ...'. ; *see also* 'Labour fixated on control orders, which operated like a sieve, and prolonged pre-charge detention which is unnecessary.' 'Terror Convictions Plummet', *The Independent*, 26 November 2010.

310 Former Guantanamo detainee, Australian David Hicks, who pleaded guilty and completed his sentence in Australia, discussed in Saul, 'Criminality and Terrorism', *supra* note 12.

311 See e.g. comment on perceived impurity in Chapters 7B.7 and 10. On the so-called war on al-Qaeda as not an armed conflict properly understood, *see* Chapter 6. For the implications more broadly than for criminal law, *see* 'War and Human Rights' in Chapter 7B3.

312 Guantanamo Task Force Report, p. 22 (noting that individuals can continue to be held as persons 'designated for continued detention' while evidence is gathered through 'further exploitation of the forensic evidence' or 'other detainees may cooperate with Prosecutors').

protections and in worse conditions than if they were serving sentences pursuant to the criminal process.[313] The imperative towards prompt investigation is therefore diminished where individuals can be subject to prolonged detention until evidence is acquired. Practice continues to raise important questions as to the priority afforded to the pursuit of criminal justice, and its inter-relationship with other areas of the legal framework, in the fight against international terrorism.

4B.1.2 Terrorism Trials

Numbers of prosecutions for terrorism in the US, as elsewhere, have grown exponentially in recent years, as discussed in the next section.[314] Numbers of prosecutions or convictions do not themselves however reveal much as regards effective law enforcement for counter-terrorism. This is particularly so where the nature of new 'terrorism' laws around the globe, and their broad reaching use and abuse, have meant that terrorist convictions have been rendered for a broad range of conduct from bombing to blogging, some of which may not be a response to what we commonly understand by terrorism at all.[315]

It is, however, undoubtedly the case that there has been a reinvigorated approach to the use of criminal mechanisms, and a burgeoning of terrorism trials. While it is impossible to do justice to the range of international practice here, some examples of state practice are worth highlighting.

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313 There are other lawful bases for detention but these tend to be short term, *e.g.*, pursuant to deportation, or in a genuine armed conflict situation *see* Chapter 7A7 and for IHL detentions Chapter 6.

314 One survey cites 2,934 arrests and 2,568 convictions in the United States. 'Terrorist Trial Report Card-Center on Law and Security – NYU Law', The Center on Law and Security, New York University School of Law, available at: http://www.lawandsecurity.org/Publications/Terrorism-Trial-Report-Card; *see also* 'Introduction to National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions', 26 March 2010, National Security Division, available at: http://jnslp.files.wordpress.com/2010/03/march-26-2010-nsd-final-statistics.pdf (providing statistics on over 400 unsealed international terrorism and terrorism-related convictions from 11 September 2001 – 18 March 2010). *See also* AP report, 'Rightly or Wrngly, Thousands convicted', below.

315 *'Rightly or wrongly, thousands convicted of terrorism post-9/11', AP*, 9 April 2011, available at: http://www.msnbc.msn.com/id/44389156/ns/us_news-9_11_ten_years_later/t/rightly-or-wrongly-thousands-convicted-terrorism-post-/visited 12 December 2012. The report identifies 119,044 anti-terror arrests and 35,117 convictions in 66 countries; 'At least 35,000 people worldwide have been convicted as terrorists in the decade since the Sept. 11 attacks on the United States. But while some bombed hotels or blew up buses, others were put behind bars for waving a political sign or blogging about a protest.' *See also Terrorist Trial Report Card, September 11, 2001-September 11, 2009*, Center on Law and Security, New York University School of Law, January 2010.

In the United States, many terrorism trials are underway concerning involvement in al Qaeda or associated groups, with some trials completed and judgments rendered.[316] A striking characteristic of US criminal practice post-9/11 has been the resort to military commissions, as discussed in Chapter 8.[317] The rejection of the normal courts and generally applicable principles and procedures of criminal law is a common characteristic of post-9/11 terrorism trials globally, as discussed below.[318] However, despite questions about the suitability of United States' federal courts for trying international terrorism, trials have in fact also proceeded in regular courts.[319]

One characteristic of note from this practice is the high number of convictions that have resulted from guilty pleas; on one estimate 80% of terrorism trials in the US involve such pleas.[320] Trials then proceeded according to an expedited process, such that the normal evidentiary requirements for proving the case do not apply.[321] Examples have included the case against the so-called 'twentieth hijacker' who pleaded guilty to conspiracy in respect of the 9/11 attacks.[322] Questions have arisen as to the reliability of such pleas, particularly where the alternative for the individual is not a trial and the prospect of acquittal but arbitrary indefinite detention as an 'enemy combatant'.[323]

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316 *See*, *e.g.*, *US* v. *Abu Ali*, 528 F.3d 210, 269 (4th Cir. 2008); S. Vladeck, 'Terrorism Trials and the Article III Courts After Abu Ali', 88 Tex. L. Rev. 1501 (2010); 'Would-Be Plane Bomber Is Sentenced to Life in Prison', *New York* Times, 16 February 2012, available at: http://www.nytimes.com/2012/02/17/us/would-be-plane-bomber-sentenced-to-life.html (a life sentence was given for the attempt to blow up a Detroit-bound airliner with explosives concealed in his underwear on Christmas Day in 2009); *United States of America v. Abdulmutallab* (2012) US District Court Eastern District of Michigan Southern Division (Case No. 10-CR-20005).

317 *See* Chapter 8, military commission proceedings.

318 Section 4.B.2 on modified procedures below.

319 Bush and others asserted that regular courts were unsuitable. *See* debate in Stephen I. Vladeck, *Terrorism Trials and the Article III Courts After* Abu Ali, 88 Tex. L. Rev. 2010.

320 L. Dervan, 'The Surprising Lessons from Plea Bargaining in the Shadow of Terror', (2010) 27(2) *Georgia State University Law Review*, p. 239. The report indicates that a similar situation arises with terrorism trials in Israel.

321 *See*, *e.g.*, 'Walker Lindh indicted on 10 counts', *CNN*, 6 February 2002; '"American Taliban" jailed for 20 years', *CNN*, 4 October 2002. Lindh was accused of being a terrorist trained by al-Qaeda, who conspired with the Taliban against Americans. He was not accused of conduct related directly to 9/11.

322 *See*, *e.g.*, *United States of America* v. *Zacarias Moussaoui*, the 'twentieth hijacker' pleaded guilty to conspiracy and membership of an illegal organisation. *See* 'Suspected al Qaeda Operative Charged with Planning Terrorist Actions', US Department of State Press Release, 21 December 2001; J. Borger, 'First Man Charged for September 11 Attacks: Muslim Radicalised in London Faces Death Penalty', *The Guardian*, 12 December 2001, available at: http://www.guardian.co.uk/world/2001/dec/12/september11.usa1. For the indictment, *see* http://www.justice.gov/ag/moussaouiindictment.htm.

323 *See*, *e.g.*, T. Yin, 'Coercion and Terrorism Prosecutions in the Shadow of Military Detention', 2006 BYU L. Rev. 1255; *see also* C. Takei, 'Terrorizing Justice: An Argument that Plea Bargains Struck Under the Threat of "Enemy Combatant" Detention Violate the Right to Due Process', (2006) 47 *Boston College Law Rev.* 3, p. 581and L. Dervan, 'The Surprising

Another characteristic of the charges brought in the US, foreshadowed by the comments in the preceding section, is that with few notable exceptions, they have not related to direct involvement in the September 11 attacks themselves, and have rarely been brought against persons accused of being high level al-Qaeda operatives.[324] Instead charges lodged in the US have related almost exclusively to broad forms of 'material support' for al-Qaeda[325] (in most cases based on evidence of periods spent at 'training camps' in Afghanistan which has been found insufficient by German courts),[326] and 'conspiracy' to commit acts of terrorism or conspiracy to provide material support for terrorist organisations.[327]

The issues this raises were highlighted when one of the first convictions before a military commission was subsequently overturned.[328] In *Hamdan* v. *United States*, the accused had been prosecuted for 'material support for terrorism' as a war crime, yet the Appeal court found that no such crimes existed, in national or international law, at the time of the conduct in question.[329]

One example from US practice that may be illustrative both of the potential of terrorism trials, and some of the challenges arising, is the case of Ahmed Omar Abu Ali. Abu Ali was convicted by a US federal court of nine counts of membership of a terrorist organisation and planning terrorist attacks.[330] The accused, a victim of extraordinary rendition who was allegedly interrogated and abused by Saudi Arabian officials in cooperation with US agents, first sought unsuccessfully to have his indictment dismissed due to delay in presenting him to a court.[331] The majority declined, as the relevant rules on

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Lessons', *supra* note 320.

324 Only a few alleged of high-level involvement in al-Qaeda have been named for trial by military commission, in most cases almost a decade after their detention. 'Military Commissions', Human Rights First, available at: http://www.humanrightsfirst.org/our-work/law-and-security/military-commissions. The US Department of Defense announced that the Office of Military Commissions prosecutors have sworn charges against five individuals detained at Guantanamo Bay: Khalid Sheikh Mohammed, Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. 'DOD Announces Charges Sworn Against Five Detainees Allegedly Responsible for 9/11 Attacks', DoD Press Release, 31 May 2011, No. 458-11, available at: http://www.defense.gov/Releases/Release.aspx?ReleaseID=14532.

325 *See* discussion of broad reaching approaches to material support or conspiracy below.

326 *See* the case of *Mzoudi*, this chapter, para. 4B.1.1.1 above. *See other* US cases available at: http://writ.news.findlaw.com/terrorism.html.

327 *R* v. *Elomar & Others* [2010] NSWSC 10, paras. 147-78 (concerning Mohammed Omar Jamal)) is discussed in Saul, 'Criminality and Terrorism', *supra* note 12.

328 *Hamdan v. United States, Case No. 11-1257, US courts of Appeal for the District of Colombia, 16 October 2012.*

329 *Ibid.*

330 *US* v. *Abu Ali*, *supra* note 316. For discussion *see* Vladeck, 'Terrorism Trials and the Artile III Courts after Abu Ali', *supra* note 316.

331 He alleged the lack of 'prompt presentment' violated the *Speedy Trial Act* and his Sixth Amendment right to a speedy trial.

'prompt presentment' were found only to apply to capture by domestic authorities. However, a dissent questioned whether the criteria was not met where the authorities were actively involved.[332]

As in many other cases post-9/11,[333] this was followed by several other (ultimately unsuccessful) challenges. Petitions focused on the admissibility of evidence obtained through torture,[334] and the lack of access to – and opportunity to confront – evidence against him.[335] The court ruled that the Government could use the 'silent witness' procedure to disclose classified information contained in communications to the jury at trial, though Abu Ali himself would only be able to see the redacted version of the documents. The case highlights both procedural adaptations, such as the use of evidence by video link or more controversially 'silent witnesses' that arise in the cases, as well as the challenges that result from allegations of violations (torture and ill-treatment or undue delay) at the pre-trial stage.[336] It also illustrates the difficult balancing determinations facing judges, and the momentous challenges facing an accused in cases of this nature, particularly where evidence is obtained at the hand of foreign officials.[337]

Looking beyond the US, several European criminal law systems have developed their experience of prosecuting international terrorism in the past decade. In the immediate aftermath of 9/11, it was Germany that took a leading role in promoting the criminal justice response to 9/11, reflecting the locus of much of the planning of 9/11 on German soil. The experience of German courts speaks both to the tenacity of the criminal process and to the challenges arising.[338] In February 2003 the first conviction arising out of the September 11 attacks was handed down by a Hamburg court to a student for his role in supporting and organising logistics for the Hamburg branch of al-

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332 It also held: '(1) U.S. law enforcement officials did not act in a 'joint venture' with Saudi officials in the arrest, detention, or interrogation of the defendant, and (2) Saudi law enforcement officials did not act as agents of U.S. law enforcement officials, and therefore *Miranda* warnings were not required.' *See* however the dissent of J. Motz in the appeal court (Judge Motz dissented saying that US officials proposing questions and being present when they are asked constitutes 'active' or 'substantial' participation). Note similar rationale refusing to dismiss the case based on the violations having been committed by foreign personnel in *R* v. *Ahmed* in English courts, below.

333 *See* Chapter 8 on military commissions and modified procedures at 4B2.3 below.

334 Judgment, p. 23. *See* 4B.2.3 below.

335 *See* 'Issues of Evidence and Procedure' at 4B.2.3 below; he challenged the 'silent witness' procedure where evidence was made available to the jury but not to him.

336 *See* 4B.2.3 below and 4B.2.4.

337 It is described as the first case in which US courts had to rely in large part on evidence obtained by foreign officials:, http://www.washingtonpost.com/wp-dyn/articles/A43940-2005Feb22.html. Where recognised rights violations have arisen at the hand of other states, the accused is therefore denied the protections that would normally apply.

338 *See*, *e.g.*, C. Safferling, 'Terror and Law: German Responses to 9/11', (2006) 4 *Journal of International Criminal Justice* 1152-165; T. Kost, 'Mounir El Motassadeq – A Missed Chance for Weltinnenpolik?', *German Law Journal*, (2007) Vol. 08 No. 04.

Qaeda; the court found him guilty of membership of a terrorist organisation and 3,045 counts of accessory to murder in the September 11 attacks.[339]

However, the conviction was quashed by the Federal Supreme Court of Germany and the case remanded for retrial, on the basis that the US had refused to share crucial, potentially exculpatory evidence with the German courts.[340] The Court famously highlighted what it described as the dangers of allowing the criminal process to be manipulated by a foreign state withholding intelligence information in circumstances where its own self-interest is at stake.[341] The US's unwillingness to share information that was critical to the trial of the individual was harshly criticised by lawyers and the courts.[342]

Motassadeq was re-tried and convicted of 'membership in a 'terrorist organization',[343] but that conviction was also rejected on appeal, and Germany's Federal Constitutional Court ordered his release.[344] It was extremely close to the end of the line for the criminal process when the German Federal Supreme Court ruled that the evidence available was sufficient to prove that Motassadeq knew about and was involved in the preparation of the plan to hijack the planes, and found him guilty of accessory in 246 counts of murder and he was sentenced to 15 years in prison.[345] Another German trial had

339 Mounir Motassadeq, a 28-year-old Moroccan, was sentenced to 15 years' imprisonment in February 2003. *See* 'Motassadeq Convicted For Role in Sept. 11th Attacks', *Washington Post*, 20 February 2003. *See* discussion in C. Safferling, 'Terror and Law: German Responses to 9/11', (2006) 4 *Journal of Int'l Criminal Justice* 1152-65.

340 Decision of the Federal Supreme Court of Germany, 3 March 2004, Strafverteitiger (BGH), StV 4/2004, of February 7, 2006. The evidence withheld was witness testimony or transcripts of statements during interrogation by, among others, the person suspected of being the ringleader of the relevant branch of al-Qaeda.

341 *Ibid.*

342 Lawyers alleged that '[s]tatements [the US authorities] kept secret led to a guilty verdict'. *See* 'Judge frees 9/11 suspects in Germany. Ruling could undo only conviction', *Washington Post*, 12 December 2003. When some of the statements by key witnesses that had been withheld during trial were eventually disclosed – following the quashing of the conviction – they included statements that the accused had not been privy to the 9/11 plot: s*ee* M. Landler, 'U.S. Report Adds Fog to 9/11 Retrial', *New York Times*, 12 August 2004. On German frustration with US non-cooperation s*ee e.g.* '9/11 Suspect Could Face Reduced Charges', *Washington Post*, 5 February 2003; 'Judge Frees 9/11 Suspect in Germany', *Washington Post*, 12 December 2003; 'September 11 Terror Suspect Acquitted', *Deutsche Welle*, 6 February 2004.

343 *Motassadeq*, Judgment, Higher Regional Court of Hamburg, August 19 2005.

344 Federal Constitutional Court, (*Bundesverfassungsgericht* – BverfG), decision of 10 January 2007, Reg. no.2 BvR 2557/06, available at: www.bundesverfassungsgericht.de.

345 Decision of November 15, 2006. On January 8, 2007, he was sentenced by the *Oberlandesgericht* Hamburg to 15 years in prison. On May 2 the Federal Court of Justice of Germany rejected a plea for revision.

ended in acquittal one month earlier revealing similar challenges.[346] On the basis of lack of evidence that the accused had any prior knowledge of the attacks, the Court acquitted, but took the unusual step of noting that it was not convinced of the defendant's innocence but unable to reach any other decision given the limited evidence available to it.[347] These cases served as a critical early illustration of evidentiary challenges and the importance of improving intelligence sharing between the US and European states.

Spain, for its part, has a long tradition of terrorism trials stemming from its experience with the Euskadi Ta Askatasuna (ETA), with an estimated 140 convictions for terrorism each year.[348] As regards efforts to pursue criminal proceedings in respect of the September 11 attacks, various international arrest warrants were issued by Spanish courts including some high level suspects – notably including Osama bin Laden.[349] However, few cases proceeded beyond the warrant stage for want of international enforcement. Some that did, such as that of the al-Jazeera correspondent remanded in custody, related not to direct involvement in the attacks but to support or, membership of, or recruitment to, al-Qaeda.[350]

By contrast, the Spanish criminal process moved promptly in response to the attacks on Spanish soil, the so-called '11-M' attacks that claimed 191 lives and injured a further 1,856 victims on 3 March 2007. While not without its critics, that process involved a relatively prompt criminal investigation, and prosecution of complex terrorist crimes involving multiple accused (29 were brought to trial), which in most cases resulted in convictions.[351] In some cases,

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346 Reportedly the evidence was made available to German authorities but permission to share with the court not granted. *See* P. Finn, '9/11 Suspect could face reduced charges. German judge says he understands alleged accomplice's claims of unfair trial', *Washington Post*, 5 February 2003; 'September 11 Terror Suspect Acquitted', *Deutsche Welle*, 6 February 2004.

347 Abdelghani Mzoudi, who was charged in a similar way to Motassadeq, was freed by a German court in December 2003 after a letter from the Federal Office of Criminal Investigation, the BKA, raised serious doubts that he had any prior knowledge of the attacks. *See* 'German Court Frees 9/11 Suspect', *BBC News*, 11 December 2003.

348 Associated Press Report on Terrorism Trials, 4 Sept. 2011.

349 *See* 'Spain Indicts Osama bin Laden on 9/11 Charges', *Associated Press*, 17 September 2003, reporting the indictment by investigative magistrate Baltasar Garzon of a total of 35 people for terrorist activities connected to al-Qaeda. The Spanish indictment (based on the principle of universal jurisdiction for acts such as those of 9/11) represents the first known indictment of bin Laden for the 2001 terrorist attacks, while in the United States, bin Laden was charged with the 1998 bombings of the US embassies in Kenya and Tanzania.

350 R. Tremlett, 'Al-Jazeera man faces terror trial', *The Guardian*, 12 September 2003. The suspect, Tayssir Alouni, conducted exclusive interviews with Osama bin Laden during the Afghanistan war and is reportedly accused of membership of a terrorist organisation.

351 On 31 October 2007, the 'Audiencia Nacional' acquitted eight and convicted the others for various levels of participation in the attacks, upheld on 17 July 2008. The judgement served the 'historical clarification' role of criminal trials, by clarifying the cause of the attacks, and *e.g.* the non-involvement of ETA, despite assertions to the effect by politicians in the immediate aftermath.

prosecutions have been overturned on appeal for lack of fair trial protections offered to the accused.[352]

The UK is another European state with a history of terrorism, and terrorism trials, and which also experienced direct attacks from al-Qaeda associated individuals in recent years. The relatively low prosecution rates in the UK have been criticised, contrasted against the broad-ranging investigative powers assumed in the decade following 9/11.[353] However, high profile terrorism cases have been completed, including in respect of the London '7/7' bombings.[354] In some cases, the legitimacy of the criminal process has been questioned in light of the abusive circumstances of the accused's pre-trial detention and torture,[355] just as in the US cases discussed above. The evolving approach of UK courts occurs against the experiential backdrop of notorious miscarriages of justice in terrorism cases in the past, which have led to abuse of process objections being upheld and cases dismissed. While this has not occurred post-9/11, courts have indicated that the involvement of UK officials in serious abuse at the pre-trial stage could have this effect.[356]

Other European states, although not themselves the subject of attack, are playing a role in investigating and prosecuting related terrorist activity. In Italy, post-9/11 several cases promptly proceeded to trial under a 'fast-track' procedure whereby a limited amount of evidence is provided and reduced sentences are handed down if convictions are secured. Once again the charges

352 For example, the Spanish conviction of Hamed Abderrahman Ahmad was overturned on appeal for lack of respect for the presumption of innocence. (22 June 2006) Spanish Supreme Court; 'Spanish "al-Qa'eda fighter" set free', *The Telegraph*, 26 July 2006, available at: http://www.telegraph.co.uk/news/1524882/Spanish-al-Qaeda-fighter-set-free.html.

353 *See*, *e.g.*, 'Terror Convictions Plummet', *The Telegraph*, 26 November 2010, available at: http://www.telegraph.co.uk/news/uknews/law-and-order/8160214/Terror-convictions-plummet.html. The report notes that in 2009 no convictions resulted from a stop and search power used more than 100,000 times. The number of people charged under counter-terror laws was reported as 12 in 2009/10 compared with 54 in 2006/07, of which five were prosecuted and three convicted.

354 For example, in January 2007, five men were sentenced to life in prison by the Central Criminal Court of London for plotting to bomb various targets in London. In July 2007, Muktar Said Ibrahim, Yassin Omar, Hussain Osman and Ramzi Mohammed were found guilty of conspiracy to murder in connection with the 21 July 2005 London bombings and each sentenced to life imprisonment. Many other cases concern terrorist plans (*e.g.*, in April 2005, Saajid Badat was sentenced by the Central Criminal Court of London to 13 years in prison for planning to blow up a passenger plane) or possession (eg in September 2005, Andrew Rowe was sentenced by the Central Criminal Court of London to 15 years in prison for possessing items which could be used in terrorist attacks).

355 *See*, *e.g.*, *R. v Ahmed (Rangzieb), R. v Ahmed (Habib),* Court of Appeal (Criminal Division), 25 February 2011, [2011] EWCA Crim 184; [2011] Crim. L.R. 734 concerning two British citizens convicted of terrorist offences after having been allegedly tortured in Pakistan, and challenged the case on abuse of process grounds. It was ultimately unsuccessful as UK authorities were not found themselves to have been involved. See 4.B.4 below on the strained inter-relationship between human rights and criminal justice.

356 *R* v. *Ahmed, ibid*. *See* similar rationale of the court in Abu Ali, above.

relate not to September 11 itself, but to falsifying documents, breaking immigration laws, and criminal association with the intent to obtain and transport arms.[357] In France too, several trials have proceeded for various forms of support for al-Qaeda or plotting of terrorist attacks.[358]

A noteworthy example of the practice of criminal courts from the African continent is the case against those accused of the 'Kampala World Cup' bombings of 10 July 2010, heard before Ugandan courts in 2011. A number of the characteristics and challenges associated with terrorism trials are given graphic illustration by this case.[359] At the outset, the process of investigation and transfer – via extra-legal rendition – is a reminder of the lack of due process in the handling of terrorist suspects.[360] Among those ultimately detained and charged was a human rights activist, who had advised the other suspects and claimed he was being punished for his human rights work,[361] recalling the dangers of broad reaching approaches to 'association' with terrorism as a criminal offence.[362]

When brought before a criminal court and granted bail (a basic right absent exceptional circumstances such as fear of flight), there were huge public protests – a reminder of the political pressures within which judges operate in terrorism cases. Mirroring the discussion above on guilty pleas in the US, at the outset of trial two suspects pleaded guilty, reportedly in order to escape the application of the death penalty. At the trial of the remaining suspects, issues arose regarding the admissibility of evidence in light of human rights abuses surrounding the process. Charges against him and another four were dismissed for lack of evidence, albeit only after he had served a year in detention.[363] Although some suggest the acquittals should be seen as a failure and they provoked protests, it should be recalled that it is ultimately to the credit

357 They are charged with supplying false documents, breaking immigration laws, and criminal association with the intent to obtain and transport arms, explosives and chemicals. *See* 'Terror suspects go on trial in Italy', *Associated Press*, 5 February 2002.

358 *See*, *e.g.*, 'Former Cern scientist faces terror trial in France', *The Guardian*, 29 March 2012, available at: http://www.guardian.co.uk/world/2012/mar/29/cern-scientist-terror-trial-france; 'France Arrests al-Qaeda Suspects', *BBC News*, 6 June 2003, available at: http://www.news.bbc.co.uk/2/hi/europe/2967202.stm ; and V. Von Derschau, 'France Detains Suspected Islamic Militants', *AP*, 15 September 2004.

359 'Kenya's world cup joy shattered by blasts,' *BBC*, 12 July 2010, available at: http://www.bbc.co.uk/news/10605457

360 *See* Chapter 10 Extraordinary Rendition.

361 'Kenyan Rendition Accuser Framed', *BBC News,* 13 September 2011, available at: http://www.bbc.co.uk/news/world-africa-14900624. Kenyan high court advocate Mbugua Mureithi and Al Amin Kimathi, executive director of the Kenyan NGO, Muslim Human Rights Forum (MHRF) were both among the detainees. Trial observers were also later detained at the border. *See* A. Singh and P. Sands, 'Uganda Must Release Al Amin Kimathi', *Voices*, 25 April 2011, available at: http://www.soros.org/voices/uganda-must-release-al-amin-kimathi,

362 *See* Chapter 4B2 below and Chapter 7B.11 below.

363 'Ugandans jailed for Kampala World Cup bombing', 16 September 2011, *BBC News*, available at: http://www.bbc.co.uk/news/world-africa-14944664 .

of a criminal court, and the rule of law it is charged with upholding, that it acquits those whose guilt has not been proved beyond reasonable doubt. This determination to resist political pressure may have been influenced by the recent establishment of a specialised international crimes division within the Ugandan High Court, illustrating the importance of such specialised provision within national courts and investigative bodies.[364]

Across the states of Asia and the Middle East, experience of terrorism prosecutions, like terrorism itself, is neither new nor a result of the so-called war on terror. There is abundant practice in terrorism prosecutions in recent years, however, such as the trial and conviction under ordinary criminal law, after a decade long investigation, of those found responsible for the Bali attacks.[365] In many other states, terrorism trials have raised multiple issues concerning independence of the judiciary, use of special courts and procedures, and respect for the fundamental principles of criminal law.[366]

As a result, there is a vast and developing body of experience in terrorism trials on a global scale. It is difficult to identify trends from disparate practice, but even this snapshot illustration of cases begins to show both the potential and the challenges of using the criminal process to hold to account those who plan, support and carry out terrorist acts. The practical and legal challenges are compounded by political pressure on law enforcement authorities and the courts. Much of the practice of trials to date reveals resort to modified jurisdictions or criminal procedures, and questions regarding respect for principles of criminal law, that will be addressed more fully in the sections that follow.

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364 The establishment of an International Crimes Division (ICAD) in the Ugandan High Court may have been instrumental in resisting the political pressure, highlights the importance of specialised units, better equipped to deal with the political pressure in most cases.

365 Umur Patek was sentenced to 20 years imprisonment on July 2012. He was not charged with terrorism, as an Indonesian court had previous ruled out the ex-post facto application of the 2003 terrorism law, but the trial proceeded on the basis of ordinary criminal law. See eg. Indonesian militant jailed for 20 years for role in Bali bombings. *See* http://www.guardian.co.uk/world/2012/jun/21/indonesia-militant-bali-bombings. On Indonesia courts more generally, *see* H. Juwana, 'Indonesia's Anti Terrorism Law', in V. Ramraj, M. Hor, et al., *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), pp. 290-309.

366 *See*, *e.g.*, special courts, commissions or procedures in Bangladesh, Jordan or Egypt. For controversies around trials and lack of independence in Pakistan, see, *e.g.*, International Bar Association Human Rights Institute, *A Long March to Justice: A report on judicial independence and integrity in Pakistan*, September 2009, though similar issues arise elsewhere. The pressure to ensure speedy justice in terrorism trials has also been criticised as infringing on fair trial rights; see eg. Human Rights Council Working Group on the Universal Periodic Review, "Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1: Pakistan", 25 March 2008, A/HRC/WG.6/2/PAK3, para. 37.

4B.1.3 International v. national models of justice post 9/11

4B.1.3.1 Focus on justice for terrorism at the national level

Increased focus on combatting international terrorism, and on the challenges in national systems' responses, raises questions as to the appropriate vertical and horizontal relationship between national and international courts. Do (or should) national courts *per se* take priority over international ones for crimes of this nature, or vice versa?[367] What has been, and what should be, the role of international courts, including the ICC?

Proponents of an international tribunal in the aftermath of 9/11 suggested that justice, or indeed the perception of justice, favoured the prosecution of September 11 offences before an impartial court outside the US, preferably in an international tribunal that would reflect the international nature of these egregious crimes and that community's interest in seeing justice done.[368] The other (predominant) view was that, provided national courts are able and willing to do justice, which the US courts (among other courts) appeared in principle to be, international alternatives were unnecessary.

It is noteworthy that despite the attacks occurring at the cusp of the development of the system of international criminal law, proposals for an international tribunal post-9/11 never really garnered support. The ICC would not have had jurisdiction over the September 11 attacks themselves, as the ICC Statute entered into force afterwards and has no retroactive effect.[369] While theoretically possible if the Security Council had referred,[370] the ICC therefore had no realistic impact on the prosecution of the September 11 attacks them-

367 The ICC is clearly bound by 'complementarity', but it takes a different approach from the *ad hoc* tribunals, *see* above. In addition to the vertical relationship between international courts and national courts, questions arise as to the horizontal relationship between national bases of jurisdiction: does or should territorial jurisdiction necessary prevail over universal jurisdiction? On uncertainty surrounding these issues, *see* Framework, Section A above.

368 *See* A.M. Slaughter, 'Terrorism and Justice', *Financial Times*, 12 October 2003, p. 23, arguing that an international tribunal comprising US and Islamic judges should be set up to try terrorists, which would not only add legitimacy to the proceedings but help overcome practical obstacles to effective prosecution. *See*, *e.g.*, M.A. Drumbl, 'Judging the September 11 Terrorist Attack', 24 (2002) HRQ 323; J. Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights', 14 (2003) EJIL 241, 261.

369 The ICC Statute did not enter into force until 17 July 2002; *see* Article 11.

370 The Security Council could, arguably, exercise its Chapter VII powers (*see* Chapter 5A.2.2) to confer jurisdiction on the Court to go beyond Article 11, but this was not a conceivable route at least as long as the US opposed the Court and has a Security Council veto.

selves, not least due to steadfast US opposition.[371] Nor has it been seriously considered to exercise jurisdiction over subsequent terrorist attacks.

In principle the emphasis on national courts is consistent with the ethos of the system of international justice,[372] including the 'complementarity' regime[373] recognising the priority of domestic over international prosecution, and arguably at least also of the territorial state over other jurisdictions.[374] Practice post-9/11 may indeed have a contributory role in consolidating this principle of the primacy of national courts. Primacy should not, however, be confused with exclusivity – deference lasts only as long as domestic courts are able and willing to ensure that justice is done in relation to the particular situation.[375] The sovereign right of states to exercise their criminal jurisdiction is accompanied by their sovereign responsibility to do so respecting international fair trial standards as enshrined in applicable human rights law and IHL.

The minimum benchmarks of a fair trial also constitute prerequisites around which international support for and cooperation with criminal justice processes should take shape.[376] If states cannot or will not meet the most basic international standards, arguably other foreign, international or quasi-international tribunals can and should be seized of jurisdiction to ensure that criminal justice can be done without justice being compromised.[377] In the light of the many

371 President Clinton signed the ICC Statute shortly before leaving office on 31 December 2000 (*see* 'The Right Action', *New York Times*, 1 January 2001, at A6) but in May 2002, the Bush administration purported to 'undo' the signature and notified the United Nations that it did not intend to ratify. *See* Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, UN Secretary-General (6 May 2002), available at: http://www.state.gov/r/pa/prs/ps/2002/9968.htm.

372 The relationship between the ICC and national tribunals is governed by the 'complementarity regime' in the ICC Statute. ICC Statute, *supra* note 4; *see also* Section 4A.1.3.2(a) above.

373 *See*, *e.g.*, the ICC's deference to national courts that are investigating or prosecuting, provided they are willing and able to do so effectively. ICC Statute, *supra* note 4 at Articles 17-19.

374 *See* the 'vertical' complementarity principle in the ICC Statute; *ad hoc* tribunals and relationships between national jurisdictions, above 4A13. *See also the* Spanish rendition and Guantánamo cases under Chapters 4B6 (below) and 7B14.

375 For example, questions arose concerning the compatibility of the Iraqi Special Tribunal for Crimes Against Humanity with internationally accepted fair trial standards. *See*, *e.g.*, P. Ford, 'Iraqi tribunal stirs fierce debate', *Christian Science Monitor*, 1 October 2003; C. Savage, 'Tribunal for Hussein Trial Criticized', *The Boston Globe*, 17 December 2003.

376 *See*, *e.g.*, Chapter 7A5.10 and the law relating to extradition and mutual assistance 4A2, above. The conditions on which this priority depends include, as the OAS has suggested post-9/11, guaranteeing 'the application of rules of due process for the alleged perpetrators, and that there is an effective will to bring them to justice'. OAS Resolution 1/03 on 'Trial for International Crimes', Washington DC, 24 October 2003.

377 It has similarly been argued in the ICC context that even with its clear rule of complementarity, a state whose prosecutions would amount to flagrant denials of justice, should not be seen as meeting the test and justifying deference; *see* arguments in *Prosecutor* v. *Saif al-Islam Gaddafi and Al-Senussi*, ICC-01/11-01/11, and the prosecutorial position in *Senussi*, at http://icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related

controversies surrounding the neglect- or the abuse- of the criminal process in relation to terrorism, and the corresponding impediments to cooperation that have arisen, it may again become pertinent to ask whether, in certain exceptional circumstances, foreign or international jurisdictional alternatives should be revived as a bulwark against ineffective or abusive national proceedings.

As noted above, terrorism was excluded from the ICC Statute primarily due to the lack of a definition, but also for other reasons, including a perception (which may have shifted since 9/11), that terrorism did not rank among the most serious crimes to which the ICC should direct its attention.[378] It is conceivable that serious acts of international terrorism could fall within ICC jurisdiction in the future, as the office of the prosecutor has suggested in relation to the possible investigation of crimes by Boko Haram in Nigeria.[379] Terrorist crimes that were part of a sufficiently widespread or systematic attack on a predominantly civilian population, such as those entailed in the September 11 attacks, could fall within the Court's jurisdiction, for example as crimes against humanity. ICC jurisdiction will generally depend (absent Security Council referral)[380] on the state on whose territory the atrocities were committed, or a state whose nationals are suspected of responsibility, having ratified the Statute or accepted the Court's jurisdiction.[381] For crimes involving international networks of individuals, it is likely that a considerable range of states would satisfy the nexus requirement.[382]

Moreover, ICC jurisdiction over 'terrorism' specifically remains a possibility for the future if a definition can be agreed. However, it is noteworthy that the events of 9/11 and their aftermath have had less immediate impact on

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%20cases/icc01110111/court%20records/filing%20of%20the%20participants/office%20of%20the%20prosecutor/Pages/321.aspx.

378 As noted in Chapter 2, this crime was excluded in 1998 from the Statute primarily due to the lack of a definition, but also for other reasons, including a perception that terrorism did not rank among the most serious crimes to which the ICC should direct its attention. This perception may have shifted post-9/11, as reflected in the condemnation of terrorism post 9/11 as 'one of the most serious threats to international peace and security in the twenty-first century'. SC Res. 1377 (2001), 12 November 2001, UN Doc. S/RES/1377 (2001). Note also SC Res. 1373 (2001), *supra* note 132, which categorised 'all acts of international terrorism' as threats to international peace and security.

379 *See* in this respect, statement by the ICC prosecutor. 'As you know, these crimes may be called terrorists attacks but they could also qualify as crimes against humanity…." 'Terrorist attacks in Nigeria may constitute crimes against humanity – ICC', PANAPRESS, 4 July 2012, available at: http://www.panapress.com/Terrorist-attacks-in-Nigeria-may-constitute-crimes-against-humanity---iCC---15-834146-32-lang2-index.html last accessed at 12 December 2012.

380 ICC Statute, *supra* note 4 at Article 13 on Security Council referral and Article 12 on preconditions for the exercise of jurisdiction.

381 ICC Statute, *supra* note 4 at Article 12.

382 Among the states party to the ICC Statute are several whose nationals were suspected of involvement in the September 11 crimes for example.

the negotiations around a definition of terrorism, or on proposals for the Court to exercise jurisdiction over 'terrorism', than some may have anticipated.[383] Limited support is also found for establishing a separate international terrorism tribunal.[384] While the world's first terrorism tribunal has been established in relation to one specific incident, in the form of the Lebanon tribunal, for various (principled and pragmatic) reasons it may be doubted that such *ad hoc* responses are likely to frequently find favour in the future.[385]

4B.1.3.2 The ICC and State Responses: Afghanistan, Iraq and beyond?

ICC jurisdiction is also potentially relevant to measures taken in *response* to international terrorism, addressed below. This could include a number of practices addressed in this volume that may amount to crimes within the jurisdiction of the Court, which have unfolded after the Statute's entry into force.[386] The ICC could for example have exercised jurisdiction over war crimes in association with the armed conflicts in Afghanistan, Iraq, or potentially crimes against humanity or acts of aggression of sufficient gravity committed elsewhere, provided the preconditions for the exercise of jurisdiction were met.[387]

In relation to Afghanistan for example, as a result of its ratification of the ICC statute on 10 February 2003, the ICC has jurisdiction over relevant crimes committed by the nationals of any state (including non-state parties such as the US) in Afghanistan.[388] A practical impediment to the exercise of that juris-

383 Assembly of States Parties to the Rome Statute of the International Criminal Court: Eighth Session, The Hague, November 18-26, 2009, U.N. Doc. ICC-ASP/8/20, Appendix III, pp. 65-66.

384 '*The Case for Establishing an International Tribunal for International Terrorist Organizations*', *E. Ivanov, 2013. Working Paper, Internaitonal Institute for counter-terrorism proposes a tribunal under the aupsices of the Security Council to determine terrorist organsiations.* Cassese, *International Criminal Law*, *supra* note 131. *See also* unsuccessful Dutch proposal to amend the ICC Statute to include terrorism at the Kampala review conference: Assembly of States Parties to the Rome Statute of the International Criminal Court: Eighth Session, The Hague, November 18-26, 2009, U.N. Doc. ICC-ASP/8/20, Appendix III at 65-66.

385 Principled concerns relate to the politicisation of the process and its selectivity which ahs affected the tribunal's credibility. Pragmatic concerns include the huge expense of establishing ad hoc tribunals, once a permanent tribunal exists in the form of the ICC.

386 Many calls for ICC engagement have made heard, including 'Blair should face war crimes trial over Iraq, says Desmond Tutu', *The Independent*, 2 September 2012, available at: http://www.independent.co.uk/news/world/politics/blair-should-face-war-crimes-trial-over-iraq-says-desmond-tutu-8100798.html.

387 As noted above, this requires that the state on whose territory the crime arises or the state of nationality has ratified or accepts the court's jurisdiction unless the Security Council refers the situation to the Court. ICC Statute, *supra* note 4 at Articles 12-13.

388 As noted above, before the ICC can act, the state of territory or nationality of the accused must be a party to the ICC treaty or accept the Court's jurisdiction. ICC Statute, *supra* note 4 at Article 12. The state can accept the Court's jurisdiction for a specific situation arising before ratification, but after entry into force of the ICC Statute.

diction arises, however, as regards US nationals as the US has negotiated special agreements with governments around the world, including with the government of Afghanistan, to the effect that those governments will not transfer US personnel to the ICC.[389] One longer-term side effect of the abuses committed by the US in the course of the 'war on terror' may be an undermining of its ability to secure such agreements in the future.[390] By contrast, despite the transitional government's brief expression of intention to ratify in 2005, Iraq has not ratified the Statute.[391] But the UK, for example, has been a state party since 4 October 2001, satisfying the alternative 'nationality' nexus[392] for UK nationals involved in conduct that might amount to war crimes or crimes against humanity after that date.[393] Hundreds of submissions have been made calling for the investigation of crimes[394] in Iraq including by UK nationals allegedly acting in 'common purpose' or 'joint criminal enterprise' with US nationals.[395] A preliminary analysis done by the Prosecutor in 2006 led to the decision that on information available at that time, the gravity

389 On the agreements, *see generally* Human Rights Watch, 'United States Efforts to Undermine the International Criminal Court: Impunity Agreements', 4 September 2002, available at: http://www.iccnow.org/documents/HRWArt98legalpaper.pdf.

390 These so-called 'Article 98 agreements' were controversial before (*see ibid.*) but met with intensified opposition in light of evidence of US war crimes in Iraq. *See, e.g.*, Warren Hoge, 'Annan Assails US for Seeking Peacekeeper Immunity', *International Herald Tribune*, 19 June 2004. The US dropped its attempt to get UN backing for these agreements in light of the Iraq abuse scandals. *See* Warren Hoge, 'Prison Abuse Halts U.S. Bid for Troop Immunity', 24 June 2004. On the agreements, *see ibid.* On questions as to their lawfulness for parties to the Statute, *see* J. Crawford, P. Sands and R. Wilde, 'Joint Legal Opinion on bilateral agreements sought by the United States under 98(2) of the ICC Statute'. These documents and an updated list of 'Article 98 agreements' may be consulted on the website of the Coalition for the ICC, available at: http://www.iccnow.org/documents/otherissuesimpunity agreem.html.

391 In February 2005 the Iraqi transitional government announced its decision to ratify the ICC Statute, but promptly withdrew that decision. The Coalition for the International Criminal Court alleged this was due to pressure from the US. H. Rizvi, 'Groups Urge Iraq to Join ICC', 8 August 2005, available at: http://www.commondreams.org/cgi-bin/print.cgi?file=/headlines05/0808-06.htm.

392 The case of the United Kingdom is not however isolated, as the nationals of a number of other states party to the ICC Statute are currently taking part in the military operations in Iraq.

393 *See* P. Sands, 'Our Troops Alone Risk Prosecution', *The Guardian*, 15 January 2003.

394 While the majority related to war crimes, to which the prosecutor conducted a preliminary analysis (*see* below), some related to aggression over which the Court did not have jurisdiction. 'Communications received by the Office of the Prosecutor', ICC Press Release, 16 July 2003, available at: http://www.icc-cpi.int/NR/rdonlyres/F5470312-25C8-4432-81C4-8F08353BB5E5 /277680/16_july__english1.pdf.

395 'Report of the Inquiry into the Alleged Commission of War Crimes by Coalition Forces in the Iraq War During 2003', Peacerights, 8-9 November 2003, pp. 14-20 (the report was commissioned by Peacerights and prepared by eight academics).

standard required by the Statute was not met.[396] This determination could change in light of allegations of egregious crimes committed in Iraq.[397] A key question in respect of Iraq on Afghanistan is likely to be whether or not domestic authorities themselves take appropriate measures to investigate thoroughly allegations on the national level.[398]

Multiple allegations have also arisen as to aggression having been committed in Iraq.[399] Some of these were also submitted to the ICC Prosecutor for investigation, but were rejected as the ICC cannot (at least as yet) exercise jurisdiction over aggression. The Statute and subsequent negotiations clearly anticipate that in the future acts of aggression will fall within the Court's rubric, once agreement is reached on a definition and conditions for the exercise of jurisdiction.

Beyond the armed conflicts, the review of war on terror measures throughout this volume – such as with the extraordinary rendition programme,[400] or, potentially, programme of targeted killings[401] – prompt the question whether they may amount to crimes against humanity. As noted in Chapter 10, rendition unfolded on the territory of several states parties. Where the preconditions for the exercise of jurisdiction are met, they could also conceivably be subject to ICC jurisdiction if no state ultimately proves willing or able to hold perpetrators to account.[402]

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396 Articles 8(1), 17 and 53. *See* statement referring to 240 communications, ICC, Office of the Prosecutor, 2006, available at: http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf. 'The resulting information did not allow for the conclusion that there was a reasonable basis to believe that a clearly excessive attack within the jurisdiction of the Court had been committed ...'

397 See Chapter 6B and 7B6 on allegations of torture against UK personnel in Iraq.

398 *See* 'Statement on communications concerning Iraq', The Hague, 9 February 2006, pp. 8-9. 'Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute. In light of the conclusion reached on gravity, it was unnecessary to reach a conclusion on complementarity.' *See also* F. Guariglia, 'The Selection of Cases by the Office of the Prosecutor of the International Criminal Court', in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden, 2009), pp. 209-17. 'Complementarity' of the ICC to national systems, *see* ICC Statute, *supra* note 4, Preamble and Articles 17-19.

399 *See, e.g.*, 'Lawyers doubt Iraq war legality', *BBC News*, 7 March 2003, reporting a letter from UK law teachers on the unlawfulness of the prospective attack on Iraq, which described such an attack as an act of aggression. *See also* the interview with Saudi Arabia's Foreign Minister Prince Saud al-Faisal, Interview with BBC News Correspondent, John Simpson, available at: http://news.bbc.co.uk/1/hi/world/middle_east/2773759.stm (questioning whether it was 'a war of aggression rather than a war for the implementation of the United Nations resolutions').

400 *See* Chapter 10 on Extraordinary Rendition'.

401 *See* Chapter 7B3, 'War and Human Rights'.

402 Among the many obstacles is lack of Pakistani ratification, and the poor ratification rate in the Middle East, where only two states have ratified as of July 2012.

4B.2 THE CHANGING FACE OF CRIMINAL LAW AND TERRORISM

In the years following 9/11 the world witnessed a massive flurry of criminal legislative activity across the globe.[403] In large part this followed the Security Council's call to states to ensure that terrorist acts and financing 'are established as serious criminal offences in domestic laws and regulations….'[404] This was supplemented by subsequent international and regional impulses calling for example for criminalisation of incitement and provocation to terrorism.[405]

Legislation post-9/11 was often passed quickly, in part in response to the pressure on states to provide information to the Security Council regarding legislative changes within ninety days.[406] Unsurprisingly, processes were at times criticised as lacking in-depth assessment of the sufficiency of existing laws, or the compatibility of the new laws with the underlying principles of criminal law in domestic systems.[407] The same rushed-through approach is commonly seen in legislation passed following particular terror attacks, often in response to political pressure to be responding, and seen to be responding, to terrorism.[408]

Changes in national laws have also reflected the increased focus – on the international, regional and national levels – on the question of how to harness criminal law not only as a tool to *respond* to acts of terrorism after the fact, but to its *prevention*.[409] Criminal law has long had a preventive dimension and experience shows the role that effective law enforcement plays in preventing terrorism and other serious crime.[410] The extent of this focus and its interpretation in recent practice, however, raises questions as to the limits of the preventive use of criminal law, as criminal anti-terrorism laws embrace an ever-broader range of prohibited conduct, reaching further back into preparatory acts and further out to the environment that sustains or 'supports' the terrorism.

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403 *See*, *e.g.*, Survey of the implementation of Security Council Resolution 1373 (2001), UN Doc. S/2008/379 (2008).

404 SC Res. 1373 (2001), *supra* note 132.

405 *See* SC Resolution 1624 (2005) calling on state to criminalise 'incitement', or Council of Europe Resolution 2007/8 relating to 'provocation' to commit terrorism. *See* below 4B21 in this section 'Incitement, Provocation, Glorification or Apology'.

406 SC Res. 1373 (2001), *supra* note 132. Confusion was generated by the UNSC 1373 pushing for criminalisation absent clarity, *see* Chapter 7B.1. Similar issues arose concerning UNSC 1267 and provisions on freezing of assets.

407 Eminent Jurists Report, *supra* note 302.

408 An example is the Indian *Unlawful Activities (Prevention) Amendment Act* 2008, adopted in haste following the November 2008 terrorist attacks in Mumbai.

409 For one manifestation on the international level, *see* the UNODC Handbook on Criminal Justice Responses to Terrorism, *supra* note 157, (focusing on the use of criminal law 'preventively').

410 *See, e.g.,* Eminent Jurists Report, *supra* note 311, p. 123.

In addition, an increase in investigative, detention or other powers and a decline in oversight and procedural safeguards have been common, as have modifications in the normal rules of procedure and evidence.[411] In some instances, these developments may respond to genuine challenges that terrorism poses to the criminal law, while in others they may reveal a certain opportunism facilitated by the 'war on terror'. In either case, developments in laws and practice around terrorism in recent years have led to wide-reaching approaches to substantive offences and modes of liability, as well as innovations in applicable procedures, as illustrated in turn below.

4B.2.1 Creation of new 'terrorism' and ancillary offences: widening the net

i) 'Terrorism'

As explored fully in Chapter 2, there is no internationally agreed upon definition of terrorism under treaty or customary law. When the Security Council nonetheless called on states to criminalise and punish terrorism severely, it fell to states to fill the legality gap and ensure that terrorism was defined with precision in national law. While some guidance was given, belatedly, at the UN level as to the components of such a definition,[412] in practice there is great diversity in definitions of terrorism on the international, regional and national levels. Many of those definitions have been criticised for their breadth or lack of precision, with serious concern arising from a range of international authorities in respect of infringements of the cardinal principles of criminal law.[413] Of particular relevance are the principles *nullum crimen sine lege*, requiring clarity and specificity in criminal law.[414]

Also central is the principle of individual responsibility, requiring that the law punish on the basis of the criminal conduct of the particular individual,

411 *See* Chapter 7 parts 7B.2.1. and 7B3.2 on detention, and other powers implicating human rights; on diminished judicial oversight *see* Chapter 11.

412 *E.g.*, SC Res. 1566 'description' of terrorism in Chapter 2. The Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (E/CN.4/2006/98), sec. III ('Reflections on the Issue of Defining "Terrorism"'), 28 December 2005suggested that 'terrorist offences' should be confined to instances where the following three conditions are cumulatively meet: (a) acts committed with the intention of causing death or serious bodily injury, or the taking of hostages; (b) for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act; and (c) constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.

413 For examples *see* Chapter 2.2 'National Measures' and 7B.5; and Eminent Jurists Report, *supra* note 302 at pp. 124-27.

414 *Ibid.*

in line with their subjective fault and respecting the presumption of innocence.[415] Some of the developments considered below raise questions regarding one or both of the basic elements of any offence – that it must involve both criminal conduct and criminal intent. Indeed, questions arise as to whether some of the conduct embraced by terrorism and associated definitions is properly 'culpable' at all, and the appropriateness of engaging the sanction and stigma of criminal law.[416] The United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has noted that in defining the term 'terrorism' it is important to ensure that it is confined in its use to 'conduct that is of a genuinely terrorist nature'.[417]

Examples abound of basic criminal law principles being tested by approaches to the definition of the crime of terrorism.[418] Even relatively mainstream definitions that reflect closely international instruments have been under attack, such as where the Canadian Courts found that state's definition to fall foul of human rights standards.[419] Specific human rights issues that have flowed from broadly defined 'terrorism' crimes being used to preclude freedom of association, expression of dissent or other disfavoured conduct are illustrated in Chapter 7.[420]

Closely associated with the cardinal principle of legality, is the principle of non-retroactivity. While most criminal laws post-9/11 did not have retroactive effect, some did. An example is Indonesia's Anti-Terrorism law, which was struck down for affording retroactive effect to new terrorism crimes.[421] Related questions have also arisen as to whether prosecutions can proceed in relation to conduct that was criminal under international (but not national) law at the time of its commission. As a matter of international law, where the crimes are well established in international law at the time of their commission, there is no requirement that they also be enshrined in national law for the

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415 On the nature of the presumption of innocence, *see* A. Ashowrth, (2006) 'Four threats to the presumption of innocence', (2006) 10 The International Journal of Evidence & Proof 4, pp. 241-78.

416 *See* discussion on 'status offences' and guilt by association in K. Roach, 'The Criminal Law and Terrorism' in V. Ramraj, M. Hor, et al., *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), p. 140.

417 U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, E/CN.4/2006/98, para. 42.

418 *Ibid.*; *see* further below for particular offences eg the scope of 'material support' for terrorism which has been held by US courts to be overly broad.

419 *R* v. *Khawaja* [2006] OJ 4245, at 73. The case is before the Supreme Court which, on 11 June 2012, heard arguments that the December 2001 Anti-terrorism Act violates the *Canadian Charter of Rights and Freedoms*.

420 For examples of prosecutions of indigenous groups, women's groups and unions, *See* Chapter 7B.11 'Proscribing dissent – expression, association, assembly'.

421 *See, e.g.,* H. Juwana, 'Indonesia's Anti Terrorism Law', in V. Ramraj, M. Hor, et al., *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), pp. 290-309. *See also* sec. 38 of the Pakistani *Anti-Terrorism Act* at http://www.fia.gov.pk/ata.htm.

nullum crimen principle.[422] In relation to terrorism under international law, as discussed above, this is problematic however, as the predominant view is that terrorism is not a crime as such under customary law, nor is there a generic terrorism treaty that purports to criminalise terrorism.[423] The specific conventions addressing particular forms of terrorism were not themselves intended to provide a basis for criminal prosecution, but to oblige states to criminalise in domestic law.[424]

The import of these issues is seen for example in the US Supreme Court case of *Hamdan* v. *Rumsfeld* in which the Petitioner successfully challenged the ability to prosecute him before a military commission for 'conspiracy to commit war crimes'.[425] While 'war crimes' were enshrined in domestic law at the relevant time, the Court had good reason to ultimately consider that 'conspiracy to commit war crimes' was a separate crime not established in national or international law at the relevant time.[426]

ii) Before the Crime? Conspiracy, Preparatory Acts, Planning, and Possession …
Suggestions of a paradigm shift towards criminal law as a preventative tool is particularly apparent in relation to the prosecution of 'preparatory' or enabling acts. Post-9/11 legislatures have often created new specific offences, while established crimes have also been subject to new interpretations and approaches in the terrorism context. These developments generally seek to enhance the efficiency of the law, by enabling states to address terrorism, within a pre-established rule of law framework, before attacks materialise. In some cases however, tensions arise regarding compatibility with basic criminal law principles.

In many states, criminal laws have long provided the basis to prosecute 'preventively' in that the harmful act need not have been accomplished, or even necessarily attempted, for a common law concept of 'conspiracy' or a civil law 'association de malfaiteurs' to arise.[427] In recent years, conspiracy

422 Article 15 ICCPR has an explicit exception for crimes under international law. Cf terrorism crimes in the sectoral treaties which do not themselves criminalise, but oblige states to do so. *See* the distinction in more detail in Cryer & Friman, *et al.*, *supra* note 31.

423 *See* Chapter 2 on the contrary (but isolated) view of the Appeals chamber of the Special Tribunal for Lebanon.

424 *See* above Part A.114 and Chapter 2; Saul, 'Legislating from a Radical Hague', *supra* note 130.

425 The Military Commissions Act 2006 establishes the crimes within the military commission's jurisdiction, including conspiracy is included in this list. It is treated as a death penalty offense if death results from the conspiracy. *See* Drumbl, 'The Expressive Value', *supra* note 7.

426 *Hamdan* v. *U.S.*, *supra* note 328; *see* majority Judgement of J. Stevens, and J. Thomas dissent, *ibid.*

427 The UNODC Handbook on Criminal Justice Responses to Terrorism, *supra* note 157, notes the offences of conspiracy and criminal association are obvious models for preventive intervention against the planning and preparation of criminal acts; both continental law concepts of elicit association and/or the common law concepts of 'conspiracy' relate to

laws have been used expansively, notably in the US, to prosecute from the earliest 'planning' stage of would-be terrorist activity.

One of the issues arising in practice has been an increasingly flexible approach to the interpretation of a criminal 'plan,' and to the connection between individuals required for a 'conspiracy,' raising doubts as to legal certainty in respect of the scope of the offence. For example, in the US case of *Rahman*, all the defendants were convicted of 'seditious conspiracy to levy war against the United States', involving numerous disparate acts whereby 'a number of rather tenuously connected behaviors' were charged as a single case of conspiracy.[428] While a plan clearly does not have to be limited to a single act of violence, it has been suggested that it does require some definition beyond acts of violence within the United States generally.[429] Under a flexible approach to the alleged plan a broad range of conduct, from completed crimes to 'schemes' were treated as part of a larger crime, with the ancillary effect of allowing a broad range of evidence being placed before the jury that would normally be considered irrelevant and inadmissible.

Conspiracy laws are also coupled with the introduction in some systems of crimes involving acts 'preparatory to terrorism' (or as discussed below material support for terrorism) where individuals are prosecuted for conspiracy to commit such prepatory or supportive acts.[430] In many cases, traditional conspiracy laws required at least a preparatory step towards the commission of the crime, thus safeguarding the notion that prosecution must be based on the *conduct* of the individual.[431] By contrast, where the individual may not yet have actually *done* anything, these developments may represent a controversial move from criminalising conduct to criminalising intention or even thought.[432]

Another manifestation of the increasing emphasis on early intervention is criminalising 'possession' of articles that may ultimately be used in terrorist

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agreements to commit crime.

428 W. McCormack, 'Inchoate Terrorism: Liberalism Clashes with Fundamentalism' (2005) 37 *Georgetown Journal of Int'l Law* 1: 'Some of these actions constituted completed crimes. Others were attempts. And yet others were unfulfilled plans or schemes. … Evidence of all these various offenses was introduced in a single trial because they allegedly formed part of a single plan.'

429 *Ibid.*

430 In one Australian case, for instance, a 23 year prison sentenced was imposed for a junior role in a conspiracy to commit acts in preparation for a terrorist act, where no specific act had yet been agreed upon and where there was not necessarily any intention to injure people. The case of *R v Elomar & Others* [2010] NSWSC 10, paras. 147-78 (concerning Mohammed Omar Jamal) discussed in Saul, 'Criminality and Terrorism', *supra* note 12; *see also* below on conspiracy to provide material support.

431 *Ibid.*

432 In the UK, see eg the prosecution of Samina Malik, discussed in Chapter 7B.11; see I. Bunglawala, 'Don't even think about it', *The Guardian*, 6 December 2007.

attacks.[433] So far as possession might be seen as a first step towards carrying out an attack, it would often already be covered by conspiracy laws. Tensions again arise however where possession is dissociated from or too remote from the commission of a terrorist act. The issue was highlighted by the case of *R.* v. *Zafar* in the English courts[434] where the appellants were convicted of possession of computer discs and hard drives containing extremist propaganda, the purpose of which – according to the prosecution – was to incite persons to travel to Pakistan to take part in 'jihad'. The Court of appeal quashed the convictions, holding that there must be some direct connection between the article possessed and the act of terrorism alleged, of which there was no such evidence in this case.[435]

iii) Membership of terrorist organisations

A common addition to the legislative books post-9/11 has been the crime of membership of a terrorist organisation.[436] The Security Council – in Resolution 1267, adopted before 2001, and subsequent resolutions adopted since then – provided the impetus by obliging states to criminalise membership of terrorist organisations on the domestic level. Prosecuting criminal organisations is nothing new, as noted in Part A: for many states, membership of a criminal organisation was already enshrined in domestic law, and the idea of prosecuting criminal organisations in international law dates at least back to Nuremberg. On one level, the fact that many more states have adopted such criminal laws post-9/11 should not then be surprising or necessarily controversial.

However, in practice, throughout history, controversy has surrounded the labelling of terrorist organisations, from Mandela's ANC[437] to Arafat's PLO[438]

433 In the UK, *e.g.* the Terrorism Acts of 2000 and 2006 (TA 2000 and TA 2006) introduced offences of: possessing an article or record of information for a terrorist purpose (s.57, TA 2000) or possessing a record of information likely to be useful in committing an act of terrorism (s.58, TA 2000) as new terrorism offences. Others included failing to disclose information about a terrorist offence (s.38BTA2000), inciting an act of terrorism overseas (s.59, TA 2000), intentionally or recklessly encouraging an act of terrorism (s.1, TA 2006), disseminating a terrorist publication (s.2, TA 2006), preparing to commit a terrorist offence (s.5, TA 2006) and engaging in terrorism training (ss.6 and 8, TA 2006).

434 *R.* V. *Zafar* (Aitzaz) [2008] EWCA Crim 184; [2008] Q.B. 810 (CA (Crim. Div.)).

435 F. Galli, 'Developments in the construction of criminal legislation – *R. v Zafar and Others*', (2008) 172(33) *Justice of the Peace* 532-35.

436 While such crimes are widespread, some examples (Australia, Tanzania and Uganda and the U.K.) are discussed in the Eminent Jurists Report, *supra* note 302 at p. 134.

437 'I was called a terrorist yesterday, but when I came out of jail, many people embraced me, including my enemies, and that is what I normally tell other people who say those who are struggling for liberation in their country are terrorists. I tell them that I was also a terrorist yesterday, but, today, I am admired by the very people who said I was one'. Nelson Mandala, *Larry King Live,* 16 May, 2000.

and far beyond.[439] Post-9/11, the same controversies surrounding terrorism appear but in heightened form, in light of the stretching of the terrorism label to reach diverse 'undesirable' conduct.[440] As history attests, caution is due to avoid guilt by association, and to ensure that the individual is being prosecuted commensurately with individual criminal responsibility, as well to avoid the political manipulation of the criminal law against political opponents. The crime of membership of a terrorist organisation is blighted with all of the same definitional uncertainties as this definition of terrorism itself, with a few more added.[441]

A first additional level of difficulty relates to what 'membership' means in the context of an entity such as al Qaeda, which has been described a 'loose network of cells,' or al Shabaab with its massive and diverse popular support base. How should 'membership' in these circumstances be understood or established? In unstructured movements where there is no system of membership as such, these concepts are not straightforward. As was noted in relation to the London 7/7 bombers, individuals that consider themselves members may be bound together by little more than broad overlapping ideologies.[442] Particular concerns arise where individuals have a role far removed from terrorist activity as such. The potential for slippage from punishing individual conduct to punishing ideology, or from individual responsibility to guilt by association, is clear.[443]

A second level of doubt that has arisen in practice relates to the role of the executive (nationally or internationally) in identifying proscribed organisations.[444] The designation of 'terrorist' organisations by the executive under certain anti-terror legislation may in practice reduce the critical role of the crim-

438 'The difference between the revolutionary and the terrorist lies in the reason for which each fights. For whoever stands by a just cause and fights for the freedom and liberation of his land from the invaders, the settlers and the colonialists cannot possibly be called terrorist, otherwise the American people in their struggle for liberation from the British colonialists would have been terrorists; the European resistance against the Nazis would be terrorism, the struggle of the Asian, African and Latin American peoples would also be terrorism …. This is actually a just and proper struggle consecrated by the United Nations Charter and by the Universal Declaration of Human Rights …. the justice of the cause determines the right to struggle.' Arafat, Address to the UN, 1984.

439 *See generally* Chapter 2, and Chapter 7 on eg Proscribing Dissent. The Eminent Jurists panel notes that the now president of the Maldives was charged with terrorism in 2005 for leading a political protest. Eminent Jurists Report, *supra* note 311, p. 126.

440 *See, e.g.*, Chapter 7B.11 'Proscribing Dissent' (referring to women's groups and indigenous groups being labelled terrorists).

441 A heightened standard of clarity and specificity is required under criminal law, and additional uncertainties arise regarding membership as highlighted in this section below.

442 *See, e.g.,* Chapter 6B.1.

443 *See* Ch.7B.11 'Proscribing dissent' – expression, association, assembly.

444 Chapter 7B.8. Listing and Delisting.

inal courts in determining guilt and displacing the presumption of innocence.[445] It has been noted as imperative that criminal courts can and do assess both the nature of the organisation in question – whether it amounts to a 'terrorist' organisation properly so called – and the role and culpability of the individual, in convicting and punishing under the criminal law.[446] Deference to terrorist 'lists' drawn up internationally, regionally or nationally[447] may challenge the presumption of innocence; innocence which must be dislodged only by a court of law, applying criminal law commensurately with individual criminal responsibility on a case-by-case basis, with doubt being resolved in favour of the accused.[448]

iv) Failing to provide information

Another development accompanying the preventative paradigm is the shift of focus from conduct to omission, criminalising those who fail to expose would-be terrorists. Once again, criminalising omission is of course not novel in criminal law, but it is exceptional, usually based on the particular responsibilities attaching to groups of individuals in law.[449] Some new terrorism laws seek to intervene preventively by broadening the scope of persons considered to have such responsibilities, for example imposing a duty on all citizens (including family members) to report any information that might conceivably lead to the prevention of terrorism.

Questions regarding clarity of scope and the foreseeability of criminal law necessarily arise from provision – such as in UK anti-terrorism legislation – which provide that a person who 'believes' information 'might be of material assistance' in preventing terrorism or securing convictions commits an offence if he or she does not disclose the information to police as soon as reasonably practicable.[450] Although it is rare for charges to be brought under this section,

445 *See, e.g.*, India's anti-terrorism law which allows the Home Ministry of the central government to declare a group to be a 'terrorist organization'. *See* 'Back to the Future: India's 2008 Counterterrorism Laws', Human Rights Watch, 2008, available at: http://www.hrw.org/sites/default/files/reports/india0710webwcover_0.pdf.

446 U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, E/CN.4/2006/98, para. 42.

447 Chapter 7.B.8.

448 *See, e.g.*, Human Rights Committee General Comment 32, Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), regarding the Presumption of Innocence.

449 *See, e.g.*, above Superior Responsibility in International Criminal Law which requires a superior- subordinate relationship, with obligations that flow therefrom.

450 Section 38B of the Terrorism Act 2000 reintroduced the old section 19 of the PTA which had been limited to terrorism in the context of Northern Ireland and criticized for its impact on family life and society. The new act relates to information the person believes to assist in '(a) preventing the commission by another person of an act of terrorism or, (b) in securing the apprehension, prosecution or conviction of another person, in the UK, for an offence involving the commission, preparation or instigation of an act of terrorism'.

cases have been brought.[451] While the objective of these laws are legitimate, caution is due as regards the implications for legal certainty, as well as for the stigmatisation and penalisation of families and communities.[452]

v) Material Support for Terrorist Organisations

An important feature of criminal practice that raises related concerns is the adoption of laws criminalising various forms of 'support' for terrorism or for prohibited organisations. It is perhaps in this context that concerns regarding criminalisation of essentially non-culpable behaviour have been most acute. Although these laws have some reflection in existing criminal concepts such as aiding and abetting or the specific liability mode of 'intentionally contributing to the commission of a crime by a group' under the Rome Statute, their scope goes far beyond established modes of liability under international criminal law. Notably, the US laws on 'material support' incriminate support for a terrorist organisation of any form. While there is a limited exception for the provision of 'medicine and religious materials,' cases have demonstrated a very restrictive approach to the interpretation of even this narrow exception.[453] Criminal laws cover not only support that contributes in some way to acts of international terrorism, the conduct which the criminal law seeks ultimately to repress and punish, but even innocent or well intentioned acts that support the non-terrorist roles that organisations on terrorism lists may, and in practice do at times, perform. Individuals may thus be prosecuted for conduct that is not in any way 'culpable,' and even paradoxically for conduct directed in some way at the prevention of terrorism.

This is illustrated in startling fashion by the 2010 decision of the US Supreme Court in *Holder* v. *Humanitarian Law Project*, where a divided court found that it was constitutional to criminalise support for a terrorist organisation (PKK), in respect of the advocacy and training of members of that

451 Yeshiemebet Girma and others were charged with and convicted of failing to provide information about acts of terrorism, contrary to section 38B (1) (b) of the Terrorism Act 2000; *see* C. Walter, S. Vöneky, V. Röben and F. Schorkopf, *Terrorism as a Challenge for National and International Law* (Springer, 2005), p. 613.

452 *See* Eminent Jurists Report, *supra* note 302, p. 134 citing the danger that media, defence lawyers, human rights groups and family members (especially children) are penalised. On the radicalizing potential of such measures, and the 'symbolic reminder of a group's shared circumstance vis-a-vis authorities and their agents of control', *see* C. Campbell, 'Beyond Radicalization: Towards and Integrated Anti-Violence Rule of Law Strategy', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), pp. 255-82, p. 272.

453 United States v. Shah, 474 F. Supp 2d 492 (SDNY 2007), 499 and United States v. Farhane 634 F2d 127 (2 Cir.2011); see Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action,' Kate Mackintosh and Patrick Duplat, July 2013, independent study commissioned by ODHA and the Norwegian Refugee Council ('Humanitarian Study 2013'), p. 40.

group to use international law to resolve disputes and obtain remedies.[454] In the absence of subjective fault, one may ask on what basis the individual can properly be subjected to the criminal law. Such laws are not unique to the US. In other states, including Australia, Denmark and Canada, criminal laws allow for prosecution despite the lack of intention to contribute to a criminal act.[455] The use of individuals as means, not ends, is anathema to the concept of individualised responsibility in criminal law.

The potential implications for a broad range of legitimate activity was acknowledged in a later case in lower courts in the US, where a federal judge reportedly struck down the legal provisions allowing for detention on grounds of 'material support' as 'unconstitutionally overbroad'.[456] The judge recognised the legitimate fear of journalists, scholars and political activists that they could face detention for exercising their rights.[457] The laws that have been most commonly been used to prosecute terrorism in the US are conspiracy laws (addressed above) and 'material support' laws. They have been used in combination to particularly broad effect, as 'conspiracy to provide

454 *Holder v Humanitarian Law Project* (2010) 561 US; *See* J. Fraterman, 'Criminalizing Humanitarian Relief: Are US Material Support for Terrorism Laws Compatible with International Humanitarian Law?', 14 January 2011, available at: http://dx.doi.org/10.2139/ssrn.1750963 . U.S. District Judge Audrey Collins in Los Angeles ruled that the Patriot Act was 'impermissibly vague' in prohibiting individuals or groups from giving 'expert advice or assistance' to designated terrorist organizations. The crime may arise anywhere in the world if the suspect is a US national or resident or enters the US any time after the commission of the offence.

455 *See* Humanitarian Study, *supra* note 453, referring e.g., to 'low standards of intent' for such offences in Australia, Denmark and Canada for example. It notes that in some states knowledge that a group is listed would suffice to render any support a criminal offence while in the UK 'reasonable cause to suspect' such designation would suffice; pp. 41, 45. *See eg* Sn 114b Danish Criminal code on financial or other support to terrorism.

456 In September 2012, a federal judge struck down Section 1021(b)(2) of the National Defense Authorization Act for 2012 that allowed for indefinite detention for 'substantially' or 'directly' provides 'support' to forces such as al-Qaeda or the Taliban: *Hedges* v. *Obama*, 12 Civ. 331 (KBF) (2012) and opinion at: http://www.lawfareblog.com/wp-content/uploads/2012/09/2012-09-12-permanent-injunction-order.pdf . The judge noted the law was 'unconstitutionally overbroad' and recognised legitimate fears in claims by journalists, scholars and political activists that they could face indefinite detention for exercising First Amendment rights. 'Anti-terrorism law struck down by federal judge', *POLITICO*, 13 September 2012, available at: http://www.politico.com/news/stories/0912/81169.html. *See also* Judge Audrey Collins in the U.S. District Court in Los Angeles who ruled that the Patriot Act was 'impermissibly vague' in prohibiting individuals or groups from giving 'expert advice or assistance' to designated terrorist organizations. 'U.S. Judge Voids Portion of Patriot Act as Illegally Vague', *LA Times*, 30 July 2005, available at: http://articles.latimes.com/2005/jul/30/local/me-patriot30.

457 *Ibid.* Lawyers are also at risk from overbroad criminal notions of providing support. In 2012 a ten-year prison sentence was upheld in federal court for a 73-year-old attorney who was convicted in 2005 of 'providing aid to terrorism' for sharing statements from her client, Sheik Omar Abdel Rahman, with the media. *See* 'Why justice is at risk in the Babar Ahmad extradition case', *The Guardian*, 5 October 2012, available at: http://www.guardian.co.uk/commentisfree/2012/oct/05/justice-risk-babar-ahmad-extradition.

material support' further waters down and stretched the potential reach of criminal law.[458]

A particular form of support for terrorism that is typically criminalised, and which raises similar concerns, is the financing of terrorism. Combating the financing of terrorism and money laundering is a key priority in the international fight against terrorism, as well reflected in the legal framework,[459] and one beset with real law enforcement challenges.[460] Extremely broad-reaching criminal laws have been passed into law that cover any form of potential financial provision 'direct or indirect' to an individual or group designated terrorist. It is often irrelevant whether or not there is any intention to contribute to terrorism or this in fact results.[461] Similar concerns therefore arise as regards the potential to greatly widen the criminal net to cover innocent or legitimate activity.[462]

vi) Incitement, Provocation, Glorification or Apology for Terrorism

Another way in which inchoate offences have been expanded pursuant to the shift towards a preventive paradigm is in the trend to criminalise acts that encourage, incite or provoke acts of terrorism.

UN Security Council Resolution 1624 of 2005 called on states to prohibit incitement,[463] marking something of a departure from international criminal law practice (where incitement is an established form of liability for genocide though not for other crimes).[464] While clearly raising questions regarding free expression, there is nothing in human rights law that would preclude prosecuting those that incite violence; on the contrary, states may be obliged to do so.[465] Provided the offence is clearly defined, and the restriction on

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458 This basis for criminal prosecution has been common in the US in recent years.

459 See eg Articles 2 and 4 of the widely ratified 1999 International Convention for the Suppression of the Financing of Terrorism (Financing Convention), and SC Res 1373 which closely reflects the Financing Convention, both in Chapter 2.

460 See eg M.A. Drumbl, Transnational Terrorist Financing, Criminal and Civil Perspective, German Law Journal 2008.

461 See eg 'Interpretative Note to FATF Special Recommendation II: Criminalising the financing of terrorism and associated money laundering ', FATF paras 3-8. The Note indicates that states should embrace a broad range of forms of responsibility for this offence.

462 See eg Humanitarian Study, *supra*, on the implications for humanitarian organisations of these crimes, and of FATF recommendations (including recommendation 8 on ensuring NGOs are not abused for terrorism).

463 SC Resolution 1624 (2005), 14 December 2005, UN Doc. S/RES/1624 (2005), called upon all States to 'adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to: *(a)* Prohibit by law incitement to commit a terrorist act or acts ...'.

464 *See* ICC Statute, *supra* note 4, Article 25. Incitement is included to reflect the Genocide Convention.

465 *See* positive obligations 7A.4.2, and human rights cases making clear that free expression is not absolute and can be restricted where incitement to violence is involved at 7A5.6; *see also* the practice at 7B.11.

rights necessary and proportionate, such laws provide an important tool in the prevention of terrorism.

Some innovations in criminal law strain these criteria however. For example, the obligation to penalise 'provocation' in Security Council resolutions appears to go further than existing international criminal law for example.[466] While similar forms of liability are recognized in international criminal law (such as 'inducing' the commission of a crime or acting 'in common purpose', or as part of a 'joint criminal enterprise'), these require that the crime 'in fact occurs or is attempted'.[467] By contrast crimes of incitement or provocation may however go further by criminalising expression which may not have contributed in any way to criminal activity or indeed been intended to have such an impact.

The Security Council's inclusion of 'provocation' was picked up in various forms, including in the Council of Europe Convention on the Prevention of Terrorism (2005), Article 5 which requires States parties to adopt such measures as may be necessary to criminalize 'public provocation to commit a terrorist offence'.[468] This Convention limits the potential scope of provocation by imposing the 'double requirement of a subjective intent to incite (encourage) the commission of terrorist offences and an objective danger that one or more such offences would be committed'.[469] However, the Convention has been relied upon by states to justify wider-ranging measures that go beyond these parameters.

The UK notoriously included the crime of 'glorification of terrorism' in its anti-terrorism legislation, referring specifically to the Europe Convention on the Prevention of Terrorism as the basis for so doing.[470] The glorification or encouragement offences, unlike the European Convention, did not require that the statement in fact encouraged any person to engage in a terrorist act – explicitly de-linking this form of encouragement from its actual effect.[471]

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466 S.C. Res. 1624, *supra* note 463.

467 *See* 'Indirect Criminal Responsibility' at Part A above.

468 Framework Decision 2002/475/JHA on combating terrorism was modified by Council Framework Decision 2008/919/JHA of 28 November 2008. The consequence is the introduction of three new offences: public provocation to commit a terrorist offence; recruitment for terrorism; and training for terrorism.

469 Council of Europe Convention on the Prevention of Terrorism: 'the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed'. The Special Rapporteur of the United Nations Human Rights Council on the protection of human rights and fundamental freedoms while countering terrorism has referred to Article 5 as 'a sound response which would respect human rights'. E/CN.4/2006/98, p. 17, par. 56c (citing the Convention as a model).

470 *See* Explanatory notes to the Terrorism Act of 2006

471 S. Chehani Ekaratne, 'Redundant Restriction: The U.K.'s Offense of Glorifying Terrorism', (2010) 23(1) *Harvard Law School Human Rights Journal*, 205-22. It need only be 'likely' to be understood as encouraging terrorism.

Moreover, the person making the statement or publishing the document need not *intend* to incite the commission of a terrorist offence, with recklessness as to this result sufficing. There has been widespread criticism of the glorification provision, for its breadth, susceptibility to abuse, and disproportionate impact on freedom of expression, by among others by the UN Human Rights Committee.[472] Despite this, similar provisions on 'glorification' have been proposed, adopted and relied upon to prosecute in other states.[473] The UN Human Rights Committee has called for the revision of legal provisions on 'encouraging' terrorism.[474]

The criminalisation of expression and opinion also takes the form of crimes that express sympathy, justification or 'apology' for 'terrorist' causes. One such broad reaching provision appears in the Russian Anti-Terrorism Act which includes the 'popularisation of terrorist ideas, dissemination of materials or information urging terrorist activities, substantiating or justifying the necessity of the exercise of such activity'.[475] Another is the Turkish Counter-terrorism law that sanctions those who 'make propaganda for a Terrorist organization or for its aims'.[476] As with all such associated offences, the wide-reaching scope of these terms must be seen alongside the expansive definitions of terrorism itself.

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472 It was criticised for breadth, susceptibility to abuse, and disproportionate impact on freedom of expression. *See* U.N. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, ¶ 26, U.N. Doc. CCPR/C/ GBR/CO/6 (July 30, 2008). *See* E. Barendt, 'Threats to Freedom of Speech in the United Kingdom?', (2005) 28 *University of New South Wales Law Review* 895.

473 Article 578 of the Spanish Penal Code prohibits 'glorification of terrorism;' *see, e.g.*, the convictions in the "Esteban, Miriam and Valentina" case before the *Audiencia Nacional*: . *See* ICJ Terrorism Bulletin, No 51, April 2011. On Canada proposals, s*ee* C. Forcese, 'Criminalizing Glorification of Terrorism: Bad Idea on Stilts', National Security Law Blog, available at: http://craigforcese.squarespace.com/national-security-law-blog/2011/11/18/criminalizing-glorification-of-terrorism-bad-idea-on-stilts.html. *See also* F. Hassan, 'Do Anti-Terrorism Act Amendments Threaten Free Speech?', *Huffington Post*, 22 November 2011, available at:http://www.huffingtonpost.ca/farzana-hassan/anti-terrorism-act-canada_b_1104538.html and 'Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues', Government Response to the Seventh Report of the Standing Committee on Public Safety and National Security Subcommittee on the Review of the Anti-Terrorism Act, available at: http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3066235&Language=E&Mode=1&Parl=39&Ses=1&File=15.

474 UN Human Rights Committee, Concluding Observations of the Human Rights Committee, Ninety-third session CCPR/C/GBR/CO/6, 21 July 2008.

475 Federal Law No. 35-Fz of March 6, 2006 on Counteraction Against Terrorism.

476 Turkish Counter-terrorism Law, 2006, Article 7 of Law 3713. On proportionality of penalties *see* Yilmaz and Kiliç v. Turkey, (Appl. No. 68514/01), Judgment of 17 July 2008.

4B.2.2 Penalties and Sentencing in Terrorism Cases

Resort to the criminal law is, in itself, intended to reflect the seriousness with which the state takes acts of terrorism. The imposition of proportionately tough sentencing for serious acts of 'terrorism' can be an important part of both the 'expressivist' and the 'retributivist' functions of criminal law in this field.[477] Security Council in 1373 underlined the duty to ensure that 'the punishment duly reflects the seriousness of such terrorist acts'.[478]

One tension that arises is that the tendency to impose 'tough' penalties for conduct that falls within the purview of 'terrorism' is out of sync with another tendency towards an overly inclusive approach to terrorism, associated crimes and modes of liability embracing a range of more and much less culpable behaviour. As such, sentences imposed may be out of proportion to the conduct of the individual. Cited as an example of this is the Australian case *R v Elomar & Others*, where a young man was sentenced to 23 years in prison for a relatively minor role in a conspiracy to commit acts in preparation for a terrorist act.[479] Likewise, the imposition of serious sentences for terrorism and ancillary offences that cover mere expressions of support de-linked from the commission of a crime, have been found to give rise to particular concerns regarding proportionality. This is seen for example in the ECtHR case law condemning the lack of proportion in custodial sentences for terrorist offences that amounted to expressions of support for Abdullah Ocalan.[480]

It has been suggested that 'special sentencing rules for terrorists' are emerging.[481] Concern was expressed for example in a 2012 case before US courts, where a federal appeals court overturned a lower courts sentence,

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477 *See* Drumbl, 'The Expressive Value', *supra* note 7; *see also* 7B.4.2'Terrorism, penalties and *nulla poena sine lege*'.

478 SC Res. 1373 (2001).

479 No specific terrorist attack had yet been agreed upon still less effectuated, and it has been suggested that there was not necessarily any intention to injure people involved in the plot. *See R v Elomar & Others* [2010] NSWSC 10, paras. 147-78 (concerning Mohammed Omar Jamal), discussed in Saul, 'Criminality and Terrorism', *supra* note 12.

480 *See, e.g.*, *Yilmaz and Kiliç v. Turkey*, *supra* note 476. The applicant's three years and nine months prison sentence for 'aiding and abetting an illegal organization', a crime under the Prevention of Terrorism Act, was based on participation in demonstrations expressing support for Abdullah Öcalan. The European Court of Human Rights concluded that, even if the interference in the freedom of expression could be justified by the need to preserve public order, it was clearly disproportionate due to the severity of the sentences.

481 *US* v. *Ressam*, 679 F. 3d 1069, 1106 (9th Cir. 2012) (dissenting Judge Mary M. Shroeder wrote: 'Our courts are well equipped to treat each offense and offender individually, and we should not create special sentencing rules and procedures for terrorists'). *See, e.g.*, 'Appeals Court Overturns Millennium Bomb-Plot Sentence; Calls it Too Light', *The New York Times*, 12 March 2012, available at: http://www.nytimes.com/2012/03/13/us/appeals-court-overturns-millennium-bomb-plot-sentence.html.

imposed on Ahmed Ressam the so-called 'millennium bomber',[482] on the basis of the undue leniency of a twenty two year prison sentence.[483] A noteworthy dissent opined that the appeals court had overstepped its authority in overturning the sentence, instead of deferring to the lower court's assessment on the facts of the particular case, on the basis that 'the majority simply did not like the idea of a terrorist leaving prison after only 22 years'.[484] The dissent noted that '[o]ur courts are well equipped to treat each offense and offender individually, and we should not create special sentencing rules and procedures for terrorists'.[485]

English courts, suggesting that heavy and indeterminate penalties may be justified by the unprecedented nature of current terrorist threats, set down stringent sentencing guidelines in the context of the criminal cases concerning the & July London bombings.[486] A later case from the same courts cautioned however that 'whilst there is a need for deterrent sentencing in terrorism cases, if sentences are imposed in this area which are more severe than the case merits, this will be more likely to inflame rather than deter extremism'.[487] An unduly punitive approach has likewise been described as 'counter-productive' to criminal law aims, as 'they may not only further radicalise offenders but also alienate the community from which they come, thus fuelling further discontent with the dominant legal and political order'.[488]

A case-by-case evaluation of sentencing is critical to ensuring proportionality. While sentencing guidelines may arguably erode this function, it is eviscerated by the imposition in some states of mandatory sentences for crimes such as terrorism. The established role of the judge in assessing the penalty, taking into account the facts and individual circumstances, is replaced by an abstract assessment of appropriate punishment by the executive and/or legislature.[489] As mandatory sentences are intended in part to send a message

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482 The Algerian national known as the 'Millennium Bomber' plotted to set off explosives at Los Angeles International Airport on 31 December 1999.

483 An 11-judge panel from the United States Court of Appeals for the Ninth Circuit ruled to send the case back to the district court for a tougher sentence.

484 Dissenting Judgement of Judge Mary M. Schroeder, *supra* note 481; *see also* the decision by the US Appeals Court in *US* v. *Abu Ali*, *supra* note 316, to overturn a thirty-year prison sentence followed by thirty years supervision on release as too lenient, and the dissent of J. Motz. The US Supreme Court denied the writ for certiori in 2009.

485 Dissenting Judgement of Judge Mary M. Schroeder, *supra* note 481.

486 On sentencing guidelines in UK *see* landmark judgment of *R.* v. *Barot*, [2008] 1 Cr. App. R(S) 247(45), followed in *R.* v. *Ibrahim*, [2008] 4 All E.R. 208 concerning the London bombings.

487 *R.* v. *Rahman & Mohammed*, [2008] 4 All E.R. 661 CA (Crim. Div.).

488 Saul, 'Criminality and Terrorism', *supra* note 12.

489 Egypt had mandatory death penalty for terrorism, which was challenged in *Egyptian Initiative for Personal Rights and Interights (on behalf of Sabbah and Others)* v *Arab Republic of Egypt*, Communication No. 334/06, 13 February 2012, ACHPR, brief available at: http://www.interights.org/taba/index.html . *See also*, for example, Human Rights Committee statement on the impermissibility of a mandatory death penalty: *Francisco Juan Larranaga*

regarding the seriousness with which crimes are regarded, they are generally severe. In some cases the even carry the death penalty. The increased resort to the death penalty in the context of terrorism trials has given rise to concern regarding proportionality.[490] In particular its 'mandatory' application, irrespective of the circumstances of the accused brings the criminal process into conflict with the human rights framework's requirements regarding proportionate penalties and the protection of the right to life.[491]

4B.2.3 Modified Procedures and Principles of Criminal Law

A further feature of criminal practice in relation to international terrorism are the jurisdictional, procedural or evidentiary rules that in some ways exempt terrorism investigations and trials from the normally applicable principles and processes of criminal law. It is imperative that states have the necessary powers to investigate effectively and prove criminal conduct beyond reasonable doubt. Making police powers 'more flexible and useful' and removing obstacles that impede investigation or trial, is a legitimate priority, provided it respects the legal framework, including the principle of legality, presumption of innocence and basic fair trial rights.[492]

It is well known that detention pursuant to the war on terror has involved prolonged arbitrary detention, abusive interrogation techniques, torture and inhuman treatment with confessions and incriminations of questionable reliability.[493] Often these practices were aimed at unfettered intelligence gathering, unrelated to (but rather a side-stepping of) the criminal process. As these practices are addressed in other chapters they are not addressed specifically here, though their impact on criminal prosecutions is discussed below.[494] They are, moreover, a reminder of the drift in the role of intelligence agencies in a number of states, which carry out arrest, detention and investigation, and

v. The Philippines (Comm. no. 1421/2005), Human Rights Committee, 24 July 2006, para. 7.2.

490 See Chapter 7B For example, Amnesty International notes the sharp increase in the number of death sentences passed in trials of people accused of having links to al-Qaeda, or to the Huthi armed group in Yemen. 'Yemen: Cracking Down under Pressure', Amnesty International, 2010, p. 22, available at: http://www.amnesty.org/en/library/asset/MDE31/010/2010/en/da8bd0cc-37ab-4472-80b3-bcf8a48fc827/mde310102010en.pdf .

491 *See, e.g.*. HR Committee statement on the impermissibility of a mandatory death penalty: *Francisco Juan Larranaga v. The Philippines, above,* (Comm. no. 1421/2005), Human Rights Committee, 24 July 2006, para 7.2; *see also* Chapter 7 'Nullum Poena Sine Lege'. Where capital punishment is not abolished, it may be applied only for the most serious crimes, following a fair trial.

492 UNODC Handbook on Criminal Justice Responses to Terrorism, *supra* note 157.

493 *See, e.g.,* case studies in Chapters 8 and 10 on Guantánamo and Extraordinary Rendition, respectively.

494 *See* 4B.4.

the importance of clarifying and distinguishing intelligence and law enforcement agencies respective roles, especially in relation to criminal justice efforts.[495]

Within the criminal law framework itself, there are myriad examples of the normally applicable rules and protections of criminal law being excluded or limited for terrorist suspects. These commonly include expanded periods of pre-trial detention,[496] sometimes without the essential rights to consult a lawyer or to challenge lawfulness.[497] Among the most striking examples of exceptionalism in the criminal sphere are the resort to special courts, and modifications to applicable evidentiary rules, addressed in turn below.

i) 'Special' Jurisdictions

The creation of special courts and tribunals to try terrorism cases has been a feature of international practice in a surprising number of states.[498] Most well known are the Military Commissions established by the US to try a relatively small percentage of the Guantanamo detainees, discussed in Chapter 8. President Bush justified their establishment by stating that 'Given the danger … and the nature of international terrorism, … it is not practicable to apply … the principles of law and the rules of evidence generally recognized in the trial of criminal' cases.[499] However, as seen above, federal courts have overcome these challenges in terrorism cases where they have had jurisdiction to do so. The intensity of the political debate was clear when President Obama's proposal to submit Guantanamo detainees to trial by normal federal criminal courts ultimately failed.[500] After several constitutional challenges,[501]

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495 *See, e.g.*, Scheinin Special Rapporteur Reports A/HRC/10/3 (paras. 25-78) and A/HRC/14/46.

496 *See* Chapter 7A5.3 and Chapter 8 in relation to Guantanamo detainees. In certain cases relatively extended periods may be justified by complex evidence gathering, sometimes internationally. Bail is often restricted in terrorism cases but pre-trial detention must be strictly necessary, and subject to safeguards including access to a lawyer and judicial oversight.

497 *See* Chapters 7A5.3, 7B7 and 8 on detention and fair trial rights.

498 *See, e.g.*, military commissions and special security courts for terrorism in, for example, US, Egypt, Jordan, Pakistan, Syria. Many more states used such courts during repressive periods, but subsequently repealed (and sometimes banned) them, as the Latin American experience demonstrates. The Eminent Jurists panel notes that in addition there are states with use centralize or specialized courts for terrorism cases, such as Spain, France, Tunisia, Morocco and Yemen. Eminent Jurists Report, *supra* note 302, p. 141.

499 President Bush signed a Military Order on 13 November 2001 which noted that: 'Given the danger to the safety of the United States and the nature of international terrorism, ... it is not practicable to apply in military commission's under this order the principles of law and the rules of evidence generally recognized in the trial of criminal' cases in the United States district courts.' (para. 6).

500 *See* Chapter 8 on Guantánamo. 'Our courts and juries of our citizens are tough enough to convict terrorists, and the record makes that clear. ....' 'Remarks by the President on National Security', 21 May 2009, Office of the Press Secretary, The White House, available at: http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09.

new pieces of legislation and rules of procedure, the commissions are now functioning at 'Camp Justice' in Guantanamo Bay.[502]

The exceptionalist criminal law framework that accompanies terrorism charges have also provided the context for military commissions and special terrorism courts in many other states.[503] Indeed post-9/11, the then Egyptian President Mubarak famously cited the US position on military commissions as indicating that the Egyptians were justified in their long having used such commissions.[504] The Egyptian 'state security courts', whose introduction was justified by reference to a national security emergency but which remained a feature of terrorism trials in Egypt for thirty years,[505] have recently been lacking the necessary independence and impartiality.[506] New special condemned by the African Commission as courts have also emerged, as exemplified by the announcement in 2013 of the establishment of a new terrorism court in Bangladesh to respond to the backlog created by the number of cases filed under novel Anti-terrorism laws.[507]

Human rights bodies have often held that the use of special courts that depend on and are closely linked to the executive or the military lack the independence and impartiality required of a criminal court, a *sine qua non* upon

See also Vladeck, 'Terrorism Trials and the Article III Courts after Abu Ali', *supra* note 316.

501 The military commission convened to judge Hamdan was held unconstitutional by the US Supreme Court in *Hamdan* v. *Rumsfeld*, *supra* note 2 as it 'lacks power to proceed because its structure and procedures violate both the Uniform Code of Military Justice and the Geneva Conventions.'

502 Following *Hamdan* v. *Rumsfeld*, *ibid.*, the law was changed by the Military Commission Act, which provided improvements to due process rights in the rules of evidence and procedure of the military commissions, though their compatibility with international requirements is still questionable – *see* Chapter 8. The shift, and eventual compromise, is reflected in e.g. the fact that evidence obtained through torture is inadmissible. But evidence obtained through methods in 'which the degree of coercion is disputed' may be admitted subject to certain conditions. *See* Drumbl, 'The Expressive Value', *supra* note 7, p. 12.

503 For examples, see eg in Yemen, the Specialized Criminal Court (SCC) was created in the name of 'countering terrorism' in 2004, and three additional SCCs were then established in 2009. The SCC has been used to convict people such as journalists covering the conflict in Sa'dah, or grievances expressed by the Southern Movement. Hundreds have been tried by the SCC since its establishment in 1999. *See* 'Cracking Down Under Pressure', *supra* note 604; *see also Sabbah* v *Egypt*.

504 'In the Name of Counter-Terrorism', Human Rights Watch, March 2003.

505 'The Emergency Law in Egypt', International Federation for Human Rights, 3 February 2011, available at: http://www.fidh.org/the-emergency-law-in-egypt .

506 *Sabbah* v *Egypt*, *supra* note 603.

507 In Bangladesh, a new Anti-terrorism law was introduced in 2009, and modified in 2011. Nearly 200 cases had been filed under it and the pace of such trials was subject to political criticism. On 13 February 2013 Law Minister Shafique Ahmed announced to parliament the prompt establishemtn of a special terrorism court. See 'Special tribunal planned to reduce 'terror trial' backlog', http://khabarsouthasia.com/en_GB/articles/apwi/articles/features/2013/03/06/feature-01

which the legitimacy of the criminal process depends.[508] They have also emphasized, specifically, that military tribunals are in principle inappropriate fora to try civilians, including for terrorism.[509]

Special jurisdictions are often invoked precisely as they guarantee less due process rights, raising specific fair trial issues. In many cases resort to special courts or tribunals may be accompanied by closed trials, bail may not be permitted by law, access to counsel or to evidence may be curtailed and rules on evidence are generally more 'flexible'.[510] Unsurprisingly, they are often therefore found to fall short of specific fair trial guarantees. An example from Pakistan involved the establishment of special anti-terrorism courts on the basis of the need for 'speedy trial',[511] or of the need for military jurisdiction over civilians accused of offences under the *Anti-Terrorism Act*.[512] In practice these courts have been much criticised for undermining basic fair trial safeguards.[513]

ii) Modified Approaches to Procedure and Evidence

Even in respect of terrorism trials before regular courts, many modifications to procedures have been introduced by anti-terror legislation around the globe. While in some cases the procedures are limited to terrorism, in others they are already used in other contexts but have been given public profile through the terrorism cases.[514] These have commonly included special measures concerning restrictions on access to classified or sensitive evidence, or differing

508 *See* Chapter 7 on 'Fair trial' and Chapter 8B.4.5 on US 'Military Commissions'. The African Commission has noted in clear terms in a decision of 2012 related to terrorism trials before Egyptian special courts; *see Sabbah* v *Egypt*, *supra* note 603

509 *Ibid.*

510 *See* Chapter 8B.4.5 on US 'Military Commissions'.

511 Section 13 of the Pakistani *Anti-Terrorism Act*.

512 For example, International Bar Association Human Rights Institute, *A Long March to Justice: A report on judicial independence and integrity in Pakistan*, September 2009, p. 65. Human Rights Watch, 'Destroying Legality: Pakistan's Crackdown on Lawyers and Judges', 2007, pp. 25-26. *See also*, Amnesty International, 'Human Rights in Hashemite Kingdom of Jordan', 2010.

513 Reported in Human Rights Council Working Group on the Universal Periodic Review, 'Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1: Pakistan', 25 March 2008, A/HRC/WG.6/2/PAK3, paragraph 37. Under 2007 amendments to the *Army Act* 1962, the military may try civilians for a wide range of offences previously under the jurisdiction of Pakistan's civilian judiciary.

514 *See, e.g.*, Terrorist Trial Report Card, September 11, 2001-September 11, 2009, Center on Law and Security, New York University School of Law, January 2010: 'Our research suggests that the techniques employed by prosecutors in terrorism-associated cases – notably the use of informants and lesser charges – do not differ markedly from those employed in prosecuting serious drug charges and organized crime. High-profile terrorism cases, in effect, have drawn greater attention to longstanding but little-noticed criticisms of well-established prosecutorial tactics.'

rules on admissibility. In the criminal context,[515] the burden of proving guilt beyond reasonable doubt and discharging the presumption of innocence, and the right to confront evidence against the accused, have long been held sacrosanct. Some of these modifications jar with traditional safeguards around which the criminal law is built.

As practice unfolds several examples emerge of courts having had to determine procedures and evidence that address various apparently competing factors: protection of sensitive information, ensuring that reliable evidence can be used, while guaranteeing basic rights such as fair trial and the integrity of the courts proceedings. A recurrent issue emerging in the context of the so called war on terror, is the admissibility of torture evidence that may be obtained through torture or ill-treatment. This was seen for example in the Ahmed Omar Abu Ali case referred to above[516] where a victim of extra-ordinarily rendition challenged the admissibility of the testimony of Saudi officers' and his own inculpatory statements made while in Saudi custody, on the basis of his alleged torture and ill-treatment. The Court found that evidence obtained through torture could not be admitted and the government must demonstrate the voluntariness of the evidence; however, on the facts of that case it found, controversially, that 'the government has met its burden of proving that Mr Abu Ali's statements were voluntary' and the Appeals Court upheld this decision.[517] This was one of many cases where issues regarding admissibility of torture evidence have arisen and the authorities have argued that the onus should lie with the accused to prove that the torture was obtained through torture.[518]

Mr Ali also challenged his lack of access to – and opportunity to confront – evidence against the accused, another common feature of recent terrorism trials. The court ruled that the Government could use the 'silent witness' procedure to disclose classified information contained in communications to the jury at trial, though Abu Ali himself would only be able to see the redacted version of the documents. Dismissing a motion for complete disclosure, the district court concluded that the redacted version of the documents provided to Abu Ali therefore 'me[t] the defense's need for access to the information'.[519]

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515 The handling of such issues by human rights bodies have often related to other contexts, for example, the balancing buy the courts re immigration procedures or special measures, as explained in Chapter 7 *see* the UK cases of *A& Others (derogation)* on access to evidence and *A&Others (torture evidence*) on admissibility in Chapter 11.

516 United States v. Abu Ali, note 325. See discussion of the case under 4B.1.2 'Terrorism Trials'; see also Vladeck, 'Terrorism Trials and the Article III Courts after Abu Ali', *supra* note 325.

517 Vladeck, ibid, p.5

518 Chapter 7B5.3; The ECHR has found the onus should lie with the state to demonstrate that evidence was not obtained through torture, not vice versa.

519 *Ibid.*

Similar schemes have unfolded in states that limit the accused's access to evidence.[520]

As terrorism trials continue to unfold, and judges determine the right balance between protecting genuinely sensitive information and ensuring fair trial, internationally accepted standards in relation to evidence and procedure may be further clarified.[521] Ensuring that justice is done and seen to be done in terrorism cases is an essential aspects of the rule of law response to terrorism, as opposed to perceptions of a 'victors justice' or of a 'criminal law of the enemy'.[522]

iii) Principles of Criminal Justice and Terrorism trials

Basic principles of criminal law, including the presumption of innocence, have been challenged in the context of terrorism trials in diverse ways. Most obviously, public authorities have shown themselves particularly prone to vilify suspected 'terrorists' as criminals pending trial, partly in the context of touting their capture for political advantage.[523] The Human Rights Committee has noted that adverse public comments about an accused person,[524] like extensive negative portrayal in the media – another common feature in the terrorism context[525] – may violate the accused person's right to be presumed innocence.

Political pressure on courts to convict those publicly declared 'terrorists' has at times given rise to concerns regarding the presumption of innocence; in other contexts the opposite pressure is apparent, and high acquittal rates has been attributed to intimidation of prosecutors and the judiciary by the

520 *E.g.* in Canadian courts see *Ahmed, Alizadeh, and Sher* criminal cases involving disputes regarding access to secret evidence; 'Terror suspect wants secret evidence against him revealed', Globe and Mail, 23 Aug. 2012 http://m.theglobeandmail.com/news/national/terror-suspect-wants-secret-evidence-against-him-revealed/article1693369/?service=mobile. For the issue in the military commissions Guantánamo *see* Chapter 8 and in the civil context elsewhere see 7B.7.3.

521 This will occur in the future as these cases proceed through the higher courts and on to human rights bodies, developing law and practice in this field.

522 On the link between the 'expressivist' function of criminal law and due process *see, e.g.*, Drumbl, 'The Expressive Value', *supra* note 7. M. Tondini, 'Beyond the Law of the Enemy: Recovering from the Failures of the Global War on Terrorism through (Criminal) Law', in *Processi Storici e Politiche di Pace / Historical Processes and Peace Politics*, Vol. 3, No. 5, 2008, pp. 59-81

523 Note comments on allegations against Abu Zubaydah for example upon capture which were withdrawn once he had access to counsel, noted in Chapter 8 on Guantanamo.

524 Communication No. 770/1997, *Gridin* v. *Russian Federation* (views adopted on 20 July 2000), UN Doc. GAOR, A/55/40 (vol. II), paragraph 8.3 where high-ranking law enforcement officials had made public statements portraying an accused person of being guilty of certain crimes, there was a violation of the presumption

525 *Saidov* v. *Tajikistan* (964/2001), ICCPR, A/59/40 vol. II (8 July 2004) 164 at paras. 6.6-7, (where State-directed media extensively described an accused as a criminal).

accused.[526] It goes without saying that the criminal law can only hope to meet any of its rule of law aims if courts and prosecutors are rigorously independent and fairly and dispassionately apply the criminal law.

Exceptionalist approaches to terrorism trials can also be seen in the application of the principles of criminal law in terrorism cases. The most troubling are those laws that effectively suspend the presumption of innocence by shifting the burden of proof to the accused to prove his or her innocence in terrorism cases.[527] This is evident in terrorism laws in a number of states, as illustrated by the Indian Amendments to the Unlawful Activities (Prevention) Amendment Act, 2008, passed in response to the Mumbai attacks.[528] The law provides that where some evidence indicates the involvement of the accused, the onus is on him to refute this, contrary to the generally applicable burden on the prosecution to prove guilt beyond reasonable doubt. Similar rules are found in the legislations of other states.[529]

A less striking yet noteworthy example of the suspension of normally applicable rules and standards lies in a piece of Spanish legislation from 2010 which treats murder that results from acts of terrorism, as opposed to other forms of murder, as 'imprescriptible'.[530] The basis for the contrast in the Spanish order between its treatment of crimes of terrorism and other crimes in this respect is not readily apparent. It is particularly curious that crimes against humanity of the Franco-era to have not been declared imprescriptible (and the Judge who decided that they were he was criminally prosecuted), yet the legislature had no difficulty in exempting the crime of terrorism from the normal rules on prescription. These and other exceptional approaches are often justified by assumptions about the gravity of terrorism, an assumption which as explained above may or may not withstand scrutiny in the particular case.

526 *See, e.g.*, 'Acquittals in terrorism cases: Prosecuting in fear, Metropolitan, Islamabad, Malik Asad', 15 August 2011, available at: http://dawn.com/2011/08/15/acquittals-in-terrorism-cases-prosecuting-in-fear.

527 *See* e.g. HRC General Comments 13 and 32, which make clear that the presumption of innocence is a fundamental human rights principle. *See also* Chapter 7A 'Fair Trial'.

528 *See* 'Human Rights Features', Asia Pacific Human Rights Network, 22 January 2009, available at: http://www.hrdc.net/sahrdc/hrfeatures/HRF191.htm . This provision removes the right to remain silent, but also effectively the presumption of innocence. During the parliamentary debates, the Home Minister Mr. P. Chidambaram justified this reversal of the burden of proof on the grounds that in the past, terrorists have evaded conviction because they were permitted to remain silent. Mr. Chidambaram stated that if evidence points to the accused 'then the accused has a duty to enter the box or let an evidence to say that I am giving contrary evidence'.

529 Eminent Jurists Report, *supra* note 311, p. 154 (referring to Australia, Pakistan, Tanzania, Uganda and the U.K as states where changes to ancillary terrorism place the burden on the accused to disprove certain elements of the charges).

530 The Ley Organica 5/2010, 22 June 2010.

4B.3 Progress and Challenges in Inter-state cooperation post-9/11

One area of considerable legal industry in the field of counter-terrorism in recent years has been in relation to international cooperation. There have been significant normative, institutional and practical developments aimed at clarifying states obligations to cooperate in criminal matters in relation to counter-terrorism, and to enhance the capacity and efficiency of national systems to meet those obligations.

In the first few years after 9/11, practice was slow to develop. Relatively few formal requests for extradition and mutual assistance from the US appear to have been processed for example,[531] reflecting the lack of national prosecutions and the 'informal' or 'extraordinary' approach to some of the international cooperation at that time.[532] As the practice of extradition and mutual legal assistance requests has developed, it has exposed interesting challenges and tensions of a legal, political and practical nature.

4B.3.1 International standards and cooperation

The obligation to cooperate in the prevention and prosecution of serious crime was already well established long before 9/11. In numerous ways international, regional and national bodies responded to 9/11 with initiatives aimed at strengthening or clarifying those obligations. Resolution 1373 (2001), adopted by the Security Council on 28 September 2001, provided the most significant normative landmark.[533] Going beyond earlier resolutions, it established the obligation of all states to, among other things, afford other states the greatest measure of assistance in connection with criminal investigations or proceedings in relation to terrorism.[534] The Security Council called on states to ratify existing terrorism conventions which have been identified as hitherto lacking implementation.[535] As a result, there has been a significant increase in the number of state parties to these conventions, which provide an important framework

531 It is noted that it is difficult to monitor practice in respect of mutual assistance, as requests are generally confidential.

532 As discussed at the start of Part B, it reflects the military as opposed to law enforcement focus of the 'war on terror,' as well as the troubling level of informal cooperation through, for example, the rendition programme discussed at Chapter 10.

533 SC Res. 1373 (2001); *see also* SC Res. 1368 (2001) noting the importance of cooperation as part of the collective framework for countering terrorism). The significant obligations were, however, imposed in SC Res. 1373 (2001).

534 The General Assembly has also called on states to take all necessary and effective measures to prevent, combat and eliminate terrorism. A Counter-Terrorism Sub-Committee was established by the Security Council, to which states report steps taken to comply with the resolution. *See* the reports to the 1373 Committee at www.un.org/Docs/SC/Committees/1373.

535 SC Res. 1373 (2001) at para. 3.

for cooperation in respect of specific forms of terrorism.[536] While the Security Council also called for progress on a comprehensive terrorism convention,[537] as discussed in Chapter 2 these developments have not borne fruit, and dispute continues as to the viability and desirability of such a convention, as well as the key elements of the definition of terrorism.

On the regional level, as the renewed focus on international terrorism has been the catalyst to measures to enhance cooperation.[538] The European Union has been particularly prolific in this area in recent years: in addition to development of common definitions of crimes[539] and common security strategy,[540] there have been multiple terrorism-specific developments (such as the Framework Decision on Terrorism),[541] as well as others which, while proposed before 9/11 and going beyond cooperation on terrorism specifically, were impelled by the political imperative surrounding cooperation post 9/11. Shortly after 9/11 the introduction of a Pan-European Arrest Warrant in 2002, for example, streamlines and expedites the extradition procedure within Europe and removes certain traditional limits on the obligation to extradite, such as the political offence exception, rule of specialty and the double criminality requirement.[542]

As regards mutual legal assistance, a significant development within the European Union was the Framework Decision on the European Evidence

536 On these developments, *see* Chapter 2, in particular 2.1.2-2.1.5; *see also* report of the Counter-Terrorism Sub-Committee, *supra* note 534; and du Plessis, 'A Snapshot', *supra* note 8.

537 One advantage of such a Convention is that it could arguably provide a broader framework for international cooperation, though its desirability and viability remain controversial; see Prost, 'Need for a Multilateral Cooperative Framework', *supra* note 264.

538 For a more thorough overview of developments, *see* du Plessis, 'A Snapshot', *supra* note 8.

539 Framework Decision 2002/475/JHA on combating terrorism has been modified by Council Framework Decision 2008/919/JHA of 28 November 2008, introducing three new offences in EU legislation: public provocation to commit a terrorist offence, recruitment for terrorism, and training for terrorism. *See* 'The Changing Face of Criminal Law' above at 4B.2.

540 In February 2010, the EU issued its first internal security strategy, which highlights terrorism as a key threat facing the EU and aims to develop a coherent and comprehensive EU strategy to tackle terrorism and a wide range of organized crimes, cybercrime, money laundering, and natural and man-made disasters. *See, e.g.*, K. Archick, 'US-EU cooperation against Terrorism', Congressional Research Service, May 2012, available at: http://www.fas.org/sgp/crs/row/RS22030.pdf.

541 *See* European Council Framework Decision on Combating Terrorism, 13 June 2002 (2002/475/JHA), OJ L 164/3 of 22 June 2002 (hereinafter 'European Council Framework Decision on Combating Terrorism'). *See also* the EU Action Plan on Terrorism (the 'roadmap') Commission document 10773/2/02/REV 2, 17 July 2002. This defines, shapes and provides for monitoring of the direction of joint action taken by European Governments and is frequently updated.

542 European Arrest Warrant, *supra* note 249, will abolish double criminality for numerous offences, the speciality principle and the political offence exception. France, Belgium, Portugal, Luxembourg and Spain have signed treaties to bring the new extradition procedures into effect by 2003. The UK intends to implement them in 2004.

Warrant (EEW),[543] which like its extradition counterpart, is not terrorist-specific but its birth has been induced by the impetus around improving cooperation in the counter-terrorism field. The EEW sets up a system for securing prompt access to objects, documents and data for use in criminal proceedings from another member State.[544] As such, it is considered by many as having important potential to enhance evidence gathering and transfer of evidence in criminal proceedings across borders. At the same time, the system exposes the challenge to ensure consistent levels of training and capacity and appropriate evidence gathering and handling, while safeguarding the rights of the defence.[545]

A range of other Framework Decisions have also been adopted. These cover for example the exchange of information between law enforcement authorities, the confiscation and freezing of assets and joint investigation teams,[546] the application of the principle of mutual recognition of judgments in criminal matters, enabling sentenced persons to be transferred to another member State for enforcement of their sentences[547] and the supervision of probation measures and alternative sanctions in other European states.[548]

Other regional cooperation measures have also been adopted and strengthened over time, within the Council of Europe,[549] the Americas,[550] Caricom and South Asia[551] for example. Within the African continent, inter-

543 *See* Council Framework Decision 2008/978/JHA of 18 December 2008, on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

544 This was originally proposed in a Commission Communication November 2003. COM(2003) 688 final.

545 'EU evidence exchange warning', *The Law Society Gazette*, 25 September 2008, available at: http://www.lawgazette.co.uk/news/eu-evidence-exchange-warning.

546 Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union OJ L 386/89, 29.12.2006; Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property OJ L 68/49, 15.3.2005; Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders OJ L 328 of 24.11.2006; and Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA) OJ L 162/1 20.6.2002. *See also* Council Framework Decision 2008/977/JHA of November 27th 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters has been adopted.

547 Council Framework Decision 2008/909/JHA of November 27th 2008.

548 *Ibid.*

549 *See*, *e.g.*, Protocol amending the European Convention on the Suppression of Terrorism (Strasbourg, 15 May 2003), ETS No. 190, not yet in force), hereinafter 'Protocol to the European Convention against Terrorism'.

550 Inter-American Convention against Terrorism (Bridgetown, 3 June 2002, OAS Res. 1840 (XII-O/02), not yet in force).

551 In addition, the South Asian Association for Regional Co-operation (SAARC) adopted an Additional Protocol to the SAARC Regional Convention on Combating Terrorism, on 6 January 2004.

esting new developments have arisen on a pan-African basis,[552] which among other things make practical arrangements (such as the establishment of national contact points) to facilitate the timely exchange and sharing of information and cooperation in the suppression of terrorist financing, and provide a basis for extradition between African Union states.[553] Sub-regionally, East African,[554] ECOWAS[555] and SADC states[556] have all now reached sub-regional co-operation agreements.

Cooperation between other states and the United States has been the focus of particular attention post-9/11. For example, trans-Atlantic cooperation between European Union member states and US law enforcement and intelligence agencies has led to several – at times controversial – new measures.[557] Several extradition and mutual legal assistance treaties have been concluded between the US and EU itself.[558] These expedite the extradition process, facilitate access to information and the exchange of personal data and strengthen operational links between investigative and law enforcement agencies.[559] These treaties are supplemented by bilateral agreements.[560] Despite these developments, certain well known challenges in fostering closer US-EU counter-terrorism and law enforcement cooperation are however outstanding. Among them, US concerns regarding intelligence sharing on the one side has impeded prosecutorial efforts in many cases, related to terrorism and counter-terrorism,

552 Following the introduction of the 1999 Convention on the Prevention and Combating of Terrorism which calls for increased cooperation, the African Union produced he Decision on the Elaboration of a Code of Conduct on Terrorism (OAU Doc. Assembly/AU/8(II) Add. 11) and the Decision on Terrorism in Africa (OAU Doc. Assembly/AU/Dec.15 (II)). There is now a protocol too: Protocol to the OAU Convention on the Prevention and Combating of Terrorism Addis Ababa, Ethiopia, 08 July 2004.

553 Its main purpose is to enhance the effective implementation of the Convention and to give effect to Article 3(d) of the Protocol.

554 Note the importance of this breakthrough as regards the potential to combat the sort of 'informal' or extraordinary rendition witnessed in relation to the Kampala bombings, discussed above in this chapter, and not uncommon in broader practice.

555 Discussed in du Plessis and M. Ewi, 'Criminal Justice Responses to Terrorism in Africa: The Role of the African Union and Sub-Regional Organizations', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), Ch. 36.

556 *Ibid.*

557 At the EU summit in Copenhagen in September 2002, agreement was reached between the US and the EU on how to swiftly and effectively exchange information between their respective forces. *See* 'EU-US co-operation in fighting terrorism', EU Presidency Press release, 14 September 2002. *See also* 'Informal EU Justice and Home Affairs Council, 13-14 September 2002', *Statewatch News online*, September 2002.

558 *See, e.g.*, Council Decision of 6 June 2003 concerning signature of the Agreements between the European Union and the United States of America on extradition and mutual legal assistance in criminal matters; Agreement on extradition between the European Union and the United States of America, 7 July 2003; OJ L 181, 19 July 2003, 25 ff.

559 Eurojust (the provisional public prosecution agency of EU) and the US are to consider cooperation agreements. Joint Investigation Teams may be established where appropriate.

560 On related controversies, *see* 4B.2.2.2. below on the UK and US agreements.

as illustrated above.[561] Differences on data privacy and data protection,[562] detention policies and fair trial guarantees[563] and differences in the US and EU terrorist designation lists,[564] are also described as impediments to fuller cooperation.

Institutional developments have unfolded, aimed variously at facilitating cooperation, providing technical assistance and building capacity to enhance the investigation and prosecution of terrorism and inter-state cooperation. Examples, with divergent roles and capacity, range from Eurojust, a judicial coordination unit within the European Union,[565] the Inter-american Committee against Terrorism of the OAS, to the intergovernmental Global Counter-Terrorism Forum established at the initiative of the US Secretary of State in 2011, with a 'primary focus on countering violent extremism and strengthening criminal justice and other rule of law institutions necessary to prevent and counter terrorism'.[566] This complements the existing international and regional entities with a role in facilitating investigation and prevention of terrorism, such as Interpol and Europol.

To varying degrees these initiatives respond to at least some of the many real challenges that have hampered cooperation in the past, be they legal or procedural obstacles, lack of trust and understanding between states, lack of capacity, or lack of procedures or mechanisms in place domestically. Enhanced cooperation for bringing persons to justice and securing reliable evidence is essential if states are to meet their obligations to prevent and punish serious crimes such as those committed on 9/11. For the most part then the industry in this field – aimed at establishing clear obligations, efficient procedures for

561 Examples are given throughout this book of the refusal to cooperate with foreign proceedings in respect of investigation, justice and accountability for war on terror related offences, as well as in relation to the terrorism criminal cases highlighted above. *See, e.g.,* the Motassedeq case in Germany at 4B.1.2, the UK investigations at 7B.14 or non-cooperation with Polish investigation into renditions, at Chapter 10

562 *See* EU-US Cooperation against Terrorism Congressional Briefing which recognises that 'The negotiation of several U.S.-EU information-sharing agreements, from those related to tracking terrorist financial data to sharing airline passenger information, have been complicated by on-going EU concerns about whether the United States could guarantee a sufficient level of protection for European citizens' personal data.'

563 *See, e.g.,* Cooperation and Human Rights Concerns below.

564 'US-EU cooperation against Terrorism', *supra* note 540.

565 Although conceived previously, the Eurojust website describes 9/11 as the catalyst to its establishment, by Council Decision 187/JHA, as a judicial coordination unit on organised crime, including terrorism. Eurojust, available at: http://eurojust.europa.eu/Pages/home.aspx.

566 *See* e.g. Global Counter-Terrorism Forum, Factsheet, available at: http://www.cfr.org/counterterrorism/fact-sheet-global-counterterrorism-forum/p28460 Although currently co-chaired by the US and Egypt, states not perhaps at the helm of best practice in relation to counter-terrorism within a rule of law framework, the 'primary focus on countering violent extremism and strengthening criminal justice and other rule of law institutions necessary to prevent and counter terrorism' is noteworthy.

giving effect to them and enhancing capacity to deliver – is, or at least should be, a positive development. However as highlighted below, questions arise as to some of these developments, in particular their compatibility with other international obligations, notably in the field of human rights.[567]

4B.3.2 Streamlining Cooperation and Relevant Safeguards?

The international standards mentioned above, aimed at strengthening obligations to cooperate, have not always developed in line with the co-existent obligations *not* to cooperate where there is a substantial risk of serious rights violation in the state requesting extradition or mutual legal assistance. In some situations, those obligations were apparently ignored, as in Security Council Resolution 1373,[568] In others they were reflected selectively or restrictively as in the Protocol amending the European Convention on Terrorism, which referred to some of the rights that require to be protected through the obligation of non-refoulement, but not to others.[569] This may have generated confusion as to applicable legal standards and rendered the rights vulnerable. It must be noted that, ultimately, both the Security Council and the Council of Europe for example have clarified that the obligations in respect of cooperation against terrorism must be interpreted consistently with international human rights.[570] Human rights bodies, through jurisprudence, have in turn clarified the scope and nature of many of these obligations.[571] Another question is how these obligations are given effect in practice, or whether measures aimed at enhancing the process of cooperation have unduly jeopardized human rights protection.

Several of the innovations in cooperation mentioned above, such as the Pan-European arrest warrant ('European Arrest Warrant'),[572] procedures for

567 See 4B.4. More detail on their compatibility with obligations in the field of human rights is discussed at Chapter 7A.5.10 and 7B.10.

568 SC Res. 1373 (2001) imposed broad-reaching obligations e.g.of cooperation, without reference to human rights.

569 Protocol amending the European Convention on the Suppression of Terrorism, Strasbourg, 15 May 2003, ETS, No. 190 (not yet in force). The Protocol precludes extradition where there is a risk of torture but not inhuman or degrading treatment or denial of justice and fails therefore to reflect fully relevant human rights law. For discussion of the Protocol, *see* Chapter 7B.10 below.

570 *See, e.g.*, SC Res. 1456 (2003), 20 January 2003, UN Doc. S/RES/1456 (2003); the Draft Explanatory Report on the European Convention on Terrorism as it will be revised by the Protocol amending the Convention upon its entry into force, adopted on 13 February 2003, text available at http://conventions.coe.int/Treaty/en/Reports/Html/090-rev.htm; and *see generally* Chapter 7B1.

571 *See* refoulement in Chapter 7 – this has been an area of considerable jurisprudential development post 9/11; *see also* examples of cases in Chapter 11.

572 See eg the European Arrest Warrant discussed above.

US-UK extradition,[573] or African sub-regional regimes adopted under the auspices of SADC and IGAD,[574] significantly change extradition practice and procedures between the states affected by them. While aimed at modernising and expediting notoriously tardy extradition procedures, they also curtail of the role of the judge in extradition proceedings, potentially dismantling essential human rights protection against unlawful transfer.[575] Among the controversial aspects are those highlighted below.[576]

4B.3.2.1 Lowering evidentiary requirements in extradition proceedings

Among the steps taken in the name of expediting the extradition process are those that seek to remove the requirement that the requesting state provide a basic degree of evidence to the requested state.[577] The European Arrest Warrant for example – initiated before the September 11 attacks but which advanced more rapidly thereafter – lowers the threshold, requiring only the provision of basic 'information' (as opposed to evidence) regarding the alleged offence, where it was committed and the involvement of the suspected perpetrator.[578] While controversial, concerns about the adoption of the European Arrest Warrant were to some degree assuaged by the fact that it removes this requirement only as between EU countries, and proposals to do the same for other countries was rejected by the EU and opposed explicitly in the UK parliament at the time.[579]

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573 Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, Washington, 31 March 2003 (hereinafter 'US-UK Extradition Treaty').

574 *See* du Plessis and Ewi, 'Criminal Justice Responses to Terrorism in Africa', *supra* note 555.

575 *See* 'Mutual Recognition of final decisions in criminal matters', *Statewatch*, at http://www.statewatch.org/news/sept00/16ftamut.htm; and JUSTICE at www.justice.org.uk/publications/listofpublications/index.html. The European Arrest Warrant, *supra* note 249, requires a judicial (as opposed to executive) decision in the issuing state (Article 1) and shouldbe applied so as to 'have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty of the European Union'. *See also* the Preamble setting out the possibility of refusing extradition if the prosecution is for discriminatory purposes. The question however is how these rights are safeguarded in practice given the streamlined procedure.

576 Also controversial are the restriction of the rule of specialty in the European Arrest Warrant and of the *ne bis in idem* principle (as regards third states) in the US-UK treaty.

577 Differences between civil and common law traditions is noted above in Part A. This change is more significant for common law than civil law countries.

578 Article 8, European Arrest Warrant, *supra* note 249.

579 At the time of the European Arrest Warrant, the EU refused to accept the lowering of this standard to non-EU countries. The UK parliament Home Affairs Committee at that time also 'express[ed] concerns at proposals to relax the requirement that extradition requests from non-European countries must demonstrate that there is a prima facie case to answer'. *See* Home Affairs Committee, House of Commons Press Release 2002-03, 5 December 2002, No. 5 'Home Affairs Committee savages EU arrest warrant proposals'. Despite this, this was done in the UK-US bilateral treaty.

Despite this, the subsequent UK-US Extradition treaty also removed the requirement that a basic level of evidence[580] be provided in requests from the US to the UK (but not vice versa).[581] While similar to the European Arrest Warrant procedure, greater controversy arises from the context of extradition requests emanating from the US. Specifically, there is concern that the arrangements allow for extradition requests to be made by the United States as a precautionary measure, prior to the establishment of sufficient evidence to justify submitting the suspect to criminal process.[582] For example, in the UK, the case of Lofti Raissi – an Algerian national detained at the request of the US on suspicion of involvement in training the September 11 pilots – resulted in his release from high security detention after five months, after the US authorities consistently failed to provide evidence to justify his extradition. Had this case, or others like it,[583] unfolded after the entry into force of the new US-UK extradition treaty removing the evidentiary requirement, he would have been extradited despite the lack of evidence against him. Many other cases may likewise proceed without any evidentiary basis or this fact even coming to light. Pressure is growing for a reappraisal of the UK-US Extradition arrangements so the position may yet change.[584]

4B.3.2.2 Removal of double criminality and political offence exceptions

The European Arrest Warrant has drawn particular criticism for the removal of the double (or 'dual') criminality principle, by virtue of which a state does not extradite for conduct not punishable in its own law. This rule, which serves both to protect the state from embarrassing diplomatic difficulties and the individual from abusive prosecution,[585] has often been described as a prin-

580 Previously, under the prior treaty, evidence sufficient for the committal of the individual in the UK was required.

581 Article 8(3)(c), US-UK Extradition Treaty. Whereas the US would provide basic statements of 'information' the UK would still have to demonstrate 'a reasonable basis to believe that the person sought committed the offense'. The differential is purportedly justified by reference to the US constitutional guarantee not to be extradited without judicial oversight of the evidence against him or her.

582 On the human rights standards applicable to arrest and the general prohibition on preventive detention, *see* Chapter 7A.53.

583 *See* for example the *Boumidiene* case, dismissed by the Bosnian Supreme Court due to lack of evidence, despite which the authorities transferred the suspect.

584 *See discussion at e.g., 'UK-US extradition treaty overhaul urged' http://www.bbc.co.uk/news/uk-politics-17553860*, or 'Wanted by the US? Brace for extradition', Financial Times, http://www.ft.com/intl/cms/s/0/5c9825d2-1cfe-11e2-abeb-00144feabdc0.html#axzz2TT0GX4rK, both 30 March 2012.

585 The principle remains relevant within the European context (particularly perhaps in an expanded Europe) so far as fundamental differences remain, e.g., in laws relating to abortion and homosexuality, which some states criminalise yet the prosecution of which would be considered by other states and human rights standards as to amount to a human rights violation. On the rationale as, in part, protecting the *nullum crimen sine lege* principle, *see*

ciple of customary law.[586] Particular concern arose from the 'ill-defined nature of the 32 categories of offence which will be exempt from the dual criminality requirement',[587] which include 'terrorism', 'participation in a criminal organisation' and 'racism and xenophobia'.[588] Given the inherent susceptibility to abuse of broadly defined laws (including – as the work of human rights courts and bodies demonstrates – laws of 'terrorism'),[589] the double criminality safeguard guaranteed an essential element of judicial oversight in the extraditing state.

Both the US-UK treaty and the European Arrest Warrant remove the 'political offence' exception. This exception has grown increasingly controversial (in particular as it came to be seen as providing a 'legal loophole for terrorists')[590] has also been excluded by various extradition arrangements as regards serious crimes.[591] So far as its removal applies to serious crimes under international law, clarifying that they are neither 'political' nor justifiable, whatever their underlying ideology, it is to be welcomed as consistent with shifts in international law and practice in favour of accountability. However, the removal of this exception may enhance vulnerability in the context of broadly defined offences of terrorism and association therewith, which often cover more and less serious crimes and are susceptible to politicization. As such, in the absence of a politicl offense exception the importance of a broad and operational rule of non-refoulement,[592] to ensure that extradition is not

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Dugard and Van den Wyngaert, 'Reconciling Extradition', *supra* note 250.

586 *See* I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003), p. 313; I. Stanbrook and C. Stanbrook, *Extradition: Law and Practice* (Oxford: Oxford University Press, 2000), p. 20.

587 *See* Home Affairs Committee report on Extradition Bill, *supra* note 279. The Committee expressed concern at the erosion of the dual criminality principle, 'in particular' given the ill-defined nature of the offences.

588 Article 2.2, European Arrest Warrant, *supra* note 249.

589 *See* Chapters 2 and 7.

590 For an increasingly rare defence of this principle, *see* C.H. Pyle, *Extradition Politics and Human Rights* (Philadelphia, 2001), in particular ch. 15, 'Gutting the Political Offense Exception', pp. 197-206.

591 *See* Chapter 2 on terrorism conventions, and Chapter 4, para. 4A.2, as regards crimes under international law.

592 Note that the non-discrimination rule (which is included in the Preamble of the European Arrest Warrant) reduces the dangers of political abuse inherent in the application of the terrorism label and the European Arrest Warrant confirms that it does not affect the duties of states in respect of human rights. European Arrest Warrant, *supra* note 249. The challenge, however, will be to ensure that the protections that human rights law does afford are operational within the streamlined procedure envisaged. For the rule *see* Chapter 7A and for positive developments reasserting the rule and clarifying its scope in this context, *see* Chapter 7B.10 'Dispatching the Problem: Return and the Refoulement post 9/11'.

sought as a vehicle for political repression or other human rights abuse,[593] is all the more important.

4B.4 The Impact of 'war on terror' violations on International Cooperation and Criminal Justice

The goals of preventing terrorism, prosecuting those responsible (with effective cooperation) and protecting human rights are compatible and mutually reinforcing.[594] In practice, however, serious tensions have arisen. Abusive pretrial detention and interrogation regimes, the erosion of the principles *nullum crimen sine lege*, presumption of innocence or the right to trial before an independent judiciary, among others, have raised questions about the fairness and indeed legitimacy of counter-terrorism criminal processes in many states. Developments in state cooperation, while generally positive, have also at time jeopardised respect for human rights protections.

The human rights deficit affects the legitimacy of the criminal process. As this section indicates, fundamental human rights violations have also impeded that process much more directly, by affecting the ability to access evidence, secure custody of suspects or to hold them to account.

4B.4.1 Inability to Secure Suspects: Extradition and Human Rights

Section A above records the obligations of states – by virtue of bilateral extradition and mutual assistance treaties as well as positive obligations in international human rights law – to cooperate with one another in the repression of serious crime and, in certain circumstances, and to *refrain* from providing such cooperation on human rights grounds.[595] This corresponds to detailed rules on non-refoulement in human rights law. As regards the impact of these obligations on cooperation practice, the landscape is mixed. The work of the human rights bodies post 9/11 demonstrates numerous occasions on which states have shown little, or only selective, respect for these obligations by

593 The historical roots of the political offence exception relate principally in sovereignty and political expediency, to avoid one regime becoming embroiled in the political affairs of another, though it has since been used by individuals to challenge extradition. *See* Dugard and Van den Wyngaert, 'Reconciling Extradition', *supra* note 250, p. 188 (noting that this exception allows states to refuse extradition where the individual 'is engaged in the struggle for human rights in the requesting state').

594 *See, e.g.*, the integrated approach in the Global Counter-Terrorism Strategy of 2006, *supra* note 235, Chapter 7B.1.

595 *See also* Chapter 7A.4.1.1, A.5.10 and B.10.

transferring suspected terrorists despite a substantial risk to their basic rights.[596] At the same time there are many other examples of states being unable to meet extraditions requests in terrorism cases because of the risks to terrorist suspects in the requesting state.

An early example relates to the death penalty, where the practice of European states to require 'assurances' that the death penalty will not be applied as a pre-condition to extradition is well established. Unsurprisingly, then the EU states made clear that 'no EU country will extradite suspects to the US if the death penalty might apply'[597] and the Council of Europe has likewise confirmed that all Member States should refuse to extradite in such cases.[598] Consistent with this, cases such as that of Mamdouh Mahmud Salim – who faced charges of terrorist conspiracy in the US – proceeded on the basis of undertakings given by the United States to German officials that prosecutors would not seek the death penalty if the suspect were extradited to the US.[599] Likewise, states have withheld extradition on grounds of the risk of torture or ill-treatment or a violation of related safeguards.[600]

Recent jurisprudence on non-refoulement in the counter-terrorism context has clarified the human rights obligations not to extradite where there are risks not only of torture and ill treatment, but of abuses in the criminal process so serious as to amount to a 'flagrant denial of justice'.[601] One issue that has caused states particular pause in their willingness to cooperate has been resort to military or special courts, of on-going relevance in several states around the world.[602] The UK was thus unable to extradite a terrorist suspect to Jordan to stand trial before a court which lacked independence and impartiality, or

596 The case work of the Human Rights Committee, for example, illustrates the piecemeal approach in state practice offering protection from certain rights and not others, at odds with the human rights obligations of the state. *See, e.g.*, Concluding observations of the Human Rights Committee: Portugal, UN Doc. CCPR/CO/78/PRT (2003), para. 12.

597 Statement by Danish Justice Minister Lene Espersen delivered during the Danish Presidency of the EU. *See* I. Black, 'Extradition of terror suspects ruled out. EU will not expose prisoners to US death penalty', *The Guardian*, 14 September 2002.

598 Council of Europe, Resolution 1271 (2002), 'Combating Terrorism and Respect for Human Rights'. This accords with the ECtHR's decision in *Soering* v. *United Kingdom*, *supra* note 269, (discussed above, Section A).

599 *See* 'Death Penalty Phase of Bombings Trial Begins', *CNN.com*, 30 May 2001, available at: http://cnnstudentnews.cnn.com/2001/LAW/05/30/embassy.bombings.01.

600 Whether it meets the high threshold for a violation of torture or inhumane treatment depends on the facts; *see* Chapter 7A52, and eg the extradition of terrorist suspects to trial which relied on evidence obtained through torture was precluded (in *Othman*, *supra* note 252), whereas extradition to confinement at a super-max prison in the US was not (*Ahmed* v. *UK*). *See Chapter 7B.5.10*.

601 *See, e.g.*, *Othman*, *supra* note 252; *see also* Chapter 7.

602 The use of military commissions, and the criticism of them for their due process deficit, are addressed at 4B.2.3, Chapter 7B3.1.

where evidence obtained through torture would be relied upon.[603] While it is important that not any potential risk of violation of fair trial guarantees should impede international cooperation, lest the system grind to a halt, where violations of core fair trial rights (amounting to a flagrant denial of justice) are at stake, the legitimacy of the law enforcement process hangs in the balance. States cannot, and have not in practice, been able to extradite as a result of requesting states failure to respect basic fair trial rights.

On the same basis, it would appear that states could not extradite an individual to be held unlawfully in Guantanamo Bay, or to stand trial before a US established military commission, for example.[604] An early harbinger of the cooperation impediment that military commission would become came in the form of a Spanish Foreign Ministry statement that Spain would not agree to a request to extradite eight alleged Islamist terrorists unless the United States agreed that they would be tried by a civilian court and not by the military commissions.[605] The Spanish authorities are reported as having insisted that persons extradited would 'not be subject to military or special tribunals, or to summary justice' and they must be tried in public with the opportunity to confront one's accuser.[606] Another example of a similar position appears in a later Dutch case, where the suspect was ultimately extradited from the Netherlands to the US but only on condition that he be neither labelled an enemy combatant nor tried by military commission, *and* that Dutch courts would be able to review and possibly modify his sentence upon his return.[607]

The impact of the inability of states to provide certain forms of cooperation in light of their human rights obligations is acknowledged in the US' 2010 Guantanamo Bay Task Force report. The report notes that states had been unwilling to cooperate with the military commissions scheme, but which would – the report suggested – have greater willingness to cooperate with federal prosecutions in regular courts.[608]

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603 Othman v. UK, *supra.* Chapter 7B.5.10 on non-refoulement notes the practice of seeking assurances to enable to state to extradite where it otherwise could not.

604 As the majority of Guantánamo detainees were not formally extradited, there has been little practice testing this principle. *See* however Ahmed v. UK case noting that extradition could proceed as there was no such risk of rendition or detention at Guantánamo.

605 S. Dillon, 'A Nation Challenged: The Legal Front; Spain Sets Hurdle for Extraditions', *New York Times*, 24 November 2001, reporting that a spokesman for Spain's Foreign Ministry confirmed that Spain would only extradite detainees to countries that offer defendants the legal guarantees provided by Spanish courts. The Foreign Ministry spokesman said, 'if we're talking about a tribunal in the United States with summary procedures and military judges, then these are not the same conditions that would characterise a trial in Spain or France or England or anywhere else in Europe'.

606 J. Yoldi, 'España advierte a EEUU de que no extraditará a miembros de AlQaeda', *el Pais*, 23 November 2001.

607 *See* the case of *Al Delaema*, Supreme Court of The Netherlands, Judgment of 5 September 2006.

608 Guantanamo Task Force Report 2010, p. 20.

4B.4.2 Inability to Secure Mutual Legal Assistance

Practice is more difficult to assess in the field of mutual assistance cooperation, due to the confidentiality and relative informality of mutual assistance requests. It would appear, however, that in several cases since September 11 European states have indicated their unwillingness to provide other forms of cooperation including mutual assistance if the evidence would be used towards the application of the death penalty.

Examples of states having publicly informed the US that they would withhold evidence absent assurances that it would not be used to secure the death penalty, include statements from Germany and France in relation to the provision of documentary evidence against the alleged September 11 conspirator, Zacarias Moussaoui.[609] The German statement emphasised that it was necessary to distinguish between sharing information with the United States that is necessary to help prevent another attack and handing over evidence that could help sentence a person to death.[610] This principle of non-cooperation in light of human rights concerns has also been reflected, to a limited degree, in mutual assistance arrangements entered into since September 11, as well as in earlier such arrangements.[611]

4B.4.3 Abuse of Process and Jeopardising Trial?

Perhaps the clearest counter-terrorism paradox would be if criminal trials simply could not proceed, not because of the challenges of investigation and prosecution but because of the nature of the abuses carried out in the name of counter-terrorism. Although the situation remains opaque, this may well be the case in respect of some of the detainees held at Guantanamo indefinitely, who the US claims are too dangerous to be released but who it is not 'feasible'

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609 Germany's former Justice Minister, Herta Daeubler-Gmelin, said that Germany would provide documents only on condition that they 'may not be used for a death sentence or an execution' (*Associated Press*, 1 September 2002). Marylise Lebranchu, the then French Minister of Justice, stated that, under Article 6 of the treaty governing judicial cooperation between France and the United States, France could either refuse assistance, or make it conditional on certain demands. She confirmed that 'any document should only be passed on to the Americans to help them with their enquiries on condition that such document [is] not used to get a conviction carrying a death penalty' (statement reported at www.ahram.org.eg/weekly/2002/597/in4.htm).

610 *See* the statement of the German Justice Minister, *ibid.*

611 *See, e.g.*, the Inter-American Convention against Terrorism which specifically notes that the obligation of mutual assistance does not apply where there is a substantial basis for believing that the request has been made for the purpose of prosecuting on discriminatory grounds. Article 14 (Non-discrimination), Inter-American Convention against Terrorism. The Convention also reflects more generally the duty to interpret the convention in accord with, among other areas of international law, international human rights law. This reflects other pre-existing standards. *See, e.g.*, Article 8, European Convention on Terrorism.

to prosecute.[612] It is impossible to asses how many criminal cases, from Guantánamo or elsewhere around the world, are simply not being brought on the basis of what they may reveal regarding abuses, or the prospects of the trial being thrown out on abuse of process grounds.

The issue is increasingly live in terrorism trials. As the Australian Courts made clear in the *Banbrika* case, abuses resulting from conditions of detention and treatment pre-trial may themselves simply render a trial unfair.[613] International practice in other areas may support the view that, at a certain point, conduct such as prejudicial publicity may also render a fair trial no longer possible.[614]

While cases in which such a drastic outcome remain rare, there are examples of this risk appearing in practice. An interesting example is where the Canadian Courts rejected a US extradition request for Abdullah Khadr,[615] as a remedy to 'distance' the courts from the grave violations and misconduct against Abdullah Khadr while he was detained in Pakistan. The first instance court had held that the extradition request could not be satisfied due to the gross misconduct of the US, contravening 'fundamental notions of justice'.[616] The ability to secure inter-state cooperation in criminal matters may therefore not only be affected by future risks of abuse in the requesting state (discussed under refoulement), but also by the extent of violations of human rights in the past.

In other cases it has been argued that the level of abuse to which the individual has been subject, or the length of the pre-trial process, is such that the trial would be an 'abuse of process,' or inherently so tainted that it jeopardises the integrity of proceedings or could never be deemed fair. This was seen in US courts in the Abu Ali case cited above, for example, where the majority rejected the claim, on the basis that the harm alleged had been at

612 This leads to a vicious circle for detainees who continue to be victims of indefinite arbitrary detention, which may be based on the extent of their earlier torture. See Chapter 8.

613 *R v Benbrika (Ruling No 20)* [2008] VSC (20 March 2008).

614 *Prosecutor v. Lubanga*, *supra* note 20. Although the prejudice arising from the prosecutor's public statements regarding the accused were insufficient to stop the trial in that case, the decision makes clear that greater prejudice would indeed have had that effect. Instead, it was a factor taken into account in sentencing. *Prosecutor v. Lubanga*, No. ICC-01-04-01/06, Decision on Sentence, 10 July 2012.

615 *United States of America v. Khadr* (2011) ONCA 3582 0110506 Docket: C52633. Abdullah Khadr was apprehended in Pakistan in 2004 and held for 14 months without warrant or access to a lawyer. He was denied access to consular services, and his repatriation to Canada by the Pakistani authorities was delayed. Upon return to Canada, he was rearrested in December 2005 under the US extradition request, having been was indicted in the US on charges of supplying weapons to al-Qaeda. The Court of Appeal of Ontario upheld the judgment of the Ontario Superior Court of Justice.The US was described as the driving force behind Abdullah Khadr's capture, on ransom, in Pakistan.See Chapter 6B.2.4. '*The Role of* Rewards and the Bounty Hunter in IHL.'

616 *Ibid.*

the hands of foreign state officials.[617] This was reflected in the subsequent case of *R v Ahmed* before English courts.[618] On the facts of that case, the Court also refused to stay a criminal case, but in doing so noted that the allegations of torture or complicity in torture had not been substantiated, that there was no link between the allegations of abuse and the accused's trial and no evidence of wrong doing by UK authorities, either in his alleged torture or through the receipt of intelligence information.[619] The judgment suggests that, had there been any such link between the information received and his trial (either through capture of the individual or the reliance on evidence on which the prosecution was based), or had UK officials been involved in any unlawfulness, including indirectly through complicity under international law, a stay of proceedings may have been required.

As the Court made clear in *Ahmed*, not every allegation of rights violations can or should thwart the ability to hold to account for serious crimes, but certain abuses may affect the legitimacy of the criminal process itself. As terrorism trials continue to unfold, questions regarding the circumstances in which stay of proceedings are appropriate, or required – including the doubtful criteria of whether the abuse was at the hand of the prosecuting state as opposed to another[620] – are likely to be further explored. The potential for human rights abuses in the war on terror to ultimately impede the ability to prosecute and punish terrorism in the future is striking.

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617 The rule of prompt presentment to a court only applied to US officials not where the individual was detained by others abroad.

618 *R.* v. *Ahmed (Rangzieb), R. v Ahmed (Habib),* Court of Appeal (Criminal Division), 25 February 2011, [2011] EWCA Crim 184; [2011] Crim. L.R. 734. The accused's allegations included of torture in Uzbekistan and Pakistan prior to his transfer to UK custody.

619 The difficult issue the court had to grapple with in that case was whether the receipt of information that may have been obtained through torture was itself a wrong that justified stay of proceedings. See chapter 3 on state responsibility through aiding and assisting under international law. The Court of Appeal found that the trial judge had thoroughly investigated whether the UK had connived at his unlawful rendition to the UK by the Pakistani authorities for the purpose of putting him on trial in the UK; on the controversial issues of complicity under international law that arise, see Chapter 10. Note footnote, *ibid*, on questions regarding the rationale for this distinction.

620 Note the distinction based on the the states *own* wrongs is controversial, and departs from the approach on admissibility of evidence in A & Ors (no. 2) in Chapter 11. The *Ahmed* case rightly rejected the idea that the purpose of stays was punishment of national authorities, and suggested that the rule serve to preserve the integrity of proceedings, which arguably applies irrespective of which authority is responsible for the abuse. Moreover, if the aim is even partly protection of individuals, avoiding 'encouragement' of torture (A & Ors, Ch 11), this rationale applies irrespective of the wrong doing state.

4B.4.4 Inadmissibility of Evidence

Finally, many of the criminal trials unfolding post 9/11 are hindered by questions regarding the admissibility of evidence illegally obtained.[621] Where evidence is obtained through torture or cruel treatment, it may well not constitute reliable evidence, but it cannot in any event be admitted in any criminal trial.[622] This may limit the basis for trial, or ultimately lead to cases being dropped or convictions being overturned.

In one of a growing number of examples, a French court overturned terrorist conspiracy convictions for five former Guantánamo detainees on the basis that information gathered by French intelligence officials in Guantánamo violated French evidentiary rules.[623] Disregard for human rights may then ultimately come at a high price not only for the individual but for the criminal justice system which is curtailed in its ability to discharge its punitive and rule of law mandate.

4B.5 Criminal Justice for Counter-Terrorism Crimes: the Other Side of the Coin

In the war on terror, criminal justice is a double-sided coin. On one, there is the role of criminal justice to prevent and punish terrorism, on which this chapter focuses. On the other is the role of criminal justice in addressing those crimes that have been committed in the name of counter-terrorism. But the practice set out above, from normative developments designed to stretch the web of criminal law to cover terrorism to burgeoning criminal terrorism trials, contrasts starkly with the dearth of activity in holding to account those responsible for violations on the other 'side'. The same legal provisions, and certainly the same rule of law perspective, demand that the law be brought to bear equally on serious crimes committed through terrorism or counter-terrorism.

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621 *E.g.*, Among the many examples *see, e.g.*, *US* v. *Abu Ali*, *supra* note 316, where the US courts referred to above, the Motassedeq case before German courts also discussed above, or the French Appeals Court decision to overturn a conviction on this basis. In *Othman*, *supra* note 252, the ECHR found that the likelihood of using evidence obtained through torture rendered the trial unfair.

622 Art. 15, Convention against Torture, Chapter 7A53 and Chapter 8.

623 'A French appeals court … overturned terrorist conspiracy convictions for five former inmates of the Guantánamo Bay prison who were tried and convicted in 2007, after they were returned to France. The court ruled that information gathered by French intelligence officials in interrogations at Guantánamo Bay, Cuba, violated French rules for permissible evidence, and that there was no other proof of wrongdoing.' 'Terror Convictions Overturned in France', *The New York Times*, 24 February 2009, available at: http://www.nytimes.com/2009/02/25/world/europe/25france.html . This was also an issue in the *Mounir El Motassedeq Case* before the German Courts discussed above, *supra* note 339.

As noted above, it is now beyond reasonable dispute that measures taken in the name of the global 'war on terror' have amounted to crimes under both international and national law. One obvious example, addressed in detail elsewhere in this study, is the extraordinary rendition programme, involving systematic state practices of abduction, torture and secret detention in bespoke 'black sites', which could amount to many crimes including torture and enforced disappearance, and potentially also crimes against humanity and, for any detentions genuinely associated with an armed conflict, war crimes.[624] Egregious acts of torture in Iraq, Afghanistan and beyond give rise to serious allegations of war crimes.[625] Systematic prolonged arbitrary detention in violation of fundamental norms as seen in Guantanamo may, arguably, also amount to war crimes or crimes against humanity.[626] The same has been alleged in respect of the systematic campaigns of targeted killings.[627]

The range of forms of individual criminal responsibility explored in this chapter suggest a range of potential charges, involving direct and indirect perpetration, such as ordering, instigation, aiding and assisting and co-perpetration against a range of the intellectual and material authors of these crimes. It is also clear that a range of states, at whose hands or on whose territory the crimes unfolded, share responsibility for the investigation and prosecution of those crimes, and cooperation in relation to the same.[628]

Yet practice of investigating and, in particular, prosecuting these crimes remains striking in its scarcity. The developments, or lack of developments, will be explored in subsequent chapters of this study.[629] Suffice to anticipate here that accountability in respect of war crimes in Afghanistan and Iraq has been minimal, against low-level perpetrators, and in respect of isolated rather than systematic practices.[630] There have been no US indictments for the widespread torture and abuse of detainees by the CIA and associates through the

624 Chapter 10 on Rendition.

625 *See* violations of IHL in Chapter 6, and Chapter 7B.14 'Justice and Accountability'.

626 ICC Statute, *supra* note 4, Article 7(1)(e) ...; crime against humanity of 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law'; *see also* Elements of the Crimes Doc, Art 7(1)(e).

627 *See* 'Ferencz Condemns Drone Attacks: "A Crime Against Humanity" -- 26 Bipartisan Congress Members, UN Question Unmanned Aerial Assaults', Peculiar Progressive, 19 June 2012, available at: http://peculiarprogressive.blogspot.co.uk/2012/06/ferencz-condemns-drone-attacks-crime.html .

628 Although lead by the CIA, a broad range of other states were involved either in hosting black sites for CIA interrogation, themselves detaining and interrogating detainees on their territory, *see* Chapter 10. Allegations of cooperation with **????????**. *See* Chapters 6 (IHL) and 9 'Justice Done? The Killing of Osama bin Laden'.

629 Chapter 7B.14 'Justice, Accountability and Reparation' discusses whether human rights duty has been met, and Chapter 8 on Guantánamo and Chapter 10 on Rendition deal in more detail with particular justice developments in those areas. Some of the obstacles to justice are also highlighted in the context of human rights litigation (but in some cases relevant also to criminal investigation) in the chapter on the role of the courts, Chapter 11.

630 Chapter 7B.14.

extraordinary rendition programme or beyond,[631] and official 'review' has been closed.[632] There is no statement of intent to investigate and where appropriate prosecute or acknowledgement that there is a legal obligation to do so.[633]

Evidence is not scarce. President Bush, among others, has openly admitted authorising waterboarding,[634] while the former head of counter-terrorism at the CIA acknowledges overseeing it and destroying 92 videotapes of interrogation sessions.[635] Seen through the rule of law lens, torture and the destruction of evidence in relation to it are serious offences, yet the sense of impunity surrounding them, at least in the US, appears entrenched.[636] Questions inevitably arise regarding the implications of the underuse of criminal law in this context, including for the deterrent and expressive functions of the criminal law outlined in the introduction to this chapter.

In the face of inactivity by the United States authorities, developments in the investigation and prosecution of war on terror crimes have however been unfolding elsewhere, as detailed in subsequent chapters. These processes have, unsurprisingly, met with intense challenges. These include investigative challenges,[637] broad-reaching state secrecy,[638] the refusal of US coopera-

631 Chapter 10.7.

632 *Ibid*.

633 As noted in Chapter 7, *ibid.*, Obama famously pledged to 'look forward as opposed to looking backwards' on various Bush administration programs but initially kept open the possibility of accountability of broken laws. 'Obama Reluctant to Look into Bush Programs', 11 January 2009, available at: http://www.nytimes.com/2009/01/12/us/politics/12inquire.html.

634 Previous President Bush admitted ordering waterboarding. The previous CIA head of counter-terrorism, Jose Rodriguez, admitted ordering it. Donald Rumsfeld stated that the US military did not waterboard, but remained silent on whether the CIA did.

635 *See* J. Rodriguez, *Hard Measures: How Aggressive CIA Actions After 9/11 Saved American Lives* (Threshold Editions, 2012).

636 *See* Chapter 10 for criticism that 'we don't put our torturers on trial. We put them on book tours.' C. Pierce, 'Waterboards, Drones and the Drones Who Love Them', Esquire Politics Blog, available at: http://www.esquire.com/blogs/politics/jose-rodriguez-cia-book-8484289.

637 Many of the crimes were subject to what has been described as a 'concerted cover up' and suffer from comlete lack of US cooperation (see Council fo Europe Second Report into Rendition (2007), and Commisioner Hammerberg's statement, in Chapter 10.7), making investigations challenging but not impossible.

638 *See, e.g.,* the trial in the Abu Omar case in Italy or the Polish investigation , where broad reaching approaches to 'state secrecy' shrouded the investigation and limited the charges; *see* chapter 10.

tion,[639] and the reported imposition of political pressure on states not to pursue the cases.[640]

Despite this, many states that cooperated with the US in alleged criminality have committed to undertaking some form of investigation, with varying degrees of force and success, and at various stages of development.[641] These include the first prosecutions that have also taken place (albeit in absentia), leading to convictions of Italian and CIA officials for Abu Omar's rendition in Italian courts.[642] Criminal investigations are open in several other states, including into allegations of systematic torture and ill-treatment in US detention facilities', and possible crimes committed by former government lawyers who provided the legal justification for torture and unlawful detention.[643] In an interesting example of the 'horizontal complementarity' between national jurisdictions,[644] in one case a Spanish judge in charge of the latter case ordered a 'temporary stay of proceedings', transferring the matter to the US Department of Justice 'for it to be continued urging it to indicate at the proper time the measures finally taken by virtue of the transfer procedure'.[645] One might question the appropriateness of this deference in the absence of a firm commitment by the US to investigate, but it will be revealing to see what if

639 Non-cooperation is noted in the previous section. *See also* the el Masri case where the Minister of Justice announced that due to lack of cooperation from US authorities, it would not be pursuing the extradition requests. 'US rejects Germany bid for extradition of CIA agents in el-Masri rendition', *JURIST*, Saturday, September 22, 2007, available at: http://jurist.org/paperchase/2007/09/us-rejects-germany-bid-for-extradition.php. UK prosecutors alluded to lack of cooperation in deciding that the Mohamdad case could not lead to prosecution of any individual. 'Joint statement by the Director of Public Prosecutions and the Metropolitan Police Service', CPS, 12 January 2012 at: http://www.cps.gov.uk/news/press_statements/joint_statement_by_the_director_of_public_prosecutions_and_the_metropolitan_police_service .

640 U.S. pressure on states not to investigate renditions has been reported and condemned by e.g. the European HR Commissioner on Human Rights.'Wikileaks' documents also records US meetings with European counterparts to this end: *e.g.* 'Officials Pressed Germans on Kidnapping by CIA', *New York Times*, 8 December 2010, available at: http://www.nytimes.com/2010/12/09/world/europe/09wikileaks-elmasri.html; 'Garzon Opens Second Investigation Into Alleged US Torture of Terrorism Detainees', Cable from US Embassy Madrid, 5 May 2009, available at: http://www.cablegatesearch.net/cable.php?id=09MADRID440.

641 *See, e.g.*, Chapter 7B.14 on justice and accountability failure generally and Chapter 10 and Chapter 8 discussions on failures in respect of rendition and Guantanamo abuse specifically. *See* e.g. Romania and Lithuania, cursory investigation into rendition or UK enquiries but no criminal prosecutions.

642 *See* Chapter 10 on Rendition.

643 See Chapter 8C3 on Spanish investigations into abuse at Guantanamo and elsewhere. See Chapter 10.7 on other initiative in eg Poland and elsewhere to hold officials of the US and other states to account for rendition.

644 Part 4.A.1.3 above.

645 A 'temporary stay of proceedings' was ordered as the case was 'transferred' to the Deptartment of Justice, in an interesting example of horizontal complementarity between states See further Chapter8C3.

anything this invitation at accountability dialogue produces, and how the dynamics of deference will evolve should the US fail to take steps towards meaningful accountability.

Despite the difficulties, investigations and, gradually, prosecutions do seem to be gaining some momentum.[646] The limited prosecutions to date means that issues around immunities, or permissible defences, have not arisen in practice. There have however been various attempts to confer immunities on US personnel who committed crimes against detainees,[647] or to manufacture' defences for interrogators and others involved in their mistreatment.[648] These developments are themselves relevant to the perceived legitimacy and potential 'expressive' value of the criminal law in countering crimes, whether terrorist or counter-terrorist.[649] Their full practical import remains to be seen if prosecutions for war on terror crimes gathers pace. Notably, in the one case where they have been raised internationally, concerning the CIA agents convicted in Milan, claims for immunity were rejected by the Court.[650]

While momentum may be gathering around accountability for some of the most extreme crimes outside the US, the results remain limited. The contrast of approach, as between the rigour, and perhaps at times over-zealous exuberance, with which criminal law responses to terrorism have been embraced internationally in recent years and the muted criminal justice response to the crimes of the war on terror is striking. The legitimacy, and hence the value, of the criminal law function can only be seriously diminished by such striking selectivity of its application.

4B.6 Conclusion

Acts of international terrorism constitute crimes under national and often also international law. A rule of law approach to counter-terrorism requires that they be prosecuted, in accordance with due process, and that those responsible be held to account with proportionate penalties. The lack of an internationally accepted crime of 'terrorism' should not impede this process: serious acts of terrorism constitute core crimes under international law, while national systems

646 These are supported and catalysed by international human rights cases, which seek, inter alia, to insist that the states in question meet their human rights obligation to investigate and prosecute. *See* Chapter 11.

647 Chapter 7B.14.

648 J. Resnik, 'Detention, the War on Terror, and the Federal Courts' (2010) 110 *Columbia Law Review* 579.

649 Chapter 7B Introduction.

650 *See eg* Chapter 10; *Abu Omar* case; 'Convictions in Abu Omar rendition case a step toward accountability', Amnesty International, 5 November 2009, available at: http://www.amnesty.org/en/news-and-updates/news/convictions-abu-omar-rendition-case-step-toward-accountability-20091105.

have increasingly incorporated forms of terrorism, among other relevant crimes, in domestic law. While there may be some gaps and areas of tension, a detailed body of international law and practice exists in relation to crimes, principles of law, jurisdiction and cooperation which, if applied effectively, equips the international community in its criminal response to international terrorism.

The immediate wake of 9/11 saw unprecedented international solidarity with the United States and a shared global commitment to justice. Remarkable unity of purpose attended international dialogue on combating terrorism post 9/11. Questions arise as to the extent to which the opportunity to improve the system of international criminal justice, and international cooperation in the enforcement of law, has been seized or squandered.

In the immediate aftermath of 9/11, there seemed relatively little role for criminal process. The goal of terrorism prevention involved the massive detaining [of] *potential* terrorist threats'[651] but principally with a view to intelligence gathering rather than seeing criminal justice done against those responsible for serious crimes. Many of those responsible have been put on kill lists rather than subject to arrest warrants. Cooperation was often 'informal' and transfers extra-legal, as epitomized by the extraordinary rendition programme. Alternative measures prevailed around globe, from preventive detention, sanctions, control orders and other measures. Many of these had a similar effect on the individual as a criminal conviction but without the rights associated with it.

It may be, however, that over time the pendulum has began to swing back towards a more central role for criminal law enforcement, as states, international institutions and commentators acknowledge the limitations and the implications of undue focus on military responses to terrorism. The relationship between military and criminal law responses remains an uneasy one in some states, notably in the US. There is, however, a shift of emphasis towards greater priority afforded to criminal justice and to strengthening international criminal cooperation.[652] Extensive developments in the fabric of criminal laws, increasing experience of terrorism prosecutions in practice, and concerted international attention to enhancing international cooperation may suggest that the opportunity was not squandered as hopelessly as may have been thought.

Yet as the experience of terrorism prosecutions unfolds, domestic criminal processes and international cooperation reveal serious tensions within the rule of law edifice. Expanded criminal offences and modes of liability enhance the

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651 Testimony of Attorney-General John Ashcroft before the US House of Representatives, Committee on the Judiciary, 5 June 2003, available at: http://www.usdoj.gov/ag/testimony/2003/060503aghouseremarks.htm .

652 Criminal justice has certainly received increased visibility over time and is now strikingly present in international discourse around effective counter-terrorism, as seen for example in the centrality afforded to it in the coordinated UN Global Counter-Terrorism Strategy and the range of international initiatives to enhance cooperation set out above.

preventive potential of the criminal law, yet they have lead to prosecutions of individuals far removed from the 'genuinely criminal conduct' that is the normal reserve of criminal law.[653] Adapted approaches to procedure and evidence may seek to meet security challenges, but jeopardize the right to trial before an independent and impartial tribunal, or the ability to mount a meaningful defence. The ever-expanding reach of criminal norms and adaptation of criminal process puts real strain on the most basic criminal law principles – legality, individual responsibility, the presumption of innocence, the independence of the judiciary and due process – upon which the legitimacy of the criminal law depends.

The experience of national courts post 9/11 also reflects in part a failure of international cooperation, despite the emphasis placed on enhancing cooperation in criminal matters post 9/11. The examples explored above, and others, illustrate the unwillingness on the part of some states, notably the US, to share information with courts in other states, impeding international justice efforts.[654] In what has been described as a 'bitter irony in the global war against terrorism',[655] the US stands accused of hampering proper convictions, but also withholding potentially exonerating information from criminal courts.[656]

Practical, political and legal obstacles to effective extradition and mutual legal assistance remain.[657] It is increasingly evident that poor human rights practices at the investigative stage have impeded international cooperation and/or effective prosecutions, the full extent of which remains to be seen. Even some of those standards and procedures advanced in the name of enhancing cooperation and the international justice it serves, have undercut judicial safeguards that are all the more critical post 9/11.

As noted in the introduction, the criminal law holds real promise in combating terrorism within a rule of law framework. Meeting the challenge of using it effectively, while upholding rather than undermining the rule of law, remains a work in progress. By contrast, meeting the parallel challenge of ensuring accountability also for those that commit crimes in the name of counter-terrorism is a far more remote ideal.

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653 U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, E/CN.4/2006/98, para. 4.

654 See eg the German example leading to the the Mzoudi acquittal outlined at 4B12.

655 *See* 'Terror Case sets Washington and Berlin at Odds', *Christian Science Monitor*, 9 February 2004.

656 See eg Criticism by German prosecutors at 4B.1.2 above.

657 Prost, 'Need for a Multilateral Cooperative Framework', *supra* note 279.

5 The Use of Force

> We the Peoples of the United Nations determined to save succeeding generations from the scourge of war ... to reaffirm faith in fundamental human rights ... to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained ... to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest ... have resolved to combine our effort to accomplish these aims.
>
> (Preamble, UN Charter, 26 June 1945)

This chapter considers the law relevant to the question whether, and if so in what circumstances, states are entitled to resort to the use of force under international law as a response to acts, or threats, of international terrorism. The legality of the use of force between states under international law is referred to as the '*jus ad bellum*'. Part A of the chapter addresses key aspects of the relevant legal framework, which part B then analyses alongside examples of state practice in response to international terrorism since 9/11. Specifically, it addresses the military interventions in Afghanistan and Iraq which followed 9/11 and the ongoing attacks on members of al Qaeda and associated groups around the world.

The distinction between the body of law addressed here, and those considered in other chapters of this study, bears emphasis at the outset. The *jus ad bellum* which determines when use of force on another state's territory is lawful must be distinguished from *jus in bello* that encompasses the rules that apply once force has been used and a conflict is underway, and which applies irrespective of whether the resort to force was lawful.[1] The lawfulness of the use of force between states, discussed here, is also distinct from the lawfulness under human rights law of the use of lethal force.[2] The use of force may be lawful under the *jus ad bellum*, but still a violation of the individual's rights

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1 The *jus in bello*, or humanitarian law (IHL) regulates the conduct of hostilities and treatment of persons, and requires, *inter alia*, that civilians must not be the object of attack, which is addressed in Chapter 6.

2 International Human Rights Law (IHRL) is discussed in Chapter 7.

under the quite different normative standards of IHRL.[3] As practice will show, confusion – whether deliberately fueled or inadvertent – has often surrounded these divergent areas of law and the justifications available to states under each.[4] Subsequent chapters explore how the various areas of law might apply, and the interplay between them, in particular situations.[5]

5A THE LEGAL FRAMEWORK

5A.1 THE USE OF FORCE AS A LAST RESORT

Where a terrorist attack amounts to criminal conduct, the appropriate framework of law is that of law enforcement. As discussed in Chapter 4, persons who are directly responsible for a crime or, in certain circumstances, indirectly responsible for contributing to it or failing to prevent it, should be brought to justice before national courts or international tribunals.

Under international law there is an obligation to resolve disputes by peaceful means, which may also be relevant in certain circumstances. This obligation is enshrined in Article 2(3) of the Charter of the United Nations, which states: 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, shall not be compromised.'[6] Peaceful means of dispute resolution include arbitration, judicial settlement,[7] non-adjudicatory methods such as negotiation, good offices, mediation, conciliation or inquiry, and settlement under the auspices of the United Nations or regional organizations. As they are directed towards addressing state responsibility, their relevance to the present study is effectively

3 The legal standards are different under different areas of law, even where the terminology may disguise this – e.g., the concept of 'proportionality' has a different meaning and effect under IHRL, IHL, and *jus ad bellum*, as does 'self defence' under criminal law, which is analogous to but different from the standard that may justify the lethal use of force under IHRL or the use of force under the *jus ad bellum,* addressed later.

4 For an example of confusion *see* e.g. reliance on arguments that territorial states have 'consented,' relevant to the use of force under the *jus ad bellum* but not the legitimacy of action under IHL or IHRL, or comments on the U.S. justification of 'self defence' in relation to the killing of Bin Laden in Chapter 9.

5 *See*, e.g., Chapters 9 and 10 on the diverse issues raised by each area of law in relation to the killing of Osama bin Laden or the Extraordinary Rendition programme respectively.

6 A similar obligation was already enshrined in the so-called Briand-Kellog Pact: Article 2, Treaty Providing for the Renunciation of War as an Instrument of National Policy, Paris, 27 August 1928, in force 24 July 1929.

7 The International Court of Justice (ICJ), as the principal judicial organ of the United Nations, is empowered to determine infringements by one state of the rights of another, order provisional measures and advise on the interpretation of law; *see* Article 92 UN Charter.

limited to disputes related to state-supported terrorism, and potentially to action taken by states in the name of counter-terrorism.[8]

The question of the lawfulness of the use of force should only arise in circumstances where none of these peaceful means are at the aggrieved states' disposal, or where such means have been exhausted or found to be ineffective.[9] This reflects the 'general principle ... whereby States can only have recourse to military force as a last resort'.[10]

5A.2 THE USE OF FORCE IN INTERNATIONAL LAW: GENERAL RULE AND EXCEPTIONS

The current rules governing the lawfulness of the use of force are contained in the UN Charter and customary international law. The advent of the UN Charter represented a moment of legal metamorphosis, when traditional legal concepts such as the 'just war' and lawful reprisals were radically altered by the new law of the United Nations, which greatly restricted the circumstances in which the use of force can be lawfully deployed.[11] The underlying 'purposes' of the UN Charter are set out in Article 1, the first of which is:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The primacy of this objective is reflected in the Charter's preamble, which opens with the famous expression of determination 'to save succeeding generations from the scourge of war.'[12] Article 2 then sets out certain fundamental 'principles', one of which is the general rule prohibiting the use of force.[13] Article 2(4) obliges all Members of the United Nations to refrain in their

8 The avenues for peaceful dispute settlement discussed here pre-suppose a level of state responsibility, discussed in Chapter 3.

9 This requirement manifests itself throughout the law on the use of force; *see* e.g. the requirement of 'necessity' of self defence and in the Security Council's power to take 'necessary measures,' below.

10 A. Cassese, 'The International Community's "Legal" Response to Terrorism', 38 (1989) ICLQ 589 at 596.

11 See L. Henkin, 'Use of Force: Law and U.S. Policy', in Henkin *et al.*, *Right* v. *Might: International Law and the Use of Force* (New York, 1991), pp. 37 ff. See also T. Franck, Recourse to Force: State Action Against Threats and Armed Attacks (Cambridge: Cambridge University Press, 2002).

12 Preamble, UN Charter.

13 Article 2(4).

international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations.

The overwhelming majority of commentators recognise that the obligation enshrined in Article 2(4) of the Charter reflects customary international law.[14] The International Court of Justice (ICJ) in the *Nicaragua* case[15] noted that Article 2(4) reflects customary law,[16] despite the fact that state practice is 'not perfect' in the sense that States have not 'refrained with complete consistency from the use of force.'[17] It has since described it as a 'cornerstone of the UN Charter'.[18] The prohibition of the use of force against another State is one of the relatively few rules of international law which has been recognised as having attained the status of *jus cogens*,[19] though it has also been suggested that the jus cogens status may properly be limited to the prohibition on launching aggressive war.[20] The resort to force by states in contravention of this rule may amount to an act of aggression for which states, but also individuals, may be responsible.[21] As will be discussed, it may also amount to an 'armed attack' against another state, a prerequisite for the use of force in self defence.[22]

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14 *See*, generally, A. Randelzhofer, 'Article 2(4)', in B. Simma *et al.* (eds.), *The Charter of the United Nations. A Commentary*, 2nd ed. (Oxford University Press, 2002), pp. 133-5, citing authoritative writings in support of this position.

15 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*, Merits, ICJ Reports 1986, p. 14 ('*Nicaragua* case').

16 *Ibid.*, para. 190.

17 *Ibid.*, para. 186.

18 *Armed Activities on the Territory of the Congo* (hereinafter '*Armed Activities* case') (*Democratic Republic of the Congo* v. *Uganda*), ICJ Reports 2005, 201, at para. 148.

19 *See* ICJ, *Nicaragua* case, note 15, para. 190 and ILC Commentaries to Articles on State Responsibility, Commentary to Article 40(4). *See* Chapter 1, para. 1.2.1.

20 N. Blokker and N. Schrijver, *The Security Council and the Use of Force: Theory and Reality, a Need for a Change?*, (Netherlands: Martinus Nijhoff Publishers, 2005).

21 The UN Charter designates the Security Council as the organ competent to determine, *in concreto*, if a breach of the prohibition of the use of force amounts to an act of aggression. For the definition of aggression *see* GA Res. 3314 (XXIX) of 14 December 1974, UN Doc. A/RES/3314 (XXIX), Article 1. 'Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.' Article 3 lists acts which qualify as an act of aggression' including '(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.' In 2010 the 13th plenary meeting of the ICC Review Conference agreed upon a definition of aggression for ICC purposes (RC/Res 6., 11 June 2010, Annex 1); *see* new Article 8 *bis* in Chapter 4A.1.

22 Not every act of unlawful use of force will be sufficiently serious to amount to an act of aggression or an armed attack. See *Nicaragua* case, note 15, para. 195.

Article 2(4) is generally accepted as infringed by any 'forcible trespass,' however limited in geography or time, and whatever its purpose.[23] As such it has been noted that the references to territorial integrity and political independence were not intended to qualify the prohibition, but on the contrary to emphasise (and thus to strengthen) the protection of the nation state from aggressive interference by other states.[24]

It perhaps goes without saying that where a state has the 'consent' of the territorial state or intervenes at its 'invitation', there is no use of force against the territorial integrity of the state at all. These are therefore key preliminary questions of fact, which are often less straightforward to ascertain than might meet the eye.[25] It is only where there is no consent that the general prohibition on the use of force arises.

Certain exceptions to the prohibition are contemplated in the Charter itself. These exceptions, which will be critical to the assessment in Part B of the lawfulness of measures taken in the counter-terroism context, involve: (a) the use of force in self defence, and (b) Security Council authorisation of force, on the basis that the Council determines it necessary for the maintenance or restoration of international peace and security.

While other possible justifications for the use of force have at times been advanced, such as 'humanitarian intervention', 'pro-democratic intervention' or 'self help', they provide doubtful justification for the lawful use of force, as discussed below. Instead, to rest on a secure legal foundation, any resort to armed force should either constitute self defence or be authorised by the Security Council. It is unsurprising then that it is these legal justifications that have been invoked explicitly by states in the context of resorting to force against terrorism in the post September 11 world, in relation to Afghanistan, Iraq, or the ongoing cross border lethal use of force against alleged al Qaeda terrorists in numerous states around the globe discussed in Part B.

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23 J. Sloan, *The Militarisation of Peacekeeping in the Twenty First Century* (Oxford: Hart Publishing, 2012), p. 74 (citing A. Randelzhofer, 'Article 2(4)', in B. Simma *et al.*, *Commentary*, note 14, p. 112-36, 123-4. Cf. D.W. Bowett, *Self-Defense in International Law* (Manchester University Press, 1958), p. 152. *See* discussion of possible thresholds of scale applicable to an armed attack by non-state actors for the purposes of self defence later.

24 On the process whereby this language came to be included, *see*, e.g., T. M. Franck, *Recourse to Force, supra* note 11, p. 12; C.D. Gray, *International Law and the Use of Force (Foundations of Public International Law)*, 3rd ed. (USA: Oxford University Press, 2008), pp. 31-33.

25 Consent is relevant to ongoing lethal force against terrorism at Chapter 5.B.3, or in relation to the killing of Bin Laden at Chapter 9. Indications that a state has or has not consented may be politically motivated and as one commentator notes often have to be taken 'with a grain of salt': M.N. Schmitt, *International Law and Armed Conflict: Exploring the Faultlines* (Netherlands: Martinus Nijhoff Publishers, 2007) p.183. On the possible relevance of 'intervention by invitation' as a 'possible legal justification' in relation to Afghanistan, *see* M. Byers, 'Terrorism, the Use of Force and International Law after September 11', 51 (2002) ICLQ 401, pp. 403-4. Invitation is certainly relevant after regime change introduced a government friendly to those executing the 'war on terror'.

5A.2.1 Self defence

Article 51 of the UN Charter provides that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

As the Charter's reference to the 'inherent' right of self defence may reflect, Article 51 was intended to encompass customary international law. Where Article 51 lacks specificity, an understanding of its content can therefore be informed by customary law.[26] However, customary law continues to exist alongside the Charter and, as will be noted, in limited respects its content may not be identical.

Self defence is an exception to the 'general duty of all states to respect the territorial integrity of other states',[27] and the only established exception to the prohibition on the use of non-UN authorised force.[28] As *Oppenheim's International Law* notes, '[l]ike all exceptions, it is to be strictly applied'.[29] The strict approach is particularly important given that self defence operates, at least initially, in the absence of a mechanism to ascertain the validity of a state's claim to exercise the right. In practice, states resorting to force very often invoke self defence as a basis for the legality of action, even where no such tenable justification exists.[30]

The essence of self defence, as the term suggests, lies in its defensive objective: it is neither retaliation nor punishment for past attacks, nor

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26 *See*, e.g., the tests of necessity and proportionality, which are not explicit in the Charter but are principles of customary law held by the ICJ to be part of the 'inherent' right of self defence under Article 51 – *Nicaragua* case, note 15, para. 194. By contrast, the rules on reporting to the Security Council *are* explicit in the Charter but are not rules of customary law. They are binding as conventional law on the UN member states as parties to the Charter, *Nicaragua* case, para. 194.

27 R.Y. Jennings and A. Watts (eds.), *Oppenheim's International Law,* vol. I, 9th ed. (London: Oxford University Press, 2008), p. 421.

28 On other possible legal justifications for unilateral resort to force advanced by certain authors but of doubtful legal standing in current international law, *see* this chapter, para. 5A.3 and N. Lubell, 'Extra-Territorial Use of Force agaisnt Non-state Actors', (Oxford: Oxford University Press, 2010), Chapter 3 who addresses, and dismisses, hot pursuit, necessity and piracy as exceptions to the prohibition on the use of force.

29 *Oppenheim's International Law*, *supra* note 27, p. 421.

30 C. Gray, *International Law and the Use of Force*, (Oxford: Oxford University Press, 2000), p. 118. A. Cassese, *International Law* (Oxford: Oxford University Press, 2001), p. 306, points out that self defence has been abused in practice, especially by great powers.

deterrence against possible future attacks.[31] The former distinguishes permissible self defence, which consists of necessary and proportionate measures to protect oneself against a future threat, from prohibited reprisals, which are responsive and largely punitive. While earlier law allowed reprisals in limited circumstances,[32] the law changed with the advent of the UN Charter, which is on its face inconsistent with retaliatory or punitive measures of force.[33] In 1970, the Friendly Relations Declaration, considered to constitute customary law on the point, confirmed that 'states have a duty to refrain from acts of reprisal involving the use of force'.[34] Central to an assessment of justifiable self defence is an assessment of the actual threat to a state, and an identification of the measures necessary to avert that threat, to which defensive action must be directed and limited. The conditions which are generally considered to require satisfaction before resort to force can be justified as self defence are set out below.

5A.2.1.1 Conditions for the exercise of self defence

a) Questions Concerning the 'Armed attack' Requirement

Article 51 contemplates self defence only 'if an armed attack occurs against a Member of the United Nations'. As affirmed by the International Court of Justice, '[s]tates do not have a right of ... armed response to acts which do not constitute an "armed attack"'.[35] The ICJ has indicated that the attack should be mounted from outside the state itself.[36] As noted below, the 'armed attack'

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31 *See* discussion of anticipatory or pre-emptive self defence, Chapter 5A.2.1.1(a). Threats of future attacks that fall outside the scope of permissible self defence may however amount to threats to international peace and security for which the Security Council is uniquely empowered to authorise force.

32 Prior to the UN Charter, the definitive statement of the permissible use of reprisals was found in the 1928 *Naulilaa* case. *See* C. Waldock, 'The Regulation of the Use of Force by Individual States in International Law', 81 (1952) RdC 455, pp. 458-60.

33 *See* Article 2(4), Article 42 and Article 51, UN Charter.

34 GA Res. 2625 (XXV), 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations', 24 October 1970, UN Doc. A/RES/2625 (XXV), para. 6. While not a binding instrument, the Friendly Relations Declaration, adopted by consensus by the General Assembly, provides insight into the understanding of states as to the law in 1970 and is often cited as customary international law binding on all states – see *Nicaragua*, note 15, para. 188.

35 *Nicaragua* case, note 15, para. 110.

36 M.N. Schmitt, 'Responding to Transnational Terrorism under the Jus Ad Bellum: A Normative Framework' (hereinafter 'Transnational Terrorism'), 56 (2008) *Naval Law Review* 1, p. 12 notes this was one point of agreement between all judges in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *ICJ Reports 2004* (hereinafter '*Wall* Advisory Opinion'). In finding there was no right to self defence, the majority distinguished the Israeli situation from that contemplated by SC Res. 1368 and 1373. See also E. Wilmshurst, 'Principles of International Law on the Use of Force by States In Self-Defence', *Chatham House* Working Paper, 2005, p. 6 (hereinafter

requirement is one of the most controversial of the self defence conditions, and highlights a number of areas where international law is unsettled.

Several issues have given rise to controversy as regards the scope of an Article 51 'armed attack,' which will be discussed in turn. A preliminary issue relates to the targets of the attack. The second, of central relevance in the post September 11 context explored in the second part of this chapter, concerns the authors of the attack, specifically whether the use of force by non-state actors may constitute an 'armed attack' for the purposes of triggering self defence, or whether a state must be responsible to justify the use of force against that state. A third issue, less central post 9/11 but which has assumed more significance in the years following those attacks,[37] relates to whether there is a threshold or scale requirement for an armed attack, or whether any cross border use of force suffices. The fourth is the thorny issue of whether 'anticipatory,' 'preventive' or 'pre-emptive' self defence is permissible and, if so, the parameters of such a right.

i) Targets of an Armed Attack: While there is no accepted definition of armed attack for these purposes, Article 2(4) refers to resort to force against another state's territorial integrity or political independence.[38] As noted above, attacks on the state's territory, irrespective of scale, are generally considered to qualify as amounting to attacks against the state's territorial integrity.[39] Among the issues in dispute as regards the targets of the armed attack is whether an attack against a state's nationals, or its interests, overseas could suffice to constitute an armed attack.[40] Support in state practice and academic writing for 'self

'Chatham House Principles'), available at: http://www.chathamhouse.org/publications/papers/view/108106. It may be open to question whether this logic would hold in all circumstances; where.g. an attack was launched from within the state, either by another state or by a non-state actor located elsewhere, defensive action could be required abroad to avert the ongoing or a subsequent attack. Attacks that originated entirely from within a state are however certainly less likely to give rise to the necessity of action in self defence another state.

37 *See* 6A.3.1 justifications for targeted killings in self defence, including the question of whether there can be a continuing attack established through an accumulation of events.

38 *See* Article 2(4). On the extent to which the language was intended to limit, see Franck, *Recourse to Force*, *supra* note 11 above. The debate on whether attacks against nationals might suffice is addressed below.

39 Note however the suggestion that there is a scale requirement for attacks by non-state actors at 5A2.1.

40 See S. Ratner, 'The Meaning of Armed Attack,' in L. van den Herik and N. Schrijver (eds.), *Counterterrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges*, (Cambridge University Press, 2013). Gray, *International Law and the Use of Force*, supra note 30, p.118-19. See discussion of the US National Security Staregies and the protection of broad U.S. interests at 5B.2.

defence' to cover defence of nationals abroad is uneven,[41] and while such a right may exist in certain exceptional circumstances,[42] it has been suggested that further clarification on this matter is required.[43]

By contrast, the protection of broader 'interests' beyond the integrity and independence of the state, and, arguably, nationals abroad, finds no justification within the law of self defence.

ii) State responsibility for the attack: a sine qua non? A second controversial question relating to the scope of an 'armed attack' under Article 51 is whether a state must be responsible for the attack for the right to self defence to be triggered, or whether the right to self defence arises even where a non-state actor is responsible for the attack (without attribution to a state). The significance of this question in determining the scope of the law of self defence in the contemporary world was put beyond doubt by the September 11 attacks.[44]

The international law of *jus ad bellum*, including self defence, developed on the assumption that disputes and resolutions would occur between states and those that act on their behalf. Yet this assumption has been subject to increasing doubt in recent years. On the one hand, the language of Article 51 of the Charter does not explicitly require state involvement in the attack to trigger self defence.[45] Nor does the logic of self defence (as permitting a state to take whatever action might be necessary to defend itself against an actual or imminent attack) require proof of state involvement in that attack. Indeed, the seminal *Caroline* case of 1837 involved non-state actors, operating without any apparent state support, indicating that – at least pre-Charter –

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41 Gray, *ibid.*, at 156-157, notes that 'few states have accepted a legal right to protect nationals abroad.' She cites the United States, the United Kingdom, Belgium and Israel as having relied upon this argument.

42 D.W. Bowett, supra, at 93, notes that it is unreasonable to characterise *every* threat to nationals located abroad as a threat to the security of the state. M. Byers, 'Terrorism, the Use of Force and International Law after September 11', 51 (2002) ICLQ 401, at 406 refers to the tacit approval by most states of the Entebbe incident wherein Israel stormed a hijacked plane in Uganda carrying Israeli nationals. Separate from questions as to whether self defence arises at all are those relating to the proportionality of force to the objective of rescuing or protecting nationals.

43 Ratner, 'The Meaning of Armed Attack', note 40, p. 710.

44 9/11 was widely attributed to the al-Qaeda network in circumstances where state responsibility for the attacks remained uncertain and was not directly asserted. *See*, e.g., document published by the UK Government, 'Responsibility for the Terrorist Atrocities in the U.S., 11 September 2001', 4 October 2001. For a discussion of the responsibility of al-Qaeda, *see* S.D. Murphy (ed.), 'Contemporary Practice of the United States Relating to International Law Contemporary Practice', 96 (2002) AJIL 237. On the test whereby acts of private actors become attributable to the state *see* Chapter 3.

45 Note, however, that as the Charter was drafted on an assumption that force was inter-state and that it governed inter-state relations, too much reliance on the omission of express wording from the Charter would be misplaced.

the law had no difficulty with self defence against force employed by non-state actors.[46]

On the other hand, while the proposition that self defence might arise in response to non-state actor terrorist attacks might not be problematic in principle, concerns do arise from the reality that non-state actors do not operate out of the high seas but are based in other states' territories.[47] Doubts arise as to whether an interpretation of Article 51 that allows those states to be attacked absent a substantial link to the offending non-state actor is an interpretation consistent with the purposes and principles of the UN Charter, including the protection of the territorial integrity and political independence of states.[48] This is particularly so where terrorist cells operate globally, potentially rendering many states susceptible to attack if, for example, mere presence on the state's territory would suffice to justify force in self defence, with the inevitable potential for an escalation in conflict.[49]

The predominant view before September 11 appeared to be that for self defence to be justified, acts of individuals or groups must be attributed to the state,[50] with controversy centering instead on the standard for attributing responsibility.[51] While some commentators said so explicitly, other writers, and indeed the ICJ judgment in *Nicaragua*, appeared to *assume* that a state must

46 The *Caroline* case of 1837, which, as noted earlier, sets down the customary law of self defence, involved the destruction by the British of an American ship, the *Caroline*, which was assisting forces rebelling against the Crown in Canada. It was common ground that the U.S. government had tried to restrain the private initiatives supporting the insurrection and arguably there was not therefore any state involvement. See M. Reisman, 'International Legal Responses to Terrorism', 22 (1999) *Houston Journal of International Law* 3, at 46.

47 *See* eg. G.M. Travalio, 'Terrorism, International Law and the Use of Military Force', 18 (2000) *Wisconsin International Law Journal* 145.

48 Like any treaty, the UN Charter must be interpreted according to its ordinary meaning, as understood in context, and in accordance with its object and purpose – see Article 31, VCLT 1969 para. 1. Subsequent agreements or practice are also relevant to interpretation: Article 31(3)(a) and (b), VCLT 1969; *Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949*, p. 174, in particular p. 180; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, ICJ Reports 1962*, pp. 157 and 159.

49 Arguably, such vulnerability is limited by a strict application of the necessity and proportionality test to any response, discussed later. *See also* Chapter 5B.1 on application to Afghanistan.

50 *See*, e.g. Cassese, 'Legal Response to Terrorism', note 10, at 596, Travalio, 'Terrorism', *supra* note 47, above. Cf. e.g., R. Wedgwood, 'Responding to Terrorism: The Strikes against Bin Laden', 24 (1999) *Yale Journal of International Law* 559, at 564. While the U.S. and Israel have been said to long hold this view, the UN until the 1980s denied that Article 51 could justify the use of force as a response to terrorist attacks: see G.Z. Capaldo, 'Providing a Right of Self Defense Against Large Scale Attacks by Irregular Forces: The Israeli-Hezbollah Conflict' 48 (2007) *Harvard International Law Journal* 101, p. 104 and C. Tams, 'The Use of Force against Terrorists', 20 (2009) *The European Journal of International Law* 2, p. 386. Both notes the shift in the approach to this question by states individually and at UN level.

51 See Chapter 3.1. Gray, *International Law and the Use of Force*, note 24.

be involved in the armed attack.[52] However, the response to the events of September 11 – notably the widespread reference to the Afghanistan intervention being justified despite state responsibility not having being made out against Afghanistan – is often cited as indicative of a different view of the law, or at least as an indication of how the law may have shifted or be shifting, influenced by the events of 9/11 and responses.[53]

Surprisingly perhaps, in the *Wall* Advisory Opinion the ICJ reiterated its view that 'Article 51 of the Charter ... recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.'[54] Despite strong dissenting judgments on this point,[55] it was suggested that such a clear statement of the Court must, in the words of one of those dissenting judges, 'be regarded as a statement of the law as it now stands'.[56] However, in the *Uganda v. DRC* judgment shortly thereafter, the Court retreated to a more equivocal position in which it acknowledged but declined to address the issue of 'whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces,' somewhat muting the force of the Court's previous opinion on the matter.[57]

Moreover, subsequent practice, while less striking in the range and nature of the state responses than the response to the Afghanistan intervention, appears to support the view that self defence may arise in respect of terrorist attacks irrespective of attribution. As discussed further in Part B, in relation to shifts in the law since 9/11, in the context of Israeli or Turkish claims to use self defence against non-state groups in the Lebanon in 2006 or Northern

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52 *Nicaragua*, note 15, para. 195. Rendering assistance to armed groups, while it may amount to unlawful intervention, did not itself constitute an armed attack as the acts of the irregulars were not attributable to the state according to an 'effective control' test. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), ICJ Reports 2007, para. 377-415. Chapter 3.1.

53 Widespread reference to the right to 'self defence' post 9/11 (despite lack of attribution to the Afghan state), including by the Security Council on 12 September 2001, has been cited as indicating that non-state actors may be responsible for an Article 51 attack. *See* e.g., Greenwood, 'International Law and the "War against Terrorism"', 78 (2002) *International Affairs*, 301 or C. Tams, note 50. A minority view holds that states implicitly recognised that there was a degree of state involvement underlying those attacks: see, e.g., L. Sadat, 'Terrorism and the Rule of Law', 3 (2004) *Washington University Global Studies Law Review* 135, at 150; M. Sassòli, 'State Responsibility for Violations of International Humanitarian Law', 84 (2002) IRRC 401 and D. Jinks, 'State Responsibility for the Acts of Private Armed Groups', 4 (2003) *Chicago Journal of International Law* 83.

54 *Wall* Advisory Opinion, note 36, para. 139.

55 *Wall* Advisory Opinion, ibid, Opinion of Judges Higgins, para. 33 and Judge Kooijmans, para. 35. Kooijmans describes the ICJ as having by-passed the approach of the Security Council in Resolution 1373. *Wall* Advisory Opinion, note 36, Dissenting Opinion, J. Buergenthal, para 6.

56 Opinion of Judge Higgins, *ibid.*

57 *Armed Activities* case, note 18, para. 147 thereby apparently tempering the impact of its *Wall* Opinion.

Iraq in 2008, respectively, attribution was not treated as a defining question.[58] While there is still controversy, and room for alternative interpretations of practice, it would appear then to be the case that 'it is now well accepted that non-state actors, even when not acting on behalf of a state, may commit armed attacks that trigger a state's right of […] self-defence.'[59]

If, alternatively, as some still claim,[60] a state link is required, the key question becomes the standard by which action of non-state actors becomes attributable to the state. As already discussed in more detail in Chapter 3, the level of support which may render the state responsible for the attack is a question of degree, dependent ultimately on the exercise of sufficient control over the conduct of those directly responsible for the attack.[61] While support for terrorists of various degrees and form may be prohibited in international law, it does not necessarily render the state constructively responsible for an armed attack, or entitle other states to use force against it. As such, it has been suggested by those that consider state responsibility for the armed attack essential, that what practice post 9/11 reveals is that the standards of attribution have loosened in respect of terrorism specifically.[62] While the stronger view may be that attribution is not a legal pre-requisite for the existence of an armed attack, as the global practice of terrorism and counter-terrorism continues to unfold, the law on self defence, and on state responsibility, and the relationship between the two, is likely to develop further.

iii) A Threshold of Scale and Effects, and Continuing Attacks? An armed attack has traditionally been considered to imply the use of force of considerable seriousness in terms of its scale and effects. The ICJ, setting out certain parameters for when interference in a state through support for armed groups might amount to an armed attack, has consistently considered it necessary

58 S.C. Res. 1701 (2006), 11 August 2006, UN Doc S/RES/1701 (2006). See, e.g., Secretary General Press Release UN Doc. SG/SM/10570, SC8791, 20 July 2006, and discussion of states' positions in Security Council discussions. I. Foss, 'Is there Something Rotten in the State of Jus ad Bellum? State Responses to Terrorism and the Jus ad Bellum', 2010, The Selected Works of Ian Foss, p. 25-28, available at: http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=ian_foss; Tams, 'The Use of Force', note 50, at 379 and 380.

59 N. Schrijver and L. van den Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law' (hereinafter 'Leiden Recommendations'), *Grotius Centre*, 1 April 2010, available at: http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf para. 38. 'Chatham House Principles', note 36.

60 Capaldo 'Right of Self Defence', note 50, p. 106 or T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press, 2010), 486-89.

61 *See* ICJ in the *Nicaragua* case, note 15, discussed in Chapter 3. Other formulae for support have been put forward. *See*, e.g., Cassese, *International Law*, note 30, p. 312, who describes the degree of support required as 'major and demonstrable'. As noted in Chapter 3, some suggest the standard may require adjustment post 9/11.

62 *See* Chapter 3.

to distinguish between 'grave forms of the use of force (those constituting an armed attack) from other less grave forms.'[63] It found, for example, that the supply of arms or logistical support was not *per se* sufficient to constitute an armed attack, while sending armed bands or mercenaries into the territory of another state was.[64] An armed attack for purposes of Article 51 has also been said to exclude 'isolated or sporadic attacks'.[65]

However it has increasingly been suggested that a distinction is due in this respect between an armed attack by a state and by non-state actors. Where one state resorts to force against another, the predominant view is that this amounts to an armed attack, irrespective of intensity.[66] However, so far as it is accepted that attacks may emanate from non-state actors, various experts have suggested that this can, or perhaps should, only amount to an armed attack where it is 'large scale.'[67]

It is generally accepted that an attack need not occur all at once, but may arise through a series of attacks over time.[68] For a series of events to amount to one armed attack, it would have to emanate from the same source.[69] If the series of attacks is part of sufficiently close continuum to amount to effectively one attack, it may meet a threshold that none of the smaller attacks would themselves meet. However, if an attack were to continue over a prolonged period it may bring into question the nature or the imminence of the threat

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63 *Nicaragua* case, note 15, para. 191; see also *Case concerning Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*) (hereinafter '*Oil Platforms* case'), Judgment, *ICJ Reports 2003*, para. 161, which also referred to 'large scale attacks,' albeit in the context of action by armed groups supported by the state. *See* Tams, 'The Use of Force' *supra* note 50, p. 387.

64 *Nicaragua* case, note 15, para. 195. The same approach was taken in the *Oil Platforms* Case, *ibid*.

65 A. Cassese, 'Legal Response to Terrorism', *supra* note 10, 18 states that self defence 'requires a pattern of violent terrorist action rather than just being isolated or sporadic acts'.

66 'Leiden Recommendations', supra note 59, para. 39, suggesting that 'Article 51 does not include a scale requirement for an armed attack ...' except for attacks by non-state actors. Dinstein rejects a threshold beyond a very low threshold of 'trifling' or 'de minimis' effects; Y. Dinstein, *War, Aggression and Self Defence*, 4th ed. (Cambridge University Press, 2005), p. 195. M.N. Schmitt, 'Transnational Terrorism', note 36, p. 14 also notes the 'scale and effects' requirement makes sense in the context of non-state actors. 'Chatham House Principles', note 36, at 966.

67 Leiden Recommendations, *supra* note 59, para. 39. 'Chatham House Principles', *ibid*, principle 6. The principles recognise this is not the view set down by the ICJ. For another view disputing that there are different scale requirements, see Ratner, 'The Meaning of Armed Attack', note 40. See 5B.1 (Afghanistan) and 2 (Attacks on Al Qaeda) on developments in thinking and practice as regards whether the attack must be attributable to the state.

68 *Ibid*, para 11 C. Greenwood, 'International Law and the United States' Air Operation against Libya', (1987) 89 *West Virginia Law Review* 933, 942, p 955-56. Tams, *supra* note 50, suggests more debate is required to clarify whether an accumulation of events doctrine is accepted in international law.

69 See Leiden Recommendations, note 59; E. Wilmshurst 'Anticipatory Self Defence', in Herik and Schrijver, *Counterterrorism Strategies in a Fragmented International Legal Order*, note 40.

being defended against,[70] and the *need* to resort to measures of self defence, discussed next, as collective action under the Charter may then be possible.

iv) A right of anticipatory self defence? The existence of a right to 'anticipatory,' 'preventive' or 'pre-emptive'[71] self defence – a right to resort to force in self defence before an armed attack has occurred or to prevent or avert a future attack – is the subject of considerable controversy.[72]

Article 51 of the UN Charter permits resort to force in self defence 'if an armed attack occurs against a member of the United Nations'. The 'ordinary meaning' of the Article 51 language appears to require that an attack has actually happened or 'occurred',[73] as opposed to being simply threatened,[74] as does a 'contextual' reading of the provision which, unlike other provisions of the Charter, omits any reference to the 'threat' of attack.[75]

On a 'purposive' interpretation of the provision – whether permitting anticipatory self defence furthers or undermines the Charter's objectives – opinion has long been more divided. On the one hand, opponents of the right can highlight the dangers of permitting pre-emptive strikes based on a state's own assessment of risk, as a slippery slope that may ultimately lead to the unravelling of the prohibition on the use of force altogether, inconsistent with the Charter's fundamental purposes and principles. On the other, a compelling argument advanced in support of a right to 'anticipatory self defence' is an appeal to 'common sense'[76] – that it is illogical or unreasonable to require

70 See Anticipatory self defence later in this chapter.

71 On the significance of the different terms, *see* e.g. N. Lubell, *Extra-territorial Use of Force supra* note 28, p. 55. As will be seen anticipatory self defence appears to have growing acceptance whereas a broad doctrine of pre-emptive or preventive use of force is currentl put forward by the U.S. but has virtually no international support. *See* 5B.2.

72 The extent of the significance of this issue was not immediately apparent in the wake of the September 11 attacks, which had occurred, but has been brought into sharp focus by the subsequent debate on legal justifications for on-going force against terrorists abroad (see B.2 including the U.S. National Security Strategy of 17 September 2002) asserted a broad-reaching right to resort to preemptive force.

73 The clause 'if an armed attack occurs' was inserted in Article 51 at the initiative of the U.S. delegation at the San Francisco Conference. During the debate the U.S. insisted the caveat 'was intentional and sound. We did not want exercised the right of self defence before an armed attack has occurred.'

74 *See* generally M. Bothe, 'Terrorism and the Legality of Preemptive Force' (hereinafter 'Preemptive Force'), 14 (2003) EJIL 227, specifically at 228.

75 *See* Article 2(4) and Article 39, belying any suggestion that the omission of the threats from Article 51 was inadvertent. *See* Bothe, 'Preemptive Force', *ibid*., at 228-9.

76 R. Higgins, *Problems and Process: International Law and How we Use it* (Oxford: Oxford University Press, 1984), 242: 'In a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state passively to accept its fate before it can defend itself.' Wilmshurst, 'Anticipatory Self Defence', note 69, at 747.

a state to wait until it has been attacked to 'defend' itself.[77] An analogy may be provided by criminal law, where the absurdity of needing to wait to be fatally shot to invoke self defence is apparent.[78] The nature of contemporary weapons systems – and the possibility of an initial potentially devastating attack – is cited as bolstering the argument in favour of a more flexible interpretation of Article 51.[79] As one commentator recently noted, 'no law ... should be interpreted to compel the *reductio ad absurdum* that states invariably must await a first, perhaps decisive, military strike before using force to protect themselves'.[80]

The opposing camps may be reconciled to some degree to the extent that there is room for debate as to when an attack actually 'begins,' when defensive action is 'interceptive' rather than anticipatory,[81] or when an attack is ongoing.[82] Thus a flexible approach to the definition of armed attack may effectively have the same result as acceptance of anticipatory self defence, allowing states to respond to preparatory acts and to avert the completion of the attack. Thus the rejection of a right of anticipatory self defence does not oblige states to be sitting ducks until harm is suffered; preparatory acts, coupled with evidence of an intent to attack, might be considered to constitute the effective commencement of an attack which can be averted before it achieves its destructive effect.[83]

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77 *See* O. Schachter, 'The Right of States to Use Armed Force', 82 (1984) *Michigan Law Review* 1620, at 1634: 'It is important that the right of self defence should not freely allow the use of force in anticipation of an attack or in response to the threat. At the same time, we must recognize that there may well be situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential.' *See also* T.M. Franck, 'When, If Ever, May States Deploy Military Force without Prior Security Council Authorization?' 5 (2001) *Washington University Journal of Law and Policy* 51, at 59-60, who notes in this respect that it may be necessary to respond to 'challenging transformations' such as increased weapons capability.

78 Like its international counterpart, criminal law does however recognise strict limits on the circumstances in which preemptive action may be taken. See A. Ashworth, *Principles of Criminal Law*, 3rd ed. (Oxford University Press, 1999), pp. 147-8; G.P. Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000), pp. 85 ff.

79 Higgins, supra note 76. On changing circumstances post the Charter's inception and flexible interpretation, *see* Franck, *Recourse to Force*, *supra* note 11, pp. 5-9.

80 *Ibid*., p. 98. However Franck acknowledges that 'a general relaxation of Article 51's prohibitions on unilateral war-making to permit unilateral recourse to force whenever a state feels potentially threatened could lead to another *reductio ad absurdum*'.

81 Dinstein, *War, Aggression and Self Defence*, *supra* note 66 p. 191. He talks of 'embarking on an apparently irreversible course of action' that casts the die. Schmitt notes this broad approach is close to what others in fact call anticipatory self defence. Schmitt, 'Transnational Terrorism', *supra* note 36, p. 17.

82 See discussion on a 'series of attacks' earlier.

83 M.E. O'Connell, 'Debating the Law of Sanctions', 13 (2002) EJIL 63; Bothe, 'Preemptive Force', note 74, at 229-30 suggests that the requirement of armed attack is uncontroversial and that it is on the meaning of such attack that there is controversy. He suggests that certain imminent attacks may be seen as 'equivalent to an armed attack.'

Those who assert a right of anticipatory self defence generally rely upon customary law, which they argue diverges from the Charter in this respect,[84] but which is acknowledged by the reference to the 'inherent' right in Article 51 itself.[85] One question is whether this right survived the introduction of Article 51, clearly worded to the contrary, and whether the Charter's framers intended a parallel inconsistent body of law to run alongside the Charter, particularly the Charter's quasi-constitutional status. Another is whether there is sufficient state practice since 1945 to support the existence of a continuing customary norm at variance with the Charter, as recourse to anticipatory self defence as a legal justification for using force remains limited.[86]

Doctrinal debate among academic commentators on the question of anticipatory self defence, at least before September 11, revealed little consensus.[87] *Oppenheim's International Law* suggests that the position is that 'while anticipatory action in self defence is normally unlawful, it is not necessarily unlawful in all circumstances'.[88] This approach may hold true post 9/11, but it has been suggested that there is growing acceptance of a limited right of self defence against ongoing and imminent attacks since then.[89]

What *is* clear is that *if* a right to anticipatory self defence exists, it is strictly limited. The circumstances in which anticipatory self defence might be per-

84 The Article 51 reference to the 'inherent' right of self defence is cited as supporting the continued existence of customary rules. Schachter, 'The Right of States', note 77, at 1633, and G.M. Travalio, 'Terrorism, International Law and the Use of Military Force', note 47, at 149, stating, similarly, that 'the presence of an armed attack is *one* of the bases for the exercise of the right of self defence under Article 51, but not the *exclusive* basis.'

85 See the *Caroline* case, to be discussed.

86 On one of the few occasions on which it was expressly invoked, in relation to Israel's attack on the Iraqi nuclear reactor in 1981, states generally shied away from debating the lawfulness of anticipatory self defence as such, but the underlying action met with condemnation as a violation of the law on use of force: see SC Res. 487 (1981), 19 June 1981, UN Doc. S/RES/487 (1981). Franck, *Recourse to Force*, note **??????@@?**, suggests that on other occasions despite state's reluctance to refer to it as such, reactions have been more equivocal.For discussion of state practice post Charter, see Gray, *International Law and the Use of Force*, note 24, p. 118.

87 Among writers holding that there is no right of self defence until an armed attack has actually commenced, see, e.g. I. Brownlie, *International Law and the Use of Force by States* (Oxford, 1981), pp. 256-7, B. Simma *et al.*, *Commentary*, note 14; Gray, *International Law and the Use of Force*, note 24, p. 117-18; Bothe, 'Preemptive Force', above, note 74, at 230. A number of authoritative commentators recognise a right to act in self defence against an *imminent* armed attack. See, e.g., Bowett, note 23, pp. 187-92; *Oppenheim's International Law*, *supra* note 27, p. 421; C. Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', 4 (2003) *San Diego International Law Journal* 7; E.P.J. Myjer and N. D. White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?', 7 (2002) *Journal of Conflict and Security Law* 5; note 76; O'Connell, 'Law of Sanctions' and Wilmshurst, 'Anticipatory Self Defence.'

88 *Oppenheim's International Law*, p. 421.

89 See Part 5B.2 below.

mitted were set out in the seminal *Caroline* case of 1837,[90] the language of which has been widely cited as establishing, and at the same time strictly limiting, the circumstances in which the use of self defence in anticipation of an attack might be permissible. The *Caroline* test has been endorsed in subsequent judicial decisions as enshrining the appropriate customary law standard,[91] and has been described by one commentator as going 'as far as pre-emptive self defence possibly goes under current international law'.[92] The test proposed by US Secretary of State and agreed by the opposing party, the British, was that there had to be a necessity that was 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.[93]

It is clear that a distinction must be drawn between a real and immediate threat of armed attack, and a potential or speculative risk thereof. A threat must be concrete and identifiable. While some may question whether the need for 'no moment for deliberation' goes too far,[94] it emphasises the immediacy of the threat for permissible anticipatory self defence.[95] A temporal dimension, which emphasizes the immediacy or imminence, in line with the exceptional or 'emergency' nature of anticipatory self defence, remains a critical criterion, and one that is closely linked to (if not subsumed by) the notion of necessity discussed below.[96] While a threat, like an attack itself, may arise over a period of time, and it is a question of degree at what point it becomes real and immediate, the passage of considerable time between a threat arising and its response may raise doubts concerning the requirement of immediacy (and with it the necessity of the use of force as a response, to be discussed later).

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90 The correspondence between the U.S. and the British Government relating to the case is reproduced in 29 (1841) *British and Foreign State Papers* 1137-1130 and 30 (1842) *British and Foreign State Papers* 195-196.

91 *See*, e.g., the judgment of the Military Tribunal at Nuremberg in the trial of Goering;D.J. Harris, *Cases and Materials on International Law*, 5th ed. (London, 1998), p. 896;R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994), p. 242.

92 Bothe, 'Preemptive Force', note 74 suggesting that the *Caroline* formula represents the law pre-Charter and that a more restrictive view should be taken in light of Article 51. On positions advanced post 9/11 and the potential shift in legal standards see B.2.

93 Letter dated 24 April 1841 from the U.S. Secretary of State Webster to the Government of the United Kingdom, Fox, reprinted in Harris, *Cases and Materials*, note 91, p. 895 The *Caroline* 'necessity and proportionality' test applies to any action of self defence, but it is 'even more pressing in relation to anticipatory self defence than [it is] in other circumstances'. *Ibid.*, at 421.

94 Wilmshurst, 'Anticipatory Self Defence', note 69.

95 See the U.S. position on the 'imminence' requirement as regards the use of force against terrorist suspects at 5B3 below. Cf. Wilmshurst, *ibid*.

96 As suggested by Christian Tams, imminence may not provide an additional restraint as it is implicit in necessity. C. Tams, "Necessity and Proportionality and their Practical Application to Self-Defence against Terrorists" in v.d. Herik and Schrijver, chapter 12. However on another view it is useful to consider the temporal element separately from necessity as it emphasizes that the use of force before an attack has begun is exceptional and requires a high level of justification. Wilmshurst, 'Anticipatory Self Defence', *ibid*.

Finally, it follows from the above test that the *capacity* to inflict harm, however grave, is insufficient, unless the circumstances indicate a real and imminent threat to carry out an armed attack. As such, there is little to suggest that the existence of weapons, even those of mass destruction, is considered *per se* sufficient to justify a claim to self defence. The oft-cited destructive capability of al-Qaeda and associated terrorist groups and individuals is clearly distinct from the real and immediate threat posed by a particular source. The rationale is reflected in domestic criminal law, where the fact that someone intends harm, or indeed possesses a weapon with the potential to do harm, or both, may justify other measures of intervention but plainly would not justify the use of force in self defence, whereas brandishing a weapon where the context indicates an immediate and unavoidable threat, would.[97]

So far as anticipatory self defence can be accepted under international law, it is an exception within an exception. It follows that any such right must be strictly and carefully construed. Issues that have arisen with regard to a lax approach, which moves from the notion of anticipatory self defence to preventive or pre-emptive self defence are discussed in relation to post 9/11 practice at Part B.[98]

In conclusion, the nature of the armed attack, in particular the non-state actor origin of the attack and its potentially 'anticipatory' nature, are contentious issues in relation to which the law may be in flux. As Part B will explore, issues related to the armed attack have been central to responses to international terrorism before 9/11,[99] and since then.[100]

b) Necessity and proportionality

As noted, necessity and proportionality are universally recognised as requirements of the law of self defence, under customary law and the UN Charter.[101] For self defence to be justified, any response must be *necessary* to avert the

97 See Ashworth, *Principles of Criminal Law*, note 78, on the imminence and duty to prevent conflict and Fletcher, *Criminal Law*, note 78.

98 'Chatham House principles', note 36; Wilmshurst, 'Anticipatory Self Defence', note 69.

99 E.g. L.M. Campbell, 'Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan', 74 (2000) *Tulane Law Review* 1067, or S. Schiedeman, 'Standards of Proof in Forcible Responses to Terrorism', 50 (2000) *Syracuse Law Review* at 249.

100 While the problems of nationals or state 'interests' appear of less relevance to its response to the events of September 11, which were considered an existing armed attack, on U.S. territory, the issue is of broader relevance to the use of force through targeted killings invoked in response to on-going terrorist attacks or threats in the future. *See*, e.g., Chapter 5.B.2.

101 *Nicaragua* case, note 15, para. 176. The necessity and proportionality rules are 'well established in customary international law'. *See also Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports 1996*, p. 226 (hereinafter '*Nuclear Weapons* Advisory Opinion'), para. 141. Gray, International Law and the Use of Force, note 24, p. 148.

imminent threat or continuing attack.[102] These factors, which (unlike the armed attack requirement) are prospective as opposed to retrospective, are critical in distinguishing lawful self defence from unlawful reprisals.[103]

As noted earlier, the requirement reflected in the *Caroline* case of 1837, is of a 'necessity ... that ... is instant, overwhelming, and leaving no choice of means, and no moment for deliberation'. The necessity of force presupposes that all alternative, peaceful means have been exhausted, are lacking or would be ineffective as against the anticipated threat.[104] In recent years, it has been suggested that the unwillingness or inability of a state to take such action may be a pre-requisite for the use of force against non-state actors on that state's territory.[105] If a state on whose territory the targets are present is able and willing to take the required action, through criminal law enforcement, use of force or otherwise, the use of force by the state will not be necessary.

Necessity may itself imply a degree of *immediacy*. While an immediate response may not be an effective response, the longer the time lapse, the more tenuous the argument becomes as to the urgent necessity of unilateral action, as opposed to collective action under the UN umbrella.

Logically, for measures to be necessary to avert a threat, they must be capable of doing so. A relevant question in determining the right to self defence is therefore the *effectiveness* of any proposed measure. If measures against those responsible for an attack will increase the threat then they can hardly be said to be necessary to avert it. To this extent questions relating to the impact of the use of force as a counter terrorist strategy, and the likelihood of encouraging or impeding future acts of terrorism, are questions of potential relevance not only to the political expediency but also to the lawfulness of the use of force.

Proportionality and necessity are intertwined, with proportionality requiring that the force used be *no more* than necessary to repel the threat presented.[106] Consistent with the underlying purpose of self defence, to defend the state from on-going or imminent harm, it is important that the

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102 *Nicaragua* case, note 15, para. 176. The *Caroline* case of 1837 set down what has been described as the customary law standard on necessity and proportionality. Campbell, 'Defending Against Terrorism', note 99, at 1067 and Dinstein, *War, Aggression and Self Defence*, note 66, at 205.

103 See Lubell, Extra-Territorial Use of Force, supra note 28, p. 52-3.

104 See Schiedeman, 'Standards of Proof', note 100, at 270. For questions as to the exhaustion of such means post 9/11 see section 5B.2.

105 *See* N Lubell, *supra* note 28; A.S. Deeks, 'Pakistan's Sovereignty and the Killing of Osama Bin Laden', ASIL Insight, http://www.asil.org/insights110505.cfm who observes that while there may be agreement on the test it is difficult to apply in practice. *See also* A. Deeks 'Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense', V.J.I.L. Vol 52.3, p. 483. *See* further below B.2.3 on the necessity of the use force against al Qaeda and associates in war on terror practice.

106 Tams, 'Necessity and Proportionality' in Herik and Schrijver, *Counterterrorism Strategies in a Fragmented International Legal Order*, note 40.

proportionality test should be applied *vis-à-vis* the requirements of repelling the threat, rather than, as is often suggested, measured against the scale of the threat or of any prior armed attack.[107] Arguments as to numbers of persons killed in the original attack outweighing numbers killed in subsequent counter-measures are of political relevance only. Assertions that 'the intensity of force used in self-defence must be about the same as the intensity defended against' is too loose an approach to proportionality in the context of self defence, where the key question is the different one of what is strictly required to avert the threat.[108] It seems all the more critical not to measure proportionality against *potential* harm. Thus, it has been suggested that an approach to preventive self defence against 'indeterminate' threats make it difficult if not impossible to apply the proportionality calculus.[109] One commentator has noted, as an example of the limits imposed by the proportionality test, that 'the victim of aggression must not occupy the aggressor's territory, unless strictly required by the need to hold the aggressor in check and prevent him from continuing the aggression by other means'.[110]

The question of whether (and which) States are responsible for an armed attack (whether or not, as discussed above, a *sine qua non* of self defence) is relevant to the question whether particular measures are justified as necessary and proportionate. Logically, necessity and proportionality require a link between the target of 'defensive action' and the threat being defended against. Targeting state institutions, for example, absent evidence of their connection to the threat or their ability to control that threat, is difficult to justify as a necessary and proportionate measure of self defence.[111]

In summary, the use of force in self defence is not automatically justified, even where there has been an armed attack and there is evidence of an imminent second attack or continuing attack that needs to be repelled. An appraisal must then be made, in the light of the facts, of the necessity and effectiveness of the measures proposed to counter that threat, and whether the measures proposed are proportionate to it. It follows from the necessity (and proportionality) test, that self defence can only be justified where the targets of defensive action have been clearly identified, such that their particular contribution to the threat in question has been properly assessed.

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107 Necessity and proportionality are thus closely interrelated.

108 F.L. Kirgis, 'Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon', 10 (2006) *American Society of International Law* 20, available at: http://www.asil.org/insights/2006/08/insights060817.html in the context of Israeli/Hezbollah affair. *See* comment in Capaldo, 'Right of Self Defence', *supra* note 50.

109 Gray, *International Law and the Use of Force*, *supra* note 24, p. 203.

110 Cassese, *International Law*, note 30, p. 305.

111 See Afghanistan, 5B.1.

c) Self defence and the Security Council

Two particular issues arise regarding the relationship between the right to self defence and the role of the Security Council. The first is the immediate requirement that any individual or collective self defence measure be reported to the Council.

Article 51 of the UN Charter provides:

> Measures taken by Members in the exercise of this right of self defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Reflecting this, Article 5 of the NATO treaty, which provides for the organisation to act 'in exercise of the right of individual or collective self defence recognised by Article 51 of the Charter of the United Nations', specifically provides that '[a]ny such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council.'While the ICJ found there to be no requirement under customary law to report to the Security Council, the requirement is explicit in the Charter itself which is binding on all UN members.[112] Failure to report may, moreover, constitute evidence that the state did not consider itself to be acting in self defence.[113]

The second issue, though somewhat more controversial, is the limitation on the right to self defence as only justifying the use of force under the Charter *until* the Council is engaged. The Charter (reflected again in the NATO treaty), certainly appears to envisage self defence as a temporary right, pending Council engagement. Article 51 provides for:

> the inherent right of individual or collective self defence if an armed attack occurs ... , *until* the Security Council has taken measures necessary to maintain international peace and security.

The NATO Treaty records at Article 5 that '[s]uch measures [of collective self defence] shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security'.

The Charter clearly assumes that once states can, they will seek Council engagement. If the Council is not engaged or does not engage, for whatever reason, the right of self defence continues for as long as the conditions for the exercise of self defence are met, but when the Council *does* engage, the Charter appears to envisage that the right to use force in self defence is superseded. No provision is made for state preference to continue to exercise the unilateral

112 *Nicaragua* case, note 15, para. 200.
113 *Ibid.*

right of self defence. In any event, unilateral resort to force would be of doubtful 'necessity' if measures were being taken under the collective security umbrella. In practice, the Council has been unusually active in its approach to counter-terrorism since 9/11, albeit in a general rather than fact or context specific way,[114] and it has not authorized the use of force in response to international terrorism.[115] Despite the level of Council activity post 9/11, it may be doubted whether the nature of that involvement could be understood as engagement of a type that would affect the right of self defence,[116] though it does raise the question of what might constitute such engagement and the inter-relationship in practice between the right to self defence and the role of the Council.

5A.2.1.2 Individual or collective self defence

The UN Charter enshrines the notion that self defence can be individual or collective, but the precise meaning of 'collective self defence' has generated some debate. Specifically, it is disputed whether Article 51 permits only the collective exercise of individual self defence (by states all of whom are subject to the attack or threat thereof), or whether it empowers other states, whose interests are not affected, to support a victim state in the exercise of that state's right of self defence.The majority of the ICJ in the *Nicaragua* case took the latter view: that a state's interests need not be directly affected where the injured state requests assistance,[117] which has been described as corresponding to state practice since 1945.[118] However, a dissenting judgment distinguishes self defence from 'vicarious defence,' noting that 'there should, even in 'collective self defence', be some real element of self'.[119]

114 *See* Chapter 2 and Chapter 7.B.1.

115 *See*, e.g., discussion of the legislative and quasi judicial roles in Ch 7.B.1 'Security v Human Rights'

116 SC Res. 1368 (2001), 12 September 2001, UN Doc. S/RES/1368 (2001). Measures such as those imposed in SC Res. 1373 (2001), 28 September 2001, UN Doc. S/RES/1373 (2001), given the breadth of their reach, could be argued to constitute Council 'engagement' to take the measures necessary for international peace and security, but the fact that it referred to the 'inherent right of individual or collective self defence as recognized by the Charter of the United Nations as reiterated in Res. 1368 (2001)' belies this approach.

117 *Nicaragua* case, note 15, paras. 104-5. *See also* Cassese, 'Legal Response to Terrorism', *supra* note 10, at 597: 'Collective self defence requires that the State has been requested or authorised to intervene by the [injured] State.'

118 Gray, *International Law and the Use of Force*, note 24, p. 188; describes the insistence on third state interest as 'far fetched'.

119 See Sir Robert Jennings' dissenting opinion in *Nicaragua* case, note 15, at 545. Gray, *International Law and the Use of Force*, note 39, pp. 187-88 notes that 'many others follow the Jennings approach' (while herself describing the position as 'far fetched in the light of state practice since 1945'). See also Dinstein, *War, Aggression and Self Defence*, note 66.

The recognition of the collective nature of the right to self defence is reflected in various treaties, including the NATO treaty.[120] Article 5 provides:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

No autonomous right to use force is, or could be, contained in the NATO treaty or any other agreement. As the NATO treaty clause itself indicates, the lawful use of collective force is limited by the UN Charter.[121] In this sense, the right enjoyed by the regional or other collective security organisation is the same as that of any individual state. The significance of the NATO treaty in this respect is, however, twofold. First, the NATO treaty is seen to operate as a standing request to other members to assist in its defence. Secondly, while self defence under the UN Charter (unlike a decision by the Security Council) is permissive, not obligatory,[122] the NATO treaty goes further, by *obliging* states parties to it to act. However, as noted above, these arrangements can only *oblige* states to take measures that they are *entitled* to take consistent with the UN Charter provisions on self defence.[123]

As set out in the following section, only the Security Council can authorise measures in the interest of peace and security that are not justified in the self defence of any state. However, the Council may, and in practice does, mandate collective or regional organisations to take those measures on its behalf.

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120 North Atlantic Treaty, Washington, 4 April 1949, 34 UNTS 243. For another regional security treaty, *see*, e.g., Inter-American Treaty of Reciprocal Assistance, Rio de Janeiro, 2 September 1947, 21 UNTS 324, in force 3 December 1948, Article 3(1). Like the NATO treaty, this regional security treaty was also activated post 9/11: see K. De Young, 'OAS Nations Activate Mutual Defense Treaty', *Washington Post*, 20 September 2001.

121 Unlike the Security Council, NATO has no independent powers to authorise the use of force. Unless it is mandated to act on behalf of the Security Council, NATO power (like that of member states) is predicated on the principle of self defence.

122 Proposals to oblige other member states to assist victims of aggression were rejected during the negotiation of the Charter. See Franck, *Recourse to Force*, note 11 p. 46.

123 Article 103 UN Charter.

5A.2.2 Security Council: maintenance of international peace and security

In situations where self defence cannot be justified, the only lawful use of force is that authorised by the Security Council.[124] The Security Council has broad powers, under Chapter VII of the UN Charter,[125] to determine the existence of any threat to the peace, breach of the peace, or act of aggression[126] and to take (or to authorise) those measures – including ultimately the use of force – that it deems necessary to address the situation.

Article 39 of the Charter empowers the Security Council to 'make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security'. The 'measures' referred to are further specified in the Articles that follow. In particular, Article 41 concerns 'measures not involving the use of armed force' that the Security Council may adopt to give effect to its decisions and establishes an obligation on Member States to apply such measures. Supplementing those powers, Article 42 confers on the Security Council unique powers to mandate enforcement action, where the non-coercive measures are deemed, or proved to be, inadequate.

The language of Security Council resolutions under Chapter VII may be recommendatory – 'calling on' all states, or particular states, to take action – or it may be mandatory, 'deciding' that specific measures should be adopted. It is these 'decisions' that are binding on member states which, under Article 25, are required 'to accept and carry out' the Council's decisions. If questions arise as to non-compliance with these obligations, it is for the Council to decide whether there has been a breach and what measures are appropriate in response.[127]

The UN Charter originally envisaged a form of international stand-by force at the beckoning of the Council.[128] This UN force has however never come into being and, in practice, the Council has instead discharged its enforcement mandate by delegation,[129] nominating member states generally, or specific

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124 To some extent the GA assumed the Council's role where the latter could not discharge its mandate during the Cold War: 'Uniting for Peace' Resolution (GA Res. 377 (V), 3 November 1950, UN Doc. A/RES/377 (V)) to address the situation in Korea, pursuant to which it established a temporary UN presence in Korea.

125 Chapter VII is entitled 'Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression'.

126 Article 39

127 These measures may of course involve the use of force. See automaticity debate, later in chapter.

128 Article 43 commits all members 'to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities…'.

129 Franck, *Recourse to Force*, note11, p. 43, refers to the Security Council authorisation of action by states as opposed to by the Security Council itself as the 'adapted power' of the Council. C. Gray, 'From Unity to Polarisation: International Law and the Use of Force against Iraq', 13 (2001) EJIL 1 at 2-3 notes increasing concern, since the 1991 Iraq invasion, to ensure that the Council retains control over UN authorised, but state executed, operations.

states, to take measures involving the use of force. Numerous situations have arisen in the post Cold-war era where states, regional organisations or 'coalitions of the willing' have been authorised to take 'all necessary measures' (which in Council speak clearly includes forceful measures) to give effect to the Council's decisions.[130]

5A.2.2.1 The Security Council and international peace and security: powers and limitations

The Security Council's power to decide measures involving the use of force is ample but not limitless.[131] The Council enjoys a broad discretion to determine the existence of a threat to or a breach of international peace or security, or whether particular conduct constitutes an act of aggression.[132] The text of Article 42 poses some limits on the power of the Security Council to adopt coercive measures, however, by specifying that measures implying the use of armed force should constitute the *extrema ratio*, to be taken only where 'the Security Council considers that measures [provided for in Article 41] would be inadequate or have proven to be inadequate' and that the measures adopted must be '*necessary* to maintain or restore international peace or security'. Moreover, the course of action decided by the Security Council must be consistent with the purposes and principles of the United Nations as defined in Articles 1 and 2 of the Charter.

a) 'Threat to or breach of international peace and security' and terrorism

The first condition for the application of measures under Chapter VII of the Charter is, as noted above, that the situation must amount to a threat to, or breach of, 'international peace and security'. The concept of 'threat to, or breach of, international peace and security' has been given an increasingly broad interpretation by the Security Council. Through practice, the phrase has come to include matters that would originally – when the Charter was framed – have been thought internal questions for the state. For example the deposing of a democratically elected government,[133] the commission of extremely serious violations of human rights[134] and the potential imminent massacre

130 *See* S. Chesterman, *Just War or Just Peace. Humanitarian Intervention and International Law* (Oxford University Press, 2001), p. 123 and Gray, 'From Unity to Polarisation', note 129, at 2-3. Since the Cold War era situations in which the Council has done so include: Kuwait (1990-91), Somalia (1992-93), Rwanda (1994), Haiti (1993), Bosnia-Herzegovina (1995-), Great Lakes (1996), Central African Republic (1997), Albania (1997), Kosovo (1999-), and East Timor (1999), Cote d'Ivoire (2003) and Libya (2011).

131 N. White, *The Law of International Organsiations* (Manchester University Press, 2005), p. 90.

132 For discussion of the definition of aggression, *see* Chapter 4A.1.1.3.

133 *See* SC Res. 841 (1993), 16 June 1993, UN Doc. S/RES/841 (1993), concerning Haiti.

134 *See* SC Res. 418 (1977), 4 November 1977, UN Doc. S/RES/418 (1977) concerning apartheid in South Africa and SC Res. 232 (1966), 16 December 1966, UN Doc. S/RES/232 (1966) concerning white minority rule in Rhodesia.

of civilians,[135] non-international conflicts[136] have all been deemed to constitute threats to 'international peace and security'.[137] In practice the standard to be applied by the Council has come to be viewed as fairly flexible, with security against overuse residing in the collective mechanism that applies it rather than in the confines of its terms, by contrast to the stricter standards governing unilateral use of force.[138]

Security Council Resolution 748 (1992), addressing Libya's refusal to extradite the Lockerbie bombing suspects,[139] was the first in a series of resolutions in which the Council articulated a relationship between terrorism and international peace and security. Like subsequent resolutions on the attempted assassination of Egypt's President Mubarak[140] and the bombings of the US embassies in Tanzania and Kenya,[141] the Lockerbie resolution noted that 'the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of international peace and security'. Likewise, Security Council resolutions adopted in response to September 11 and subsequently have unequivocally determined the events of that day and (more controversially) international terrorism more broadly, as constituting a threat to international peace and security.[142]

While the terms of Security Council resolutions 1368 and 1373 of September 2001, and the resolution that followed the Madrid bombing of March 2003, suggest that 'any act of international terrorism' amounts to a threat to inter-

135 SC Res. 1973 on Libya (2011), note 121. The Council debate focused on 'the mission being authorised as that of protecting threatened Libyan civilians against violent atrocities that were allegedly being massively threatened by the Qaddafi government, with special reference at the time to an alleged imminent massacre of civilians trapped in the then besieged city of Benghazi. The debate emphasised the application of the norm of Responsibility to Protect (R2P). R. Falk, 'NATO intervention in Libya: Acting beyond the UN mandate' (hereinafter 'Beyond the Mandate'), *Third World Resurgence*, available at: http://www.twnside.org.sg/title2/resurgence/2011/253/world1.htm

136 See SC Res. 713 (1991), 25 September 1991, UN Doc. S/RES/713 (1991), concerning Somalia and SC Res. 794 (1992), 3 December 1992, UN Doc. S/RES/794 (1992) concerning Bosnia-Herzegovina.

137 See discussion on humanitarian intervention and pro-democratic intervention, paras. 3.3.1 and 3.3.2 in this Chapter.

138 It falls to the state invoking self defence, in the initial stage, to apply and determine the legitimacy of its recourse to force. Susceptibility to abuse in the absence of any external oversight is great and therefore the exception to the prohibition on the use of force must be narrowly construed.

139 SC Res. 748 (1992), 31 March 1992, UN Doc. S/RES/748 (1992).

140 SC Res. 1044 (1996), 16 August 1996, UN Doc. S/RES/1044 (1996).

141 SC Res. 1189 (1998), 13 August 1998, UN Doc. S/RES/1189 (1998) and SC Res. 1267 (1999), 15 October 1999, UN Doc. S/RES/1267 (1999).

142 *See* SC Res. 1368 (2001), note 117. On 28 September 2001 the SC adopted SC Res. 1373 (2001), note 117, described as a 'wide-ranging, comprehensive resolution with steps and strategies to combat international terrorism'. The Council plainly did not however authorise the use of force

national peace and security,[143] this is to be doubted, particularly given the absence of international accord around the substance and scope of the definition of terrorism. Moreover, the Council's own earlier Resolution 1269 of 1999 '[u]nequivocally condemns all acts, methods and practices of terrorism *... in particular those which could threaten international peace and security*'.[144] What is clear is that the concept of a threat to international peace and security *may* encompass acts of 'terrorism', to which Chapter VII action could be directed.

b) Measures to maintain and restore international peace and security

As noted above, the fact that there is a threat to international peace and security itself is not sufficient to trigger the lawful use of force. Consistent with the principles of the UN as enshrined in Articles 1 and 2 of the Charter,[145] and reflected in the language of Article 42, for military action to be possible, the Security Council must consider non-military measures under Article 41 of the Charter to be (or have been) inadequate. TheSecurity Council has to determine that those measures would be ineffective for the purpose of restoring international peace and security, and that force is necessary. Logically, necessity encapsulates an element of proportionality – the particular measures taken should be capable of furthering international peace and security and the force used should be no more than necessary to achieve this purpose. These are essentially factual questions for the Council's assessment in light of the prevailing circumstances.

The Council has broad discretion to decide which measures are appropriate to maintain and restore international peace and security in the particular situation. Measures that the Council may decide to authorise or mandate under the Chapter VII rubric of maintaining international peace and security cover a wide array, some involving armed force and others not, as history attests. In the post-Cold War period, non-forceful measures have included establishment of *ad hoc* criminal tribunals,[146] referral of situations to the ICC,[147] the

143 SC Res. 1368 (2001), note 117, condemns 9/11 as, 'like any act of international terrorism', 'a threat to international peace and security'. The Preamble of resolution 1373 (2001), note 117, likewise notes that 'such acts, like any act of international terrorism, constitute a threat to international peace and security'. See also SC Res. 1530 (2004), 11 March 2004, UN Doc. S/RES/1530 (2004), where the Council, condemning the bomb attacks in Madrid on 11 March 2004, stated that it 'regard[ed] such act, like any act of terrorism, as a threat to peace and security'.

144 SC Res. 1269 (1999), 19 October 1999, UN Doc. S/RES/1269 (1999) (emphasis added).

145 *See* Article 2(3) on resolution of disputes through peaceful means and Article 2(4) on the non-use of force.

146 On the establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, *see* Chapter 4.

147 SC Res. 1970 (2011), 26 February 2011, UN Doc. S/RES/1970 (2011) through which the Security Council referred the crisis in Libya to the prosecutor of the ICC; SC Res. 2000 (2011) 27 July 2011, UN Doc. S/RES/2000 (2011), where the Council referred the situation following the 28 November 2010 Ivorian elections; SC Res. 1593 (2005), 31 March 2005, UN Doc. S/

imposition of a war reparations procedure,[148] attempts to force the extradition of alleged terrorists,[149] and sanctions lists with a view to freezing of assets and banning movement of persons placed on Council 'lists'.[150]

The Council has authorised 'enforcement action' through coercive measures, for example, to restore a democratically elected government in Haiti[151] and to end apartheid in South Africa,[152] white minority rule in Rhodesia[153] and armed conflicts in Bosnia-Herzegovina[154] and Somalia,[155] and more recently to protect civilians in Libya.[156] The use of force for the purpose of cross-border criminal law enforcement – which may be impermissible if unilateral[157] – also forms part of the Council's enforcement arsenal, and has been invoked in several situations in recent years.[158]

As regards measures that may overstep the constitutional limits highlighted above, it has been questioned to what extent the Council is empowered, for example, to authorise 'regime change', given the Charter's protection of states' 'political independence' as a fundamental principle.[159] The Security Council has in fact intervened only once to effect a change of government – where a *de facto* government had usurped power, causing serious unrest, and the Security Council authorised force to restore the democratically elected government – and it did so emphasising the exceptional nature of the measure.[160] It also authorized the Libyan intervention in 2011 that led to deposing the

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RES/1593 (2005) the Council decided to refer the situation in Darfur, Sudan to the ICC prosecutor – the first ICC referral giving the ICC jurisdiction over a non-state party.

148 Reparation procedure for Iraq, described by Chesterman, *Just War or Just Peace*, note 142, pp. 121-2. Chesterman also refers to the demarcation of a territorial boundary between Iraq and Kuwait, *ibid*., p. 122.

149 Extradition measures involved suspects from Libya and Sudan, Chesterman, *ibid*.

150 SC Res. 1267 (1999), 15 October 1999, UN Doc. S/RES/1267 (1999).

151 SC Res. 841 (1993), note 145.

152 SC Res. 418 (1977), note 146.

153 SC Res. 232 (1966), note 146.

154 SC Res. 713 (1991), note 148.

155 SC Res. 794 (1992), note 148.

156 SC Res. 1973 (2011), note 121; see Falk, 'Beyond the Mandate', note 147.

157 History indicates several examples of unilateral enforcement action in the territory of other states having been condemned. See for example *United States* v. *Alvarez-Machain* 504 US 655 (1992) and *Attorney General of Israel* v. *Eichmann* (Israel Supreme Court 1962), reprinted in 36 ILR 277 at 299, 304. *Oppenheim's International Law*, p. 387..

158 *See*, e.g., SC Res. 837 (1993), 6 June 1993, UN Doc. S/RES/837 (1993), in relation to Somalia. The possibility of invoking Security Council powers for the enforcement of criminal law is addressed at Chapter 4.

159 This was questioned in the context of Iraq, *see*, e.g., R. Singh and A. MacDonald, 'Legality of use of force against Iraq', Opinion for Peacerights, 10 September 2002, available at http://www.lcnp.org/global/IraqOpinion10.9.02.pdf (hereinafter 'Singh and MacDonald, Opinion on Iraq'), at para. 79 noting that '[W]hile the Security Council can demand that Iraq achieve certain results, it cannot dictate its choice of government. … a change of regime cannot be considered absolutely necessary to achieving the Security Council's legitimate aims.'

160 *See* SC Res. 841 (1993) on Haiti, note 133, which was justified in part by reference to broader regional implications.

Qaddaffi regime, though that resolution demanded a ceasefire and an end to attacks on civilians, authorised 'all necessary measures to protect civilians and civilian-poulated areas,' and a no-fly zone,[161] rather than regime change as such, causing questions as to whether NATO went beyond what the Council had in fact authorized.[162] While removal of an unpopular government by the Council, as an end in itself, would not find support in the Charter, the Council would appear to be empowered to authorise force against a regime which it found to pose a threat to peace and security, which could not be averted other than through the regime's demise.

While it is clear that the Security Council's powers are limited to action taken in accordance with the Charter, less clear are the consequences of overreach, and whether any other body is entitled to review the Council's decisions.[163] While this issue may become relevant to decisions of the Security Council to authorise measures of force against terrorism in the future, it is not central in the absence of such Council authorisation in the first years of the 'war on terror'.[164]

5A.2.2.2 Express and implied authorisation to use force: interpreting resolutions

Consistent with general principles of legal interpretation, a Security Council resolution must be interpreted according to the ordinary meaning of the language used, understood in its context and in light of the resolution's pur-

161 SC Res. 1973 (2011), note 121 para 4 a*uthorizes'* all necessary measures, … to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force …'.

162 Richard Falk notes that although SC Res. 1973 does authorise 'all necessary measures,' and the resolution is 'vague,' the debate reveals that the measures authorized related to averting massacre. By contrast, 'once under way, the NATO operation unilaterally expanded and qualitatively shifted the mission as authorised, and almost immediately acted to help the rebels win the war and to make non-negotiable the dismantling of the Qaddafi regime. NATO made these moves without even attempting to explain that it was somehow still acting primarily to protect Libyan civilians. This was not just another instance of "mission creep" as had occurred previously in UN peacekeeping operations (for instance, the Gulf War of 1991), but rather mission creep on steroids!' Falk, 'Beyond the Mandate', note 135.

163 *See* Chapter 7 B.1 'Security v Human Rights' *See also* on the lack of UN accountability, Scheinin, U.N. Doc. A/65/258 (2010), note 142, paras. 17-80. For the role of the ICJ and ICTY in reviewing the powers of the Council, *see* S. Lamb, 'Legal Limits to UN Security Council Powers', in G. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford, 1999), pp. 361 ff. and J. E. Alvarez, 'Judging the Security Council', 90 (1996) AJIL 1.

164 It is uncontroversial that force against terrorism has not explicitly been authorised in the Council's several resolutions on terrorism, discussed at Chapters 2 and 7. Regarding implied authorisation and Iraq, *see* this Chapter 5 B.2.1.1.

pose. This analysis can be informed by debates that lead to the resolution's adoption and, to a more limited degree, by statements made thereupon.[165]

Given the justifications invoked by states for the use of force post September 11 (particularly in Iraq), discussed in section B of this chapter, two issues relating to the interpretation of Resolutions and the manner in which the Security Council authorises states to use force are worthy of mention. The first is whether authorisation can be inferred from earlier Security Council resolutions; the second is whether states can unilaterally 'enforce' obligations imposed by the Council, absent a decision of the Council to that effect.

'Implied authorisation' is, *per se*, a controversial notion. Its legitimacy has been questioned as stretching too far 'legal flexibility'.[166] In practice, reliance by states on implied authorisation as a legal justification in the past has been limited and, where invoked, subject to criticism.[167] Characteristically, it has been asserted not as a primary justification for resort to force but one coupled with the breach by the target state of its international obligations and/or humanitarian intervention,[168] an approach which has been described as a 'combination of a series of weak arguments in the hope that cumulatively they will be persuasive'.[169]

Moreover, practice attests to the fact that where the Council authorises force it will generally do so in clear terms. For example, Resolution 678 of 19 November 1990, one of many Security Council Resolutions handed down during the Gulf Conflict and universally understood to authorise the use of force, stated that: 'the Security Council authorises member states cooperating with the government of Kuwait to use all necessary means to uphold and implement Resolution 660'.[170] The '*all necessary means*' language, while not

165 See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, ICJ Reports 1971, note 15, at p. 53; M. Byers, 'The Shifting Foundations of International Law: A Decade of Forceful Measures Against Iraq', 13 (2002) EJIL 21 and M. Wood, "The Interpretation of Security Council Resolutions", 2 Max Planck Yearbook of United Nations Law 82 (1998).

166 R. Higgins, 'International Law in a Changing International System', 58 (1999) *Cambridge Law Journal* 78, at 94.

167 *See* generally Gray, 'From Unity to Polarisation', note 129, which addresses the use of force in Iraq up to and including 2001; *see also* Higgins, 'Changing International System', note178.

168 Implied authorisation appeared to be relied upon in relation to the use of force in the no-fly zones of Northern Iraq, although the UK later specified its legal justification as humanitarian intervention which, it noted, 'supported' SC Resolution 688 (1990), 5 April 1991, UN Doc. S/RES/688 (1991). For UK justification see Hansard debate, 26 February 2001, in Gray, 'From Unity to Polarisation', note 129, at 9. It was also invoked by at least some states involved in the Kosovo NATO action, although again alongside other justifications, notably humanitarian intervention.

169 Gray, 'From Unity to Polarisation', note 129, at 16 notes that this cumulative 'weak argument' approach is 'typical legal reasoning, and common in the area of the use of force'.

170 SC Res. 660, 2 August 1990, UN Doc. S/RES/660 (1990) called for the withdrawal of Iraq from Kuwait.

explicit, is universally understood in the diplomatic context as synonymous with the authorisation of necessary force.[171]

Given the fundamental principle prohibiting resort to force, and the exceptional nature of the right to do so, there must be a strong presumption against implied (as opposed to clearly expressed) authorisation[172] or open-ended authorisation to use force, and in favour of a strict interpretation that limits the right to use force to the particular situation and purpose to which the authorisation was directed.[173]

Moreover, given the unique power vested in the Council to determine breaches of peace and security and to authorise force, if necessary, resolutions must not be interpreted in a manner that would ultimately divest the Council of this role.[174] The Council will often threaten to authorise force in the event of non-compliance, by referring to the 'severest consequences' that a material breach of a resolution will attract, but it remains within the exclusive power of the Council to decide whether there has been a breach, whether at that point in time the breach amounts to a threat to international peace and security and whether, in turn, the threat necessitates and justifies coercive measures. While it can and does delegate the carrying out of measures of enforcement, the Council does not, and could not (without abrogating its constitutional responsibilities), delegate the power to decide whether the particular situation, in the light of all prevailing circumstances, justifies the use of force. Often resolutions expressly indicate the Council's intention to decide what measures should be taken in the event of a breach but even where they do not this may be inferred from the Council's exclusive remit under the Charter.

It follows that where a state does not meet its obligations under Council resolutions, there is no automatic right of other states to 'enforce' these obligations. The power to authorise enforcement resides in the Council itself, in accordance with its powers and responsibilities under the Charter, and not with member states.[175] An attempt to justify force on this basis would fall foul of the international law it purports to uphold.

5A.2.2.3 Veto power and the 'failure' of the Council to act

The voting system adopted in the Charter was intended to ensure political balance, with the safeguards against overuse implicit in the exceptional powers

171 By contrast, note the absence of such language in the post-September 11 resolutions, confimed by the general reference to self defence in the first post 9/11 resolution 1368.

172 This is sometimes referred to as the 'automaticity' question.

173 The fact that SC Res. 1368 (2001), note 117, is framed as against 'terrorism' in general, rather than any particular situation, provides an additional reason why the resolution could not be interpreted as authorising force consistently with the UN Charter.

174 See the discussion of attempts to rely on authorisation given in the context of the invasion of Kuwait to justify force against Iraq in a quite different context, para 5B.

175 Article 39, Article 42.

vested in the Council.[176] In other words, it was never meant to be easy to get Council approval to use force under the Charter system. This system, and the veto power in particular, has been subject to criticism since its inception,[177] with criticism harshest and most justified during the Security Council inertia of the Cold War era.[178] But such stagnation is distinct from a scenario where diplomacy fails and a functioning Council cannot agree,[179] or the Council never being approached in the first place.[180] Despite the veto, which the US now invokes more than any other permanent member, and despite controversial refusals to authorize force, such as in light of the crisis in Syria of 2011-12,[181] numerous resolutions have been passed in recent years, including authorising the use of force, raising the potential for robust Council engagement. It may be that the limitations in the Council role to date, and concerns regarding unilateral resort to force in recent years, have contributed to greater emphasis on the need to reform and improve the UN system for collective security.[182]

Council authorisation remains a *sine qua non* for the legitimate resort to force other than in self defence. It is worthy of emphasis, in conclusion, that the obligation on states is not to give the Council a first opportunity to

176 A Security Council resolution is passed by a majority of states sitting on the Council voting in its favour, absent the use of the veto by one of the Council's five permanent members. The five permanent members of the Security Council are China, France, Russia, the UK and the U.S.

177 Certain non-permanent members have long challenged the legitimacy of the veto power, while some contend that the Council, as envisaged at its inception, has essentially failed. Franck, *Recourse to Force*, note 11, p. 52.Many others, while acknowledging its imperfections, support it as the only available system of collective security. *See* generally Cassese, *International Law*, note 30, chapters 13 and 14, and Bothe, 'Preemptive Force', note 74.

178 *See* e.g. 'Uniting for Peace' Resolution, above. The rationale is that while the Council has primary responsibility for international peace and security under the Charter, the General Assembly can assume 'secondary' responsibility where the Council is paralysed. See *Certain Expenses* case, pp. 164-5 and 168. A presumption was that action taken by the UN for the fulfilment of one of the UN Charter's purposes was not *ultra vires*.

179 The secondary General Assembly 'powers' have not however been invoked for decades..

180 *See* 5B.1 on Afghanistan, where Operation Enduring Freedom continues for over a decade without seeking SC approval, or also B.2, where approval has not been sought.

181 The refusal of the Council to authorize measures such as sanctions or indeed the use of force in Syria in 2012 on has provoked much controversy. *See*, e.g., 'Friction at the UN as Russia and China veto another Resolution on Syrian Sanctions', *New York Times*, 19 July 2012, available at: http://www.nytimes.com/2012/07/20/world/middleeast/russia-and-china-veto-un-sanctions-against-syria.html Syria and Russia describe the violence as the state's response to acts of 'terorism' in Syria. *See*, e.g., 'Russia says US tries to Justify Terrorism in Syria', *Reuters*, 25 July 2012.

182 Among many documents and proposals for Council reform *see*, e.g., 'In Larger Freedom', report of 2005, UN Doc A/59/2005; and 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels', 19 September 2012. UN Doc A/67/L.1, para. 35. *See also* 'Hoping to Bring Security Council in Line with Contemporary Realitites, Speakers in Open Debate Urge Members to Unblock Resistance to Reform' Security Council 60870th Meeting, (UN Doc. SC/1083).

authorise force, before themselves proceeding unilaterally, but to refrain from the use of force unless or until such authorisation is achieved.

5A.3 Other justifications for the use of force? The laudable aims and doubtful lawfulness of humanitarian intervention or 'force to enforce'

As noted above, the UN Charter contains a prohibition on the use of force by states, and one explicit exception thereto in the case of self defence. The starting point for assessing any other purported legal justification of potential relevance to the use of force post September 11, is their incompatibility with the plain wording of the Charter. Their validity depends essentially on the establishment of a compelling argument that a pre-existing customary rule continues to exist post Charter, or that a new customary rule has developed alongside the Charter.[183]

The reluctance on the part of the majority of states as regards the development of customary international law that would extend or dilute exceptions to the prohibition on the use force might be explained in the following words of a Swedish delegate to the Security Council:

> The charter does not authorise any exception to this [Article 2(4)] rule except for the right of self defence. This is no coincidence or oversight. Any formal exceptions permitting the use of force or military interventions in order to achieve other aims, however laudable, would be bound to be abused, especially by the big and strong, and to pose a threat, especially to the small and weak.[184]

Unlike self defence or Security Council authorisation, the justifications discussed in this section were not invoked directly by states resorting to force post September 11 and as such cannot constitute legal justifications for action taken. However, as they were alluded to alongside the legal justifications discussed elsewhere in the chapter in the context of the use of force in response to terrorism post 9/11, their relevance in legal terms deserves brief consideration.

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183 As will be discussed, attempts to interpret Article 2(4) as itself consistent with other justifications for resort to force have been broadly discredited. It is noted that there is however only limited scope for the development of customary law rules that are inconsistent on their face with the provisions of the Charter. *See* Gray, *International Law and the Use of Force*, note 24.

184 Swedish representative to the Security Council debate on Entebbe incident involving use of force by Israel against hijackers in Uganda, SC 1940th meeting, in Chesterman, *Just War or Just Peace*, note 130, p. 26.

5A.3.1 Humanitarian intervention and the Responsibility to Protect 'R2P'

Proponents of the doctrine of humanitarian intervention assert that international law allows states, in exceptional circumstances, to intervene militarily to avert 'grave humanitarian crisis'[185] or 'humanitarian catastrophe'.[186] More recently, a broader discussion on the developing notion of the international community's 'responsibility to protect' ('R2P') has emerged and is sometimes cited as comprising the right (or rather the responsibility) to use force to prevent mass atrocities.[187]

A crucial distinction must however be drawn between the controversial assertion of the right of humanitarian or protective intervention by states, acting individually or in coalitions, and the power of the Security Council to authorise military force on humanitarian grounds. As noted above, the Security Council has the power to authorise enforcement measures it deems necessary pursuant to international peace and security, which has been interpreted by the Council as encompassing prevention of humanitarian crisis.[188] This is reinforced by the 'R2P' doctrine, which is explicit in respect of the Council's role in authorizing force.[189]

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185 UK justification in Iraq no-fly zones, 26 February 2001, House of Commons Hansard Debates, in Gray, 'From Unity to Polarisation', note 129, at 9.

186 *See* for example W.M. Reisman, 'Coercion and Self Determination: Construing Charter Article 2(4)', 78 (1984) AJIL 64; F. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed. (New York, 1997). For a detailed critique of these theories, and others, see, in general, Chesterman, *Just War or Just Peace*, note 130.

187 On R2P, see 'The Responsibility to Protect', Report of the International Commission on Intervention and State Sovereignty, December 2001 (hereinafter 'R2P Report 2001'), available at: http://responsibilitytoprotect.org/ICISS%20Report.pdf. A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2004), paras. 199-209, available at: http://www.un.org/secureworld/report2.pdf ; UN GA Res. of 7 October 2009 on the Responsibility to Protect, UN Doc. A/RES/63/308 (2009). See e.g., Brunnee, Jutta and Toope, Stephen J., The Responsibility to Protect and the Use of Force: Building Legality? (February 11, 2010). Global Responsibility to Protect, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1551296 acknowledges controversy with 'humanitarian intervention,' p. VII, and presenting a much more limited proposal regarding use of force.

188 The Council authorised coercive measures under Chapter VII against apartheid in South Africa and white minority rule in Rhodesia (SC Res. 232 (1966), note 136), to end non-international armed conflicts in Bosnia-Herzegovina (SC Res. 713 (1991), note 136) and Somalia (SC Res. 794 (1992), note 136), and to protect civilians from crimes against humanity in Libya (SC Res. 1973 (2011), note 121). In practice such crises have usually been accompanied by an 'international' element, such as refugee influx or the prospect of other states becoming drawn into conflict.

189 E.g. Sumnmit Outcome Document, para 239. R2P acknowledges the primary role of the Security Council but leaves open the possibility that other organsations, the GA or regional organizations, fill the role if the Council cannot. As described by Nicholas Tsagourias, R2P endorses the aims behind humanitarian intervention while 'removing the rather charged language of intervention, and by dressing the action in institutional cloths.' N. Tsagourias, 'Necessity and the Use of Force: A Special Regime', 41 (2010) *Netherlands Yearbook of*

Different questions arise in respect of the right of states acting without Council authorisation. As noted above, there is, at a minimum, a 'heavy burden of proof – an obligation to rebut a solid negative presumption'on those who seek to justify recourse to force on these grounds.[190] Yet state practice in support of the emergence of a customary law right to use unilateral force within the framework of – or alongside – the UN Charter remains scarce.[191] While numerous interventions have involved a humanitarian element, such as interventions by India in East Pakistan in 1971, Vietnam in Cambodia in 1978 and Tanzania in Uganda in 1979, the states involved relied primarily on other, more traditional, forms of justification, such as self defence. A right to intervene to avert humanitarian catastrophe was asserted by the United Kingdom in the context of Northern Iraq in 1991,[192] and again, most forcefully, by some (but not all) of the states involved in the NATO intervention in Kosovo in 1999.[193] The Kosovo intervention is often cited by proponents of humanitarian intervention, but it is noteworthy that many of the states involved relied principally on other justifications, such as Security Council support, as the legal basis of the campaign.[194] The same was true of the interventions in Afghanistan (2001) and Iraq (2003), discussed later.[195] The lack of state practice in support of a right to intervene pursuant to the much discussed 'R2P' (including the failure of states to intervene in Darfur or Syria) is even more pronounced.[196]

International Law, p. 25. See 'R2P Report 2001', note 187.

190 Franck, *Recourse to Force*, note 11, p. 151.

191 'In the past five years, more than 133 states (representing approximately 80 percent of the world's population) have issued individual or joint statements rejecting the legalization of [humanitarian intervention]... . The weight of academic opinion is also against it.' R. Goodman, 'Humaniatarian Intervention and Pretexts for War,' 100 (2006) AJIL 107, p. 108. Gray, *International Law and the Use of Force*, note 24, p. 57-9.

192 Statement of the United Kingdom Foreign and Commonwealth Office, reported in Gray, *International Law and the Use of Force*, note 24, p. 36-7.

193 Statement of United Kingdom to the Security Council, justifying 'an exceptional measure to prevent an overwhelming humanitarian catastrophe,' SCOR 3988th meeting, 24 March 1999 at 12. Gray, *International Law and the Use of Force*, note 24, p. 42-3 notes that only the Netherlands and the UK asserted that the action was a legal (as opposed to moral) response to a humanitarian catastrophe.

194 Numerous states relied on the fact that the action supported the Security Council's objectives for Kosovo, despite the absence of authorisation for military action. *See* e.g. White House statement in S. Murphy, 'Legal Regulation of the Use of Force', 93 (1999) AJIL 628, at 631. On the arguments of states before the ICJ, noting that only Belgium argued humanitarian intervention, see Chesterman, *Just War or Just Peace*, note 130, p. 46.

195 *See* Section B.2.1.6.

196 The principles of R2P appeared to have some effect in Libya, where the Council authorised force, but not in Syria. While not definitive, as states may chose not to exercise the right for various reasons, there is little apparent basis in state practice to indicate support for a unilateral right (or collective right, outwith the UN system) to use force pursuant to R2P. The dearth of state practice on R2P undercuts any assertion of a legal norm having emerged in relation to the use of force. *See* e.g. Brunee and Toope, note 187, p. 17. *See* discussion

While there is much dispute on what the law *should* provide for, even among those who support such intervention in principle, there are relatively few who assert the existence of a right of humanitarian intervention under current international law;[197] this is exemplified by it being described on occasion as a 'situation precluding wrongfulness' rather than as a lawful basis for resort to force in international law.[198] Likewise, several independent enquiries in the wake of the Kosovo intervention found it to have been illegal but morally justifiable, and called for the elaboration of new legal guidelines in this area.[199] However, the ambivalence of many is reflected in the fact that just as humanitarian or protective grounds have not been invoked frequently by states as a legal justification for action, nor has intervention in circumstances where the motivation was – at least in part – humanitarian met with consistent condemnation from states or the Security Council.[200]

As so few states have asserted a legal right to intervene on these grounds, it follows that the parameters of the concepts remain undeveloped. The UK – seen to be an advocate of a right to humanitarian intervention in the Iraq and Kosovo contexts[201] – justified as lawful intervention occurring only in the following certain exceptional circumstances:

> "Every means short of force has been tried to avert this situation. In these circumstances and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is

'The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect, D Akande, ejiltalk, 28 August 2013.

197 *See* Fourth Report of the Forth Foreign Affairs Committee, 1999-2000, at www.parliament.the-stationery-office.co.uk/pa/cm1999/28/2802.htm, inquiring into, *inter alia*, the lawfulness of the Kosovo intervention, which noted that the 'sternest critic' as well as the 'firmest supporter' of humanitarian intervention in Kosovo (referring to Professors Brownlie and Greenwood, respectively) agreed that 'the provisions of the UN Charter were not complied with'.

198 Advisory Council on International Affairs, *Failing States: A Global Responsibility*, Advisory Report No. 35, May 2004, p. 59 (hereinafter *Dutch AIV Report* 2004).

199 *See* Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* 164 (2000). *See also* Foreign Affairs Committee Kosovo Report, para. 138, 'we conclude that NATO'S military action, if of dubious legality in the current state of international law, was justified on moral grounds'. *See also Dutch AIV Report* 2004, note 198.

200 Absence of condemnation may be a principal measure of state practice and *opinio juris*, but not necessarily so: see Gray, *International Law and the Use of Force*, note 24, p. 21. It has also been pointed out that lack of response may evidence the common inadequacy of enforcement of international law, rather than an endorsement of the legality of humanitarian intervention. Chesterman, *Just War or Just Peace*, note 130.

201 This was a reversal of its previous view that such intervention was 'at best not unambiguously illegal' (*see* the internal document of the UK Foreign and Commonwealth Office cited in Chesterman, *ibid*., p. 2).

directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose".[202]

Academic proponents of the development of the law on humanitarian intervention have suggested different prospective formulae, including for example the addition of a requirement that execution be by a 'multinational force'.[203] As regards R2P, the newer incarnation proposes to focus more narrowly on the protection against genocide, crimes against humanity, war crimes and ethnic cleansing, and as noted above recognises the importance of collective or institutional rather than unilateral action.

The issue of the use of force for humanitarian protective purposes is extremely sensitive, lying as it does at the heart of the twin objectives of the UN Charter to prohibit the use of force and to protect humanity.[204] While States can and should take measures to ensure respect for human rights and prevent crimes under international law,[205] ICJ's statement that "the use of force could not be the appropriate method to monitor or ensure such respect" appears to remain valid as a statement of law.[206] Likewise, as discussed at Chapter 3, the International Law Commission Articles on State Responsibility preclude the use of force as a counter measure against international wrongs.[207] Rather, it would appear to remain the exclusive remit of the UN Security Council to legitimise coercive measures, other than in self defence, 'whatever be the present defects in international organisation'.[208]

It is noted that some writers have also asserted a right to pro-democratic intervention, closely associated with but separate from the notion of humanitarian intervention.[209] The assertion of this exception to the use of force

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202 Statement by the UK representative to the Security Council, S/PV 3988 (1999) 12, in Chesterman, *Just War or Just Peace*, note 130, p. 212. On the grounds put forward in relation to Iraq, see Gray, *International Law and the Use of Force*, note 24, p. 37.

203 Recommendations of Professor Vaughan Lowe, in Foreign Affairs Committee Kosovo Report, p. 369. For other academics' proposed guidelines *see* R.B. Lillich, *Humanitarian Intervention and the United Nations* (Charlottesville, 1973); Teson, *Humanitarian Intervention*, note 198.

204 *See* Article 2(3) (on human rights) and Article 2(4), UN Charter. Note however that the statement of Russia before the Security Council in the context of the Kosovo debate questioned whether 'the unilateral use of force will lead precisely to a situation with truly devastating humanitarian consequences', SCOR (LIV) 3988th meeting, at 2-3 in Franck, *Recourse to Force*, note 11, pp. 167-8.

205 *See* Articles 40 and 41 of the ILC's Articles on States Responsibility regarding the collective responsibility for serious breaches of international obligations, including human rights, discussed in Chapters 3 and 7.

206 *See* Gray, *International Law and the Use of Force*, note 24, p. 35.

207 ILC's Articles, Article 50.

208 *Corfu Channel* case, note 202, p. 29.

209 See Reisman, 'Coercion and Self Determination', note 186. Another manifestiation is 'anti-tyranny' intervention, see A. D'Amato, 'The Invasion of Panama was a Lawful Response to Tyranny', 84 (1990) AJIL 516, Cf. M. Byers and S. Chesterman, '"You, the People": Pro-democratic Intervention in International Law', in G.H. Fox and B.R. Roth, *Democratic Governance and International Law* (Cambridge University Press, 2000), 259-292. On democracy

suffers from all of the difficulties of humanitarian or protective intervention, discussed above, aggravated by the assertion of a substantially lower threshold for intervention, and finds no real support in legal doctrine or state practice.[210] As one commentator notes, 'if taken literally such a rule would render up to a third of the world's states susceptible to intervention on this basis. More realistically, it opens the way to selective application of a principle that is prone to abuse.'[211] The unilateral use of force on such grounds must again be distinguished from the role of the Security Council. Yet as noted above even the Council has been reticent to authorise forceful measures to remove one government (whatever its political complexion or indeed human rights record) and replace it with another in the name of international peace and security.[212]

In summary, although the issue remains controversial, it is doubtful that the heavy burden of establishing a customary right of forceful intervention on humanitarian grounds has been discharged.[213] Momentum around the notion of the 'responsibility to protect' is, however, gaining ground and the law may yet shift to accommodate such an exception to prevent imminent humanitarian crisis in the future.[214] It remains to be seen whether coherent rules, and procedural and evidentiary safeguards against abuse, can be elaborated, and the issue is likely, once again, to revert to questions regarding the role of a collective security mechanism.

Finally, while an exception on such humanitarian grounds could conceivably cover the aversion of extremely serious acts of terrorism, this would arise only in extremely rare situations. One can readily envisage, however, that should such a norm develop in the future, it would be invoked in justification

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as a human right, see, in general, J. Crawford, 'Democracy and International Law', 93 44 (1993) BYIL 113.

210 While the United States is cited as relying on it (among other grounds) in Grenada, it expressly distanced itself from such a claim in its 1989 invasion of Panama; Statement of the United States to the Security Council, S/PV 2902, reported in Gray, *International Law and the Use of Force,* note 24, p. 57.

211 Chesterman, *Just War or Just Peace*, note 130, p. 90.

212 The sole example of it having done so was Haiti, where the Security Council, emphasising the 'unique character of the present situation in Haiti' authorised the use of force to remove the military junta that had overthrown the first democratically elected government, and to return the ousted President Aristide. As noted, there is controversy as to whether this was what the Council authorized in relation to the Libya intervention, even if this was the result. *See* Chapter 5A.2.2.

213 This militates strongly against its legality as discussed in Gray, *International Law and the Use of Force*, note 24, p. 24 referring to the ICJ in the *Nicaragua* case: '[F]or the Court the fact that states did not claim a new right of intervention was a decisive factor in the rejection of the emergence of any customary law right.'

214 It is noted that states resorting to use of force post September 11, including the erstwhile foremost proponent of the humanitarian justification, the UK, while emphasising the humanitarian element to the military approach, have not sought to rely on humanitarian intervention as a legal justification.

for the use of force against terrorism, just as the one permissible basis for unilateral force that currently exists, self defence is at present.[215]

5A.3.2 Breakdown in international enforcement?

A question of potential relevance to some of the justifications for use of force made in the context of counter-terrorism is whether a state is entitled to resort to force where another state unlawfully violates its essential interests, and the international enforcement machinery contemplated in the UN Charter fails. It has aptly been described as an argument of 'some moral force' that an aggrieved state should be able to enforce its own rights where the 'source of the right' does not do so.[216] Flying, as it does, in the face of the clear prohibition in Article 2(4) and the foundations of the collective security system established in the UN Charter, a particularly heavy onus would lie on the proponent of such a view.

However, while states will often invoke non-compliance to bolster the perceived justice of their use of force, state practice in support of 'self help' as a legal justification (as opposed to a factor mitigating the culpability of illegal resort to force) is again limited.[217] The ICJ in the *Corfu Channel* case noted that Albania had violated its international obligations but found that, while this was an extenuating circumstance, it did not justify recourse to force.[218] Likewise, the International Law Commission's Draft Articles on State responsibility, while recognising that counter measures against another state that has violated its obligations are permitted, make clear that such measures 'shall not affect ... the obligation to refrain from the threat or use of force contained in the UN Charter'.[219] While a state may, in the face of violations, take measures of 'self help', under the current system of international law these do not include resort to force.

The failure of states to meet international obligations, for example to hold to account those responsible for terrorism, may be relevant to an assessment of aspects of the self defence test, notably the necessity test that requires that

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215 On overuse of self defence, *see*, e.g., Part 5B. Note that elements of humanitarian arguments accompanied the Iraq and Afghanistan interventions, without full-blown humanitarian intervention being invoked. See the discussion of the legitimacy of the idea of force to enforce in the Report of the Dutch Committee of Inquiry into the war in Iraq, NLIR 2010, supra note 198.

216 See Franck, *Recourse to Force*, note 11 p. 109, where he opines that the protracted failure of the UN to redress an egregious wrong may give rise to a limited right of self help.

217 In the post 9/11 practice explored at Part B, failure to meet international duties in respect of terrorism has been invoked in most debates around the legitimacy of certain responses.

218 *Corfu Channel* case, note 202, p. 35. See also *Nicaragua* case, note 15, para. 202, on the general principle of non-intervention. See also Chesterman, *Just War or Just Peace*, note 130, p. 54.

219 Article 50, ILC's Articles.

the use of force be a last resort.[220] But beyond self defence, the assertion of a right of unilateral law enforcement 'bears no relation to the text of Article 2(4) and establishes no limits on which rights may be vindicated or by whom'.[221] Enforcement of international law has always been and remains a predominant Achilles heel in the international legal system.[222] If its inadequacies, and those of the Security Council veto system in particular, could be relied upon to justify unilateral force it may represent the unraveling of the prohibition on the use of force and the collective fabric of the UN Charter.

5A.3.3 Hot Pursuit?

Finally, it has occasionally been suggested that cross border incursions against terrorists can be justified on grounds of 'hot pursuit'.[223] This reflects a misapplication of a doctrine applicable to the law of the sea, which 'involves no violation of territorial sovereignty,' to unlawful cross border incursions which do.[224] Despite misunderstandings in this respect, there is little support in practice or doctrine for an exception to the prohibition on the use of force on these grounds.[225]

5A.4 Failed and Failing States and the Use of Force

Growing attention has been dedicated in recent years to the related phenomenon of failed and failing states. State failure undoubtedly has serious implications for human beings and for the international legal order.[226] Con-

220 See discussion of the unwillingness and inability of states to address threats of terrorism as a basis for action in B.2.1. later in this chapter. Dinstein, *War, Aggression and Self Defence*, note 36, at 247, referring to self defence where the state is unwilling and unable as 'extra-territorial law enforcement' and Schmitt, 'Transnational Terrorism', note 36 at 27, emphasising that self defence against non-state actors necessarily involves breaches of states' duties.

221 Chesterman, *Just War or Just Peace*, note 130, p. 56, referring to the theory of 'self help', in support of humanitarian intervention, put forward by Reisman, 'Coercion and Self Determination', note 186.

222 On advances to improve enforcement of international criminal law post 9/11 see Chapter 4B.

223 See justifications by Turkey for incursions in in Northern Iraq at 5B.5 below.

224 *Oppenheim's International Law*, p. 387 on the distinction.

225 *Oppenheim*, *ibid.*, Dinstein, note 66 p.176, Lubell, 'Extra-Territorial Use of Force, Chapter 3.

226 The issue is not new, but has been given renewed emphasis in part due to the link to the 'war on terror'. See, e.g., G. Helman and S. Ratner, 'Saving Failed States', *Foreign Policy*, 1992-1993, available at: http://www.foreignpolicy.com/articles/2010/06/21/saving_failed_states. They note that 'From Haiti in the Western Hemisphere to the remnants of Yugoslavia in Europe, from Somalia, Sudan, and Liberia in Africa to Cambodia in Southeast Asia, a disturbing new phenomenon is emerging: the failed nation-state, utterly incapable of sustaining itself as a member of the international community.' For a discussion of the issue and its implications, *see*, e.g., *Dutch AIV Report* 2004, note 198; J. Piazza, 'Incubators of

cerns have often been expressed, not least by successive US administrations, that such states provide staging or breeding grounds for terrorism.[227] One of the questions that arises is the relevance of the failed or failing nature of states to the law on the use of force against terrorism in those states.[228]

On one level, the question that arises is whether interventions in a failed state with no government to protect borders or exert sovereignty can be said to be in violation of Article 2(4) at all. The basic international legal principle is, however, that the state (not the government) is the legal entity that bears rights, and continues to do so even after governments may fail. As such, to equate loss of sovereignty with loss of government, still less with weak government, finds little support as an argument of law.

On the current state of law and practice, there is also no separate exception justifying the use of force in failed or failing states. Rather, the failed or failing nature of states may be relevant to an assessment of facts relevant to determining the lawfulness of force under one of the established exceptions in international law.

Firstly, the Security Council may well consider the failing nature of a state as a relevant factor in determining both the existence of a *threat* to international peace and security, and the *necesssity* of multilateral action in light of the lack of the state's own lack of capacity to act. The risk of terrorist attacks flourishing unchecked in a failed state or, more strikingly, the human rights implications that flow for the states own nationals of such a situation, may well provide the basis for Council action.[229] Were a broader right of protective intervention on the part of states, beyond action by the Council, to develop in the future, state failure may well be a factor that would contribute to an assessment of the need for such intervention.

Terror: Do Failed and Failing States Promote Transnational Terrorism?', 52 (2008) *International Studies Quarterly* 469, available at: http://www.politicalscience.uncc.edu/jpiazza/Terrorism%20and%20Failed%20States%20ISQ%202008.pdf.

227 Obama has emphasized addressing failed states on several occasions. *See*, e.g., discussion that '[b]efore the American invasion, Afghanistan was a failed state whose government did not provide for the security and needs of its people,' providing 'the perfect environment in which al Qaeda could flourish'. 'Increase Non-Military Aid to Afghanistan by $1 billion', available at: http://www.barackobama.com/pdf/CounterterrorismFactSheet.pdf. The Bush Administration's national security strategy highlights the problem of failed states. For examples, *see* M. Lehto, *Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism Beyond Violent Acts*, (Netherlands: Martinus Nijhoff, 2009) (hereinafter *Indirect Responsibility*); questioning the empirical basis for this see A. Schmid, 'Why Terrorism? Root Causes, Some Empirical Findings, and the case of 9/11,' in Lehto, *ibid*.

228 See, e.g., B. Dunlap, 'State Failure and the Use of Force in the Age of Global Terror', 27 (2004) *Boston College International and Comparitive Law Review* 453, available at: http://lawdigitalcommons.bc.edu/iclr/vol27/iss2/9.

229 *See*, e.g., Haiti SC Res. 841 (1993), note 133, and Darfur SC Res. 1593 (2005), note 147, which may have been examples of this. The Council does not treat states failure as a ground in itself however. *Dutch AIV Report* 2004, note 209, p. 55.

Notably, failure may also be relevant to an assessment of when the use of force is permissible in self defence against terrorist groups. The assessment that the territorial state out of which such groups may operate was not willing or able to address the threat, while not determinative of the lawfulness of defensive action (all criteria including imminence of an attack would need to be satisfied), it may be an important factor pointing towards the necessity of force and the lack of an alternative cooperative framework for addressing the threat. So while it is not a separate ground for use of force, 'in the case of state failure, another circumstance that does warrant intervention may exist at the same time'.[230]

In short, alternative justifications for the use of force have little support in current international law. Reliance on self defence is, increasingly, the way in which states justify unilateral force, whatever the true motivation and nature of the operations. Sometimes this entails stretching the concept beyond it's natural elasticity and raising questions about the distortion of the exception and its effect. This is particularly apparent in practice in relation to the use of force post 9/11 to which we now turn.

5B THE USE OF FORCE POST 9/11

In the immediate wake of the attacks of 11 September 2001, the United States committed itself to a sustained 'war on terror',[231] a significant component of which has involved the use of force by the United States, and on occasion its allies, abroad. It began with the large scale military interventions in Afghanistan and Iraq,[232] and has continued with the use of lethal force against suspected terrirorists in other states, with strikes to date at least in Pakistan, Yemen and Somalia, with the potential for further expansion.The latter is the latest manifestation of a policy of preventive – or pre-emptive – force against terrorist threats, which was advanced most radically in the United States National Security Strategies of 2002 and 2006 and which continues in practice in somewhat modified form.[233]

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230 *Dutch AIV Report* 2004, note 198, p. 67.

231 *See* Address of the U.S. President George W. Bush to a Joint Session of Congress and the American People, 20 September 2001, available at http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html. The categorisation of this as a 'war' is discussed in Chapter 6B1.

232 The U.S. military campaign against Iraq ('Operation Iraqi Freedom') and the parallel British military operation ('Operation Telic') began on 19 March 2003.

233 *See inter alia* US National Security Strategies, below Chapter 5B.3; speeches from President Bush, State of the Union speech to joint session of Congress, Jan 29, 2002 and more recently President Obama, Speech on US drones and counter-terrorism policy, 23 May 2013, Chapter5B2. On the 'war on al Qaeda and associated groups' and IHL see Chapter 6B.1.1.

Multiple questions arise regarding the application of the legal framework set out in the preceding section of this chapter. This section seeks to highlight some of those questions considered to be of particular significance to an assessment of the lawfulness of the use of force employed since September 11, while highlighting areas of potential development of the law in this field.

5B.1 AFGHANISTAN

The military intervention in Afghanistan began on 7 October 2001 and continues to the present day.[234] The legal justification for military action, advanced by both the United States and its principal ally, the United Kingdom, was self defence in response to 9/11 and in anticipation of a future attack. Both states reported to the Security Council under Article 51. The US noted that measures were taken as a response to the armed attacks of 9/11 and to 'prevent and deter' further attacks.[235] The United Kingdom took a narrower view, justifying the use of force in self defence 'to avert the continuing threat of attacks from the same source' as the September 11 attacks.[236] However, when it came to the objectives of military action, these were presented, at various points and in various guises, as attacking al-Qaeda training camps and personnel, compelling the Taleban to hand over al-Qaeda suspects, and, ultimately, toppling the Taleban regime.[237]

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234 'Operation Enduring Freedom' began in the immediate aftermath of September 11, on 7 October 2001, and was not necessarily limited to operations in Afghanistan. It has involved the U.S. and several allies. A UN authorized force, ISAF, was established in 2002 to assist the government, in the interests of international peace and security. However it is separate from OEF which continues to operate alongside ISAF in the pursuit of Taleban and Al Qaeda. For more detail *see* e.g. Gray, *International Law and the Use of Force*, note 24, p. 194.

235 *See* 'Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council', UN SCOR, 56th Session, UN Doc. S/2001/946: 'In response to these attacks, and in accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States ... We may find that our self-defence requires further actions with respect to other organizations and other States.'

236 *See* 'Letter dated 7 October 2001 from the Chargé d'affaires of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council', UN Doc. S/2001/947 (2001): 'These forces have now been employed in exercise of the inherent right of individual and collective self defence, recognized in Article 51, following the terrorist outrage of 11th September, to avert the continuing threat of attacks from the same source.'

237 On the objectives of the campaign, *see* statement by the UK Prime Minister ('Attack on Afghanistan: Tony Blair statement', *CNN*.com, 7 October 2001, at http://edition.cnn.com/2001/WORLD/europe/10/07/gen.blair.speech). *See also* the report on the military objectives of the campaign released by the British Ministry of Defence (Ministry of Defence, 'Defeating International Terrorism: Campaign Objectives', available at http://www.operations.mod.uk/veritas/faq/objectives.htm). Noting apparent inconsistencies between descriptions of

The unprecedented unity following the September 11 attacks translated into either open or tacit support for military action in Afghanistan.[238] Many states indicated their support for the campaign overtly, for example by allowing their airspace to be used,[239] or offering logistical support.[240] There was little state opposition expressed in respect of the military action, and the validity of the legal justifications proffered appeared to almost go unquestioned behind expressions of condolence and sympathy with the US.[241] At first, critical appraisal of the lawfulness of the Afghan intervention from academics and civil society was also extremely cautious and hesitant; considerably more such criticism has emerged as some distance is gained from the autumn of 2001.[242]

State reactions to the use of force in Afghanistan, as elsewhere, are relevant to an assessment of the lawfulness of the use of force in that context. They may also potentially, be relevant to an assessment of the development of the law. One incident itself rarely changes the law, particularly if it conflicts with an established rule, and the events in question must be seen in the context of how similar situations were addressed in the past and in particular whether they are replicated in the future. While there are differences of views as to the extent to which the Afghanistan intervention had a 'radical and lasting transformative effect on the law of self defence,'[243] as will be seen there are

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campaign objectives advanced at different times, *see*, e.g., V. Lowe, 'The Iraq Crisis: What Now?', 52 (2003) ICLQ 859 at 860.

238 S. Ratner, 'Jus ad Bellum and Jus in Bello after September 11', 96 (2002) AJIL 905, at 910, citing the only questions concerning legality as having come from North Korea, Sudan, Iraq, Cuba, Malaysia, and Iran. Gray, *International Law and the Use of Force*, note 24, p. 193, citing China, Russia, Japan, and Pakistan among others as having supported the intervention.

239 E.g., Greece and Turkey. See House of Commons Research Paper 01/72, 'September 11: The Response', 31 October 2001, available at: http://www.parliament.uk/commons/lib/research/rp2001/rp01-072.pdf (hereinafter 'House of Commons Research Paper 01/72'), p. 28.

240 Japan pledged logistical support. See House of Commons Research Paper 01/72, note 239, p. 29-30.

241 Even the Islamic conference communiqué of 11 October 2001 was notably silent on the U.S. bombardment, while stating that 'We have endorsed a global consensus and condemnation of terrorist acts, condolence and sympathy with the United States and a commitment to eradication of international terrorism.' See 'Islamic Leaders condemn terrorism', *CNN.com*, 11 October 2001, available at: http://edition.cnn.com/2001/WORLD/meast/10/11/gen.qatar.oic. Iran was among the few states opposed to the intervention ('Islamic Leaders Condemn Terrorism', *ibid.*)

242 *See*, e.g., Myjer and White, 'The Twin Towers Attack', note 87; J. Paust, 'Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond', 35 (2002) *Cornell International Law Journal* 533, who criticise the lawfulness of the intervention as it unfolded against the Taleban as well as al-Qaeda. *See also* S. Kapferer, 'Ends and Means in Politics: International Law as Framework for Political Decision Making', 15 (2002) *Revue québéquoise de droit international* 101. Tams, 'Use of Force Against Terrorists' supra note 50 p. 391.

243 Gray, *International Law and the Use of Force*, note 24, p. 194.

grounds to consider that it was instrumental in contributing to a legal shift at least in respect of certain aspects of the law of self defence.

5B.1.1 Key questions arising

The questions arising as relevant to the lawfulness of the use of force in Afghanistan, addressed in this section, relate principally to whether the right of self defence was triggered and the requirements of necessity and proportionality met. Specific questions include the following: could the use of force in self defence be justified where al-Qaeda, as opposed to the state of Afghanistan, was considered responsible for the September 11 attacks; could regime change be justified in these circumstances; was Afghanistan a case of justifiable anticipatory self defence;[244] was the use of force a last resort and did the states involved discharge the burden of so demonstrating; what relevance should be attached to the failure to engage the Security Council to take the necessary measures, in preference for prolonged reliance on self defence?

5B.1.1.1 Armed Attack by a Terrorist Group: Dispensing with the State responsibility requirement?

Among the key legal issues of relevance to the lawfulness of the intervention is whether self defence could justify the use of force in Afghanistan in response to 'terrorist' attacks by a non-state actor such as al-Qaeda. In other words, where individuals, networks or organisations are responsible for an attack, could self defence be used against them on the territory of another state, even where their actions could not be attributed to that state?[245]

As set out above, while not uncontroversial, the dominant view (or at least assumption) until the time of the 9/11 attacks was that armed attack occurred at the hand of a state, with differences of view more commonly revolving around the standard for attribution.[246] It was notable, then, that while multiple allegations were lodged against the Taleban,[247] the case for its legal

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244 As this issue was not controversial in relation to Afghanistan but came into sharp focus in relation to Iraq, anticipatory self defence in Afghanistan is considered at Section 5.B.2.

245 There can be little doubt that the events of 9/11 met other 'armed attack' criteria relating to scale and intensity threshold (see A.2.1); the focus here is on authorship and the status of actors as the controversial issue.

246 See Part A.2.1; cf US and Israel's more isolated positions pre 9/11.

247 There were various references to the Taleban having 'harboured', 'supported' or 'protected' al-Qaeda (UK letter to the Security Council, statements by U.S. President and NATO Secretary General, discussed at Chapter 2) but not to the regime having been legally responsible for the attacks. See, e.g., the statement made on 7 October 2001 by the UK Prime Minister (note 237): 'There is no doubt in my mind, nor in the mind of anyone who has been through all the available evidence, including intelligence material, that these attacks were carried out by the al Qaeda network headed by Osama bin Laden. Equally it is clear

responsibility for the September 11 attacks was never made out in terms by the states seeking to engage in military action in Afghanistan.[248] From information publicly available, it is open to question whether the Taleban regime had the power and authority in respect of al-Qaeda to satisfy the degree of control required for the acts of private entities to be legally attributed to it. This is a question of fact, the onus of proof in respect of which would normally rest with those seeking to establish responsibility, but intervening states in Afghanistan declined to do so. No evidence of the regime's 'control' over al-Qaeda, nor clarity as to the other allegations against the regime (and legal consequences thereof), was advanced.

The September 11 attacks were nonetheless broadly characterised – including, in their immediate aftermath, by the Security Council,[249] NATO[250] and other bodies[251] – as amounting to 'armed attacks' for the purposes of self defence. On one view these statements, and the conduct of at least some intervening states, could conceivably have been based on *assumptions* as to the responsibility of Afghanistan, consistent with state responsibility being a prerequisite of the law of self defence.[252] But on another view the acceptance of the right to self defence as arising in response to the September 11 attacks, absent assertions of state responsibility, strengthens the case that such responsibility was not (or no longer) a prerequisite for self defence under Article 51, at least in the peculiar circumstances of Afghanistan.[253]

While perhaps not dispositive, the Afghan intervention and reactions thereto did appear to tilt the balance away from the necessity of a state re-

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that they are harboured and supported by the Taliban regime inside Afghanistan. ...We have set the objective to pursue those responsible for the attacks, to eradicate bin Laden's network of terrorism and to take action against the Taliban regime that is sponsoring him.'

248 Acts of private individuals become attributable to the state where the latter exercises 'effective control' over the conduct of the former; the Taliban may also be responsible for 'indirect aggression' where it has 'substantial involvement' in the activities of al-Qaeda. For more detail on applicable standards, *see* Chapter 3.

249 Resolution 1368 (2001), recognised the 'inherent right of individual or collective self-defence, implicitly accepting that that terrorist attacks addressed in the Resolution constituted 'armed attacks' under Article 51.

250 NATO press release (2001) 124.

251 NATO, OAS, EU and others organisations also affirmed the right of self defence. See C. Gray 'The US National Security Strategy and the New "Bush Doctrine" on Pre-emptive Self-Defence', (2002) 1 *Chinese Journal of International Law* 437, p. 441.

252 By noting that force would be used against 'the same source' as the September 11 attacks, while identifying the Taleban as one of the objectives of the military intervention, the UK's position could be interpreted as having been premised on an assumption that the test had been satisfied. (*See* however C. Greenwood, 'International Law and the "War against Terrorism"', note 53, at 303, noting that no such allegations of responsibility were made). See L. Sadat, 'Terrorism and the Rule of Law', note 53,at 150.

253 *See* Greenwood, 'War against Terrorism', *ibid*. See Gray, *International Law and the Use of Force*, note 24, p. 208 on the peculiar circumstances and the view of some that Afghanistan may be seen as a 'one-off' situation. Cf Tams, 'The Use of Force', note 50. See also conclusions in this chapter and Chapter 12.

sponsibility nexus.[254] As noted in Part A, this apparent shift was swiftly countered by a subsequent ICJ opinion, however, reasserting the traditional view that self defence arises in response to an attack by or on behalf of a state,[255] though as noted in the legal framework section a subsequent ICJ decision was more equivocal.[256]

Subsequent state practice showed that the approach adopted vis-à-vis Afghanistan was not an aberration. Perhaps the clearest example is the Turkish incursion into Northern Iraq in 2008, to combat 'terrorism' and those that 'help or harbor terrorists.' State responses did not indicate opposition, in principle, to the use of force against armed groups as a violation of Article 2(4).[257] Another example relates to the Hezbollah attacks that prompted Israeli incursions into Lebanese territory in 2006; Israel was condemned for the lack of proportionality of the attacks, but not for using force and invoking self defence against a non-state group (although some of Israel's statements held Lebanon responsible for the attacks).[258] Just as with 'Operation Enduring Freedom' in Afghanistan, the question of attribution does not appear to have been treated as a defining question in these situations. The non-state actor issuewas not a significant feature of debate on the legality of subsequent cross border capture operations.[259]

While there is still controversy, and room for alternative interpretations of practice, the weight of commentary supports the view that clear cut attribution is no longer a pre-requisite to trigger resort to self defence.[260] It would seem that widespread references to the right to 'self defence' post 9/11, including by the Security Council on 12 September 2001, represented or con-

254 As noted in this Chapter 5B.4 this development will have to be assessed in context, in light of subsequent approaches to other similar situations.

255 *Wall* Advisory Opinion, note 36, para. 139, discussed at Section 5.A.2.1.1.(ii).

256 *Armed Activities* case, note 18. *See* section A.5A211(a)(i)

257 Other states appear to have been broadly supportive and even the criticism was couched in terms of the use of force as 'not the best response. The territorial integrity of Iraq is for us very important,' rather than as unlawful. Foss, *supra* note 58, at 28-31, Tams, 'The Use of Force', note 63, p. 380.

258 S.C. Res. 1701 (2006), 11 August 2006, UN Doc S/RES/1701 (2006). *See*, e.g., Secretary General Press Release UN Doc. SG/SM/10570, SC8791, 20 July 2006, and discussion of states' positions in Security Council discussions. Foss, *ibid.*, at 26. Statement of G8 noting Israel was 'exercising the right to defend itself ...'. Many condemned the lack of proportionality rather than the use of force per se. See, e.g., Foss, *ibid.*, at 25-28, Tams, 'The Use of Force', note 63, at 379.

259 Chapter 9 on the Bin Laden operation and e.g. the U.S. intervention in Libya in 2013 to capture suspected terrorist al Libi who was taken to stand trial in a U.S. court: 'Captured in Libya, 1998 Bombing Suspect Pleads Not Guilty in a Manhattan Court', *NY Times*, 13 Oct 2013.

260 Leiden Recommendations, note 59, para. 38. 'Chatham House Principles', note 36; Wilmshurst, 'Anticipatory Self Defence', note 69; Tams, 'Use of Force', supra note 50, p. 381; Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', note 87.

tributed to a shift in the law.[261] The question of attribution is no longer considered an essential, though it may yet be relevant to other questions, including the permissible scope of action in self defence, addressed later in this chapter.

There is some question whether states simply dispensed with the need for a state nexus in Afghanistan, or whether they might have been endorsing a lower standard than the traditional 'effective control' test for attributing conduct to the state.[262] A shift in standards of attribution may have broader implications for the international legal framework, including finding states responsible for a broader range of private actors, which states may not be willing to embrace.[263] It may be that a loosening of the law on self defence has found favour over a rewriting of the laws on state responsibility.[264]

It is noteworthy, however, that while the reactions of states and commentators supportive of the use of force in Afghanistan, noted above, seemed to suggest there is no state responsibility requirement, they do appear to rest on assumptions of some degree of 'culpability' on the part of the Afghanistan *de facto* government. It is not however always apparent whether this is a legal prerequisite (or factor rendering the operation more politically palatable), and what precisely is the *legal relevance* of the various formulae put forward to the effect that the Taleban had supported, harboured, protected, or provided safe haven for terrorists[265] or that it had 'violated international law' in its relationship with al-Qaeda,[266] or otherwise.[267]

The approach adopted in Afghanistan may have paved the way for, or influenced, subsequent reliance on states having 'harboured' terrorists (the Israeli allegation against Lebanon in 2006[268]) or been 'unwilling or unable' to address terrorist threats, as providing a basis for the use of force against

261 *See*, e.g., Greenwood, 'War against Terrorism', note 53. Like the Security Council, NATO, the OAS, the EU and other international organisations also referred to the right of 'self defence' shortly after 9/11.

262 On the assertion that the recognition of 'self defence' represents not a rejection of the state responsibility requirement, but a lowering of the standard by which the conduct of individuals becomes attributable to the state see e.g. Jinks and Sassòli note 53.

263 *See* discussion in Chapter 3 on e.g. responsibility for terrorism and for private contractors, often engaged in counterterrorist activity without the state being effectively accountable for their actions.

264 Lehto, *Indirect Responsibility*, note 227 at 405, suggests that it 'seems easier to accept a new interpretation of the rules governing the use of force than to set aside the rules of attribution'.

265 For instances where these formulae were used, see Chapter 3. Note also that the U.S. National Security Strategy commits the U.S. to holding to account 'nations that are compromised by terror'.

266 Greenwood, 'War against Terrorism', note 53, p. 313. See the rule against the use of force being invoked as a remedy for violation of obligations, discussed earlier in this Chapter.

267 These wrongs, which were well established, may provoke a right and duty to take steps against a regime, but do not provide a legal justification for using force and they were not invoked as doing so.

268 Gray, *International Law and the Use of Force*, note 24, p. 234-5.

them.[269] A number of the questions that arose of relevance to state responses to the Afghan intervention are therefore of broader significance in relation to the use of force against al Qaeda (and other terrorist groups), addressed in the following section.

While certain of the wrongs committed by the Taleban regime may well have created rights and obligations on the part of the international community, they appeared to fall short of amounting to state involvement in the armed attack against another state, and created a dubious legal justification for the use of force.[270] The legal relevance, to the use of force, of a state having failed in its obligations to prevent acts of terrorism was not made clear. Obvious doubts related to lack of clarity as to the legal standards and by whom these determinations could be safely and appropriately be judged.[271]

The introduction of notions of culpability may in practice be an attempt to limit (at least a little) the circumstances in which such force can be used on another state's territory, rather than purporting to provide a legal justification as such. Other interpretations of the law pursue a similar end, such as the suggestion noted above that only 'large scale' attacks by non-state actors should trigger the right to use force in self defence.[272] There is clearly an awareness of the potential practical and political implications of the removal of the state responsibility link. If a mere territorial link between a state and a responsible organisation were to be sufficient to justify use of force against that state, might the states of 'North America, South America, Europe, Africa, the Middle East and across Asia' which, according to reports, have terrorist cells operating in their territories, be susceptible to attack?[273]

The drive to interpret self defence as allowing states to take necessary measures while limiting the circumstances in which this might arise to avoid overreach and ready resort to force is understandable. The multiple claims by states to be using force against terrorists in recent years testify to the importance of restraint. The contours of the concepts surrounding self defence

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269 *See* B.2. below for the Obama administration's reference to unwillingness or inability in the context of self defence, or the more extreme position advanced by Jack Goldmsith, former President Bush adviser, that the prohibition on force does not apply where a state in 'unable to unwilling' to meet the threat itself.

270 On state responsibility and permissible action against wrongdoer states, *see* Chapter 3. As noted in section 5A, the use of force is not justified as a counter-measure against wrongdoing states, unless justified in self defence.

271 *See* Chapter 3 on State responsibility and the impermissibility of force as a counter-measure. 'R2P' reflects the role of the Security Council is making such determinations.

272 Leiden Recommendations, note 59, para. 39. See threshold discussion in 5A.2.1.1 of this chapter.

273 'U.S. National Security Strategy', note 251, p. 5. The direct planning of the September 11 attacks took place in several countries, but there is little suggestion that those states should be vulnerable to attack from others defending against the global terrorist threat. Allegations of failure to exercise due diligence are common in most such states at some point; *see* Chapter 7A4.

– whose stretching in recent years may have been followed by attempts to shrink them back to a safer size – may need to continue to be defined and clarified in the years ahead.

5B.1.1.2 Regime change as necessary and proportionate?

It may be accepted as compelling that the rationale of self defence requires a state to be able to take necessary measures to defend itself against those responsible for an imminent or on-going attack, whatever their status and wherever their location, and irrespective of attribution. It may remain doubtful, however, on what basis force can then be directed against the institutions of a state, with a view to regime change, where that state has not been found, or indeed alleged, to be responsible for the attack or the source of any on-going or future attack.[274] Questions as to the respect for the territorial integrity and political independence of the state, reflected in Article 2(4) of the Charter, are all the more pressing where force is used not only against private actors on the state's territory but against the institutions of the state itself, and particularly with a view to bringing about a change in regime.

A key issue to arise in relation to the military intervention in Afghanistan is therefore whether targeting institutions of the state, and regime change, was a legitimate objective under the law of self defence, and specifically how it measures up against the necessity and proportionality test? Where a state does not exercise sufficient 'control' over the organisation's conduct to be legally responsible for it, in what circumstances, then, is the government's removal nonetheless strictly necessary and proportionate to avert the threat? A particularly heavy onus must lie on states seeking to rely on their own right of self defence to remove another government, given the Charter's fundamental principle of sovereign equality and political independence, to demonstrate the strict necessity of such measures.[275]

Despite statements by the UK that force would be directed against the 'same source' as the September 11 attacks, the military intervention in Afghanistan went beyond the targeting of al-Qaeda operations, to the removal of the Taleban regime.[276] However, the UK government was evidently uncomfortable with the concept of regime change and sought carefully to restrict its justification for the removal of the Taleban as necessary to destroy the al-Qaeda

274 For the purposes of necessity, brief incursions onto foreign territory to take particular measures of defence, maybe distinguished from removal of a government.

275 Article 2(4) and 2(7) UN Charter.

276 *See*, e.g., Blair speech of 7 October 2001, note 237; The British Ministry of Defence (note 237) expressly stated that one of the immediate objectives of the so-called Operation Veritas was to bring about '[a] sufficient change in the leadership to ensure that Afghanistan's links to international terrorism are broken ... where necessary taking political and military action to fragment the present Taliban regime, including through support for Pushtoon groups opposed to the regime as well as forces in the Northern Alliance'.

network (even if, as noted above, it did not then clarify the factual basis for its assessment of this relationship between the Taleban and al-Qaeda).[277]

Concerns about 'regime change' were even more apparent in relation to Iraq discussed at 5B3. In that context, while the US placed considerable emphasis on 'regime change' and the removal of Saddam Hussein, going so far as to place a bounty on his head, it is noteworthy that European states supportive of the United States again sought to distance themselves from these objectives, emphasising that 'Our goal is to safeguard world peace and security by ensuring that this regime gives up its weapons of mass destruction.'[278] Such issues have been described as dividing the US and UK governments, and the latter took pains to emphasise that while regime change might be a welcome 'consequence' it was not the 'aim' if the intervention.[279] As such, it may be doubtful then whether the Afghan situation, particularly when seen in context of the Iraqi one that followed it, provides any basis for asserting a new legal doctrine of regime change.[280]

While the support for the use of force in Afghanistan in 2001 was undoubtedly overwhelming, it is questionable whether the same consensus attended the necessity and proportionality of the actual use of force as it unfolded in the months and now many years that followed. The lawfulness of targeting the Taleban depends on whether doing so was genuinely necessary to protect the intervening states – a question of fact that appears never to have been clearly established.[281] The continued reliance on self defence as a basis for

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277 *See*, e.g., statement of the UK Prime Minister: 'Our target the whole time is to close down the terrorist network in Afghanistan. Since the Taliban regime stand between us and that objective, then we have to remove them. If they choose – as they have done so far at least – to side with bin Laden ... ' ('Blair: We have no choice but war', *The Mirror*, 31 October 2003). *See also* 'Blair says evidence against bin Laden 'powerful' Radio Interview with Tony Blair on ABC Local Radio, Australia, 1 October 2001: 'If [the Taliban] are not prepared to give up bin Laden, which they could do if they wanted to, then they become an obstacle that we have to disable or remove in order to get to bin Laden. So that's their choice. So it's not as if we set out with the aim of changing the Taliban regime, but if they remain in the way of achieving our objective, namely that bin Laden's associates are yielded up, and the terror camps are closed. Then the Taliban themselves become our enemy' (transcript available at: http://www.radioaustralia.net.au/international/radio/onairhighlights/428882).

278 M. Champion, 'Eight European Leaders Voice Their Support for U.S. on Iraq, Letter From Group of Countries Isolates France, Germany, Smooths Path to War,' *Wall Street Journal*, 30 January 2003, available at: http://online.wsj.com/article/0,SB104387547015844 5104,00.html (23 October 2012). The open letter was signed by the Prime Ministers or Presidents of the Czech Republic, Denmark, Hungary, Italy, Poland, Portugal, Spain and the United Kingdom.

279 The UK Attorney General advised that regime change would not be a lawful objective. 54 ICLQ (2005) 767, para 36. See discussion in Gray, *International Law and the Use of Force*, note 24, p.231-34.

280 On the view that there is no such support, see Gray 'Regime Change', *ibid.*, 231.

281 Doubts as to the relationship between the Taleban and al-Qaeda, and whether the former really controlled the actions of the latter, grew over time. *See*, e.g., the reports of the 9/11 Commission (National Commission on Terrorist Attacks upon the United States) noting

forceful action in Afghanistan against Taleban and al Qaeda years later raises 'growing concern that *Operation Enduring Freedom* overstretched the limits of self-defence.'[282]

5B.1.1.3 Last resort?

A question much discussed in relation to Iraq but relevant also to the use of force in Afghanistan and elsewhere is whether the military intervention was, as it must be under the law, a last resort, with all peaceful means having been exhausted in accordance with Article 2(3) of the Charter. According to statements by the US President and UK Prime Minister, the bombardment of Afghanistan and the Taleban was justified, in part, by reference to the fact that attempts to secure the extradition of bin Laden and others had been unsuccessful. Before 9/11, extradition of bin Laden had certainly been sought through the Security Council,[283] although post 9/11 it took the form of a demand, outwith the extradition process, that he and others be 'turned over' for extradition from the United States.[284]

Did this suggest that military action (at least against the Taleban) may not have been necessary if the Taleban had cooperated and been 'prepared to give up bin Laden'?[285] It is a question of fact whether all efforts to handle this matter by the criminal law route were exhausted, whether the international cooperation was fully engaged and exhausted, whether the requests for extradition could have been made more effective if bolstered by robust international coordination (and backed up where necessary by Security Council authorisation

that members of the Taleban leadership opposed 9/11for strategic reasons.

282 Tams, 'The Use of Force', note 50, p. 378.

283 *See*, e.g., SC Res. 1333 (2000), 19 December 2000, UN Doc. S/RES/1333 (2000). Post 9/11, the Council again urged compliance with earlier resolutions. 'Security Council Urges Taliban to Comply with Texts Ordering Bin Laden Handover', *United Nations News Centre*, 18 September 2001, available at: http://www.un.org/apps/news/storyAr.asp?NewsID=1501&Cr=iraq&Cr1=.

284 Reportedly the U.S. demanded extradition, the Taleban requested proof of bin Laden's involvement and later (with the prospect of air strikes looming) said it would consider turning him over to a third country but the U.S. administration indicated that it would not negotiate. After strikes began, the Taleban reiterated its offer: *see*, e.g., *Toronto Star*, 6 October 2001, p. A4; or *Associated Press*, 7 October 2001): 'Under Islamic law, we can put him on trial according to allegations raised against him and then the evidence would be provided to the court.' It may be that cooperation was not feasible and would not have weakened al-Qaeda sufficiently, but, as has been noted, 'that case was never really made in public'. *See* R. Falk, 'Appraising the War against Afghanistan', p. II, available at http://www.ssrc.org/sept11/essays/falk.htm.

285 *See* Radio Interview with Tony Blair: 'If they are not prepared to give up Bin Laden, which they could do if they want, they become an obstacle. That is their choice', ABC Radio, note 277.

to use coercive measures),[286] or whether the 'extradition' ultimatum was essentially of presentational significance. If self defence were justified at the outset, could the threats at a certain point have been addressed through law enforcement and was this justified on an ongoing basis?

While it would be far-fetched to suggest that the existence of the complex system of national and international criminal justice automatically renders the right to use force in self defence redundant, should be one of the alternatives that states are obliged to explore in assessing the necessity of resorting to force. What may be noteworthy then is that the criminal law paradigm and its relationship to the necessity of the use of force was virtually absent from post September 11 discourse by those that were responsible, ultimately, for the Afghan intervention. While people can reasonably disagree on whether law enforcement measures alone would have been effective to meet the threat posed, and the Afghan record gives cause for profound skepticism,[287] the question remains whether, in these circumstances, the case for the necessity of force (of the nature and scale employed in Afghanistan) was adequately made out at all relevant stages.

5B.1.1.4 Self defence and the Security Council post 9/11

Indications are that in the wake of 9/11 the Security Council was poised to assume its responsibility in respect of a situation that it condemned, the day after the attacks, as a 'threat to international peace and security',[288] in clear reference to its unique powers to determine and take measures (including if necessary the use of force) to address such threats. It also '[e]xpresse[d] its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations'.[289] However, this dimension of the Council's role was not invoked by states, which proceeded instead to act unilaterally and through US-led 'coalitions of the willing'.[290] While the UN subsequently authorized ISAF in Afghanistan, it is noteworthy that despite the passage of more than a decade into the enduring military

286 One question is whether criminal law enforcement in conjunction with military force might debilitate the threat, reducing the scope for military action even if it fails to avert it altogether.

287 Prior efforts to secure suspects and process suspected terrorists are a factor in such a determination. However, the possibility of unprecedented post 9/11 unity providing the basis for an enhanced cooperation initiative, if necessary supported by the use of force as a law enforcement tool, should also be considered. See Chapter 4.

288 SC Res. 1368 (2001), 12 September 2001, UN Doc. S/RES/1368 (2001), para. 1.

289 *Ibid.*, para. 5.

290 It has been pointed out that the coalition was not brought under the umbrella of the UN, in contrast to the Gulf Coalition that used force against Iraq in 1990. *See* Myjer and White, 'The Twin Towers Attack', note 87, at 7. *See* however, the separate ISAF operation.

operation in Afghanistan, the US continues to purport to act in self defence through Operation Enduring Freedom.[291]

Military action in Afghanistan therefore prompts questions as to the correct relationship between permissible self defence and collective action under the Charter. While the US and its allies may have fulfilled the obligation under Article 51 to 'report' measures taken in self defence to the Council, one question is whether they should have attempted to secure a mandate from the Council instead of relying on self defence one month after the attack.[292] The Article 51 reference to self defence 'until the Security Council has taken measures necessary to maintain international peace and security' suggests so. It may be questioned then whether the refusal to engage the Council in this context undermined the collective security mechanism.[293]

So far as the use of force is unilateral (permissibly so in the case of self defence) the underlying assessments – such as whether alternative means exist, whether a threat is imminent, or whether it is necessary in the wake of an attack to remove governments perceived to be sympathetic to terrorist causes – are in turn unilateral. In part this highlights the importance of having strict and clearly defined criteria for self defence. It also underlines the importance of a collective mechanism assuming its role at the earliest opportunity. Growing lack of confidence in the reliability of intelligence on the basis of which decisions are made, generated through the 'war on terror', underscores the importance of checks on individual states' discretion to act. By refusing to engage – rather than only report to – the Security Council, states avoided accountability and oversight of the resort to armed force internationally.

5B.2 The Use of Force in the 'War' with al Qaeda and associated Terrorists Worldwide

Alongside the conflict in Afghanistan, the US has consistently claimed to be waging a broader war against 'al Qaeda and associated groups' (as discussed in chapter 6, IHL).[294] Pursuant to this, it claims the right to use force against

291 It referred to the operation once, while extending the operation of ISAF. Gray, *International Law and the Use of Force*, note 24, p. 207.

292 Note also that questions have been raised as to whether the requirement of 'immediacy' was met by action taken outside the Security Council framework one month on: see generally Myjer and White, 'The Twin Towers Attack', note 87.

293 Article 51 itself provides for self defence 'until the Security Council has taken measures necessary to maintain international peace and security' and imposes an obligation to report.

294 *See* further Chapter 6.B.1. See inter alia George W. Bush, State of the Union speech to joint session of Congress, Jan 29, 2002; US National Security Strategies, below; most recently President Obama, Speech on US drones and counter-terrorism policy, 23 May 2013, note 233.

non-state actors in territories beyond traditional battlefields.[295] In practice, the US has in fact used cross border force against terrorists on a widespread basis, in several states and with growing regularity in recent years.[296] Most commonly, this involves air strikes by unmanned aerial vehicles (commonly referred to as 'drones'). Although not limited to Pakistan,[297] it is noted that reports indicate thousands of deaths through drone killings in that state alone.[298] In Yemen, such attacks are on the rise.[299] While less information is available in relation to Somalia, it is clear that numerous attacks have also occurred there, apparently mainly against members of the the al Shabaab organisation believed to have close links to al Qaeda.[300] Less commonly, Special Forces operations have also conducted raids to kill (or on occasion to capture) suspected al Qaeda operatives, as illustrated by the particualr case

295 "The long war against terrorist networks extends far beyond the borders of Iraq and Afghanistan and includes many operations characterized by irregular warfare – operations in which the enemy is not a regular military force of a nation-state. In recent years, U.S. forces have been engaged in many countries, fighting terrorists and helping partners to police and govern their nations." US Department of Defense *Quadrennial Defense Review Report* (2006) p.11.

296 "In January 2009, when Obama came to power, the drone programme existed only for Pakistan and had seen 44 strikes in five years. With Obama in office it expanded to Afghanistan, Yemen and Somalia with more than 250 strikes. Since April there have been 14 strikes in Yemen alone." 'Drone wars and state secrecy – how Barack Obama became a hardliner' Paul Harris, The Observer, Saturday 2 June 2012 20.56 BST http://www.guardian.co.uk/world/2012/jun/02/drone-wars-secrecy-barack-obama.

297 The Guardian's website maps the locations of drones strikes in Pakistan: http://www.guardian.co.uk/news/datablog/interactive/2012/aug/02/drone-attacks-pakistan-map?utm_medium=referral&utm_source=pulsenews>.

298 *See* e.g., Stanford Law School Report Living Under Drones (2012) at < http://livingunderdrones.org>; The Bureau of Investigative Journalism (TBIJ) reports that drone strikes killed 2,562-3,325 people in Pakistan from June 2004 through mid-September 2012. It has been noted that the number has now surpassed the number of those killed in 9/11, though of course legally the requirements of self defence do not involve numbers calculations but proportionality to the attack or imminent threat being averted, as noted in part A and further below. Chapter 6B22 for more detail on drones.

299 TBIJ asserts that the Yemen casualties since 2002 have amounted to between 362-1,052 (reported) and that there have been between 53-63 confirmed U.S. operations in Yemen over this time. For examples see <http://www.thebureauinvestigates.com/2012/05/08/yemen-reported-us-covert-action-2012/>.

300 While reporting on the U.S. intervention in Somalia (2001) is described as incomplete, TBIJ has reported approximately 170 people have been killed since 2007, and that there have been up to 23 U.S. strikes and 9 drone strikes between 2007 and 2012. The main target of US action in Somalia has been militant group al Shabaab which is reported as having strong links with al Qaeda. [*Reuters*, 'Qaeda leader says Somalia's Shabaab joins group' Feb 9 2012 <http://www.reuters.com/article/2012/02/09/ozatp-qaeda-shabaab-idAFJOE8180BP20120209>], though al Qaeda leaders are also among those targeted: see e.g. Eric Schmitt and Jeffrey Gettleman 'Qaeda Leader Reported Killed in Somalia' *New York Times*, May 2, 2008accessed<http://www.nytimes.com/2008/05/02/world/africa/02somalia.html?ref=adenhashiayro&_r=0>.

of Osama bin Laden discussed in Chapter 9.[301] The actual, and potential, scope of such international operations remains uncertain; one area of speculation for example is whether, or how, the increased CIA surveillance over sways of Africa for example will translate into the 'elimination' of detected threats.[302] What is clear is that targeted killings have vastly increased in the course of the war on terror.[303]

The US justifies the use of force, including the now frequent resort to drone killings, as 'consistent with its inherent right to self defense under international law'.[304] It has claimed the right to attack al Qaeda and associated entities and individuals "anywhere in the world," consistent with the perception of a "global battlefield" and a conflict against international terror networks of 'global reach'.[305] The nature of the escalated resort to force by the US raises many questions from across the legal framework.[306] The implications of the 'long war' and the 'global battlefield' for the laws of war/IHL, and the interrelationship with human rights protections, for example, are often the focus of attention, as discussed in Chapters 6 and 7. But critical issues also arise as regards the implications for the principles enshrined in Article 2(4) and the strained approach to the concept of self defence in international law. Some of the key questions arising in respect of the purported right to use force

301 *See* Lubell 'the War(?) with al Qaeda', referring to operations in Syria, p. 428, and the Libya raid to capture al Libi, October 2013, in E. Wilmshurst (ed.), Classification of Conflicts (Oxford), 2013.

302 *See*, e.g., 'U.S. expands secret intelligence operations in Africa' *Washington Post*, 14 June 2012. The surveillance planes are launched from one of a series of bases where states appear to have consented, but travel into many other African states where counterterrorism is described as the main U.S. priority. http://www.washingtonpost.com/world/national-security/us-expands-secret-intelligence-operations-in-africa/2012/06/13/gJQAHyvAbV_story.html.

303 See below, though Obama heralded a reduced resort to drones in the future in his 2013 National Defense University speech.

304 E.g., Harold Koh, Comments at the Annual Meeting of the American Society of International Law, Washington, D.C. (hereinafter 'ASIL Comments 2010') 25 March 2010, available at: http://www.state.gov/s/l/releases/remarks/139119.htm. John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, The Efficacy and Ethics of U.S. Counterterrorism Strategy, Remarks at the Woodrow Wilson International Center for Scholars (Apr. 30, 2012), *available at* http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy. A released DOJ White Paper, "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force," disclosed by NBC News, 4 Feb 2013 provides the perameters of the US legal position; *see also* President Obama, speech, 23 May 2013, note 233, asserts the lawfulness of all such actions under the law of self defence.

305 George W. Bush, State of the Union speech to joint session of Congress, Jan 29, 2002; Obama continued to assert the right to target enemies wherever they are; see below for emerging qualifications such as the willingness and ability of the state.

306 This is for many reasons, related to IHRL, IHL – *see*, e.g., Special Rapporteur on Extra-judicial arbitrary executions among other condemnation (available at: http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx) – though they also raise serious issues regarding the law on the use of force which are the focus of this chapter.

against members of al Qaeda on a potentially global scale are highlighted below.

5B.2.1 Overriding Sovereignty? Questioning the relevance of Article 2(4)

A preliminary question has arisen regarding whether the targeted use of force against al Qaeda suspects in certain states around the world, in certain circumstances, engages the article 2(4) prohibition at all. On a perhaps extreme view, it would be unnecessary to invoke self defence as there would be no use of force in prima facie violation of Article 2(4).

One question in this vein is whether limited incursions onto another state's territory, for the purposes of a targeted killing for example (as opposed to the large scale military interventions that characterized early resort to force in the war on terror), should be considered to violate territorial integrity or political independence envisioned in Article 2(4) at all. The fact that states often emphasise the 'limited' nature of incursions may suggest that this is relevant to the determination of lawfulness.[307] However, as noted in relation to the legal framework set out above, the dominant reading of international law as it currently stands is that there is no 'threshold' for the use of force between states, such that limited excursions might be considered excluded from the prohibition. Rather, any coercive incursion onto another state's territory may violate Article 2(4) unless it can be justified by reference to one of the exceptions outlined above.[308]

Another view to emerge from debate in the United States, but of doubtful legal force, is that if a territorial state is 'unwilling or unable' to itself address the terrorist threat from its territory, the Charter's 'sovereignty concerns are overcome' and there is simply no violation of Article 2(4).[309] While as noted below, willingness and ability may be one factor of relevance to an assessment of whether self defence is necessary,[310] it must, however, be seriously doubted

307 Tams, 'Use of Force', supra note 50, p. 388.

308 This relates to the question of a 'threshold' discussed in a different context (when an armed attack by terrorist groups might arise) in part A.

309 Jack Goldmsith, former head of the Office of Legal Counsel tasked with providing legal guidance to the president and executive branchsuggests that the 'U.N. Charter's sovereignty concerns are overcome because the nation in question is unwilling or unable to address the group's threat to the United States.' http://www.lawfareblog.com/2011/09/thoughts-on-the-latest-round-of-johnson-v-koh. It contrasts this view to that of Harold Koh which suggests, in line with international law, that the U.S. needs to justify its position by reference to self defence. See also The Stanley Foundation, *Bridging the Policy Divide, America and the Use of Force: Sources of Legitimacy* June 2007, p. 2, p. 7.

310 It appears to be in the context of an assertion of self defence that the Obama administration asserts the relevance of willingness or ability test, not as a separate exception: note the debate between Koh and Goldsmith. Koh's view is that it is part of the self defence assessment, and it is addressed further, in that context, to be discussed.

that the fundamental protection of Article 2(4) is simply removed in these circumstances.[311]

States do have obligations to act against terrorism on their territory, as explained for example in Chapter 2, but the legal framework is clear that the use of force is not one of the countermeasures that states may take in response to violations.[312] Nor, as noted above, is the unilateral use of force to 'enforce' international law a recognized exception.[313] Many – if not most – states struggle to various degrees to address the threat of terrorism, and it is difficult to countenance the implications for international stability if allegations of such unwillingness or inability alone, as determined by another state unilaterally, were per se to remove sovereign protection. Indeed, even in relation to the more extreme and difficult situations of failed and failing states in Chapter 5 Part A, it is questioned that the Article 2(4) protection ceases to exist. Rather the question must remain whether or not, absent collective UN authorized action, the conditions for the exercise of the right to self defence are met.[314]

One preliminary question regarding Article 2(4) that *is* key, however, is whether there is territorial state consent to the particular use of force. While not relevant to many aspects of the framework – a territorial state cannot consent to a violation of human rights on its territory by another state, or to violations of IHL – if a state consents to the cross border operations in question, there is no violation of the state's territorial integrity. It appears for example that Yemen had consented to operations on its territory in relation to the first drone strike of 2002, while the situation in respect of Pakistan remains debatable.[315] Recent practices recalls that it is often politically difficult for governments to publicly acknowledge that they have consented to the United States' carrying out targeted killings on their territory, which makes this a murky determination of fact. An illustration of this emerged from the revelation that the President of Yemen approved US operations against al Qaida in the Arabian Peninsula while stating that 'we'll continue saying the bombs are ours, not yours';[316] another was the statement by the foreign minister of Burkina Faso

311 These doubts arise all the more strongly in the context of 'failed and failing' state scenarios, discussed previously, but as noted even there Article 2(4) applies; see Dutch report, supra note 194 and discussion at at 5A.4.

312 Chapter 3.3.1.

313 See 5A.3.2, 'Force to Enforce'. States in practice rely on self defence not law enforcement rationale, though they may sweeten their case by reference to infractions by the territorial state – Afghanistan is a prime example. *See* e.g. discussion in Tams, 'Use of Force', *supra* note 50, p. 378.

314 Chapter 5.A.3.4 'Failed and Failing States'.

315 *See* Lubell, 'The War (?) with al Qaeda', *supra* note 302, p. 430 and Chapter 9 in relation to the killing of Osama bin Laden.

316 U.S. Embassy cable from Yemen, 4 January 2010, Yemeni president Salah rejects U.S. ground presence (www.guardian.co.uk/world/us-embassy-cables-documents/242380). In C. Gray, 'President Obama's 2010 United States National Security Strategy and International Law on the Use of Force', *Chinese Journal of International Law*, 35 (2010), para. 23.

on the importance of being 'very, very discreet' in relation to whether the state permitted US special forces operations on their territory.[317] The result may be confusion of fact, but not of law, on the critical preliminary question of state consent.

The fact that the US administration consistently relies on self defence may support the assumption that, at least some of the time, the attacks on members of al Qaeda are not being conducted with the states' consent. Nor can there be a serious contention that they are justified by Security Council resolutions. The lawfulness of the increasing resort to targeted killings in other states territorities must therefore depend on the stregnth of the US claim that the attacks are justifiable under the law of self defence.

5B.2.2 Justifications based on Self Defence

In response to mounting criticism of their wide resort to targeted killings, the US President and several high level officials have set out the perameters of the US position on self defence. The right to self defence has variously be justified on the basis that 'al Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us,' and that 'high level al Qaeda leaders are planning attacks.'[318] Likewise, it has stated 'we conduct targeted strikes because they are necessary to mitigate an actual ongoing threat – to stop plots, prevent future attacks, and save American lives.'[319]

In relying on self defence as the justification, the questions to be addressed in relation to each incidence of use of force are whether, in accordance with the legal framework set out above, an armed attack has occurred or – if anticipatory self defence is accepted – one is imminent, and if the use of force is necessary and proportionate to avert it.[320]

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317 E.g., Washington Post 14 June 2012, (note 328), citing an interview with Djibril Bassole, the foreign minister of Burkina Faso, praised security relations between his country and the United States, but declining to answer questions about the activities of U.S. Special Operations forces in his country. 'I cannot provide details, but it has been very, very helpful,' he said. 'This cooperation should be very, very discreet. We should not show to al-Qaeda that we are now working with the Americans.' http://www.washingtonpost.com/world/national-security/us-expands-secret-intelligence-operations-in-africa/2012/06/13/gJQAHyvAbV_story_4.html.

318 Koh, 'ASIL Comments 2010', *see* note 304.

319 John Brennan, Assistant to the President for Homeland Security and Counterterrorism, speech on counterterrorism of 30 April 2012 at http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100 Brennan 2012 speech.

320 *See* Chapter 5A.

5B.2.2.1 Identifying the 'Armed Attack'?

As discussed in the legal framework and in relation to Afghanistan, while the matter remains in dispute, the predominant view would now appear to be that non-state actors may launch an armed attack, triggering the right of self defence.[321] While 9/11 was, understandably, widely considered to constitute such an attack, the nature or source of any current 'attack' from 'al Qaeda and associated groups', many years on from 9/11, is far less obvious.[322] It is, for example, doubtful that to the extent that there have been attacks on the US from al Qaeda since then, that they could meet the scale or intensity threshold that is often thought to apply for an armed attack by a non-state group.[323]

One approach, reflected in occasional references to the targeted terrorists as participating in a 'continuing' attack against the US, is that there is an ongoing terrorist attack, which may have began on 9/11 but continues to the present day.[324] The law acknowledges that a series or accumulation of attacks may in certain circumstances constitute the armed attack – and the series taken together may meet any intensity threshold that singly they would not have met. The suggestion, however, of one 'ongoing' attack broad enough to embrace the 9/11 attacks of more than a decade ago, and the disparate attacks by disperate entities since then, would surely constitute such an elastic approach to armed attack as to be unsustainable.

Moreover, for acts of violence to form part of one larger armed attack for the purposes of self defence they would have to emanate in some degree from 'the same source.'[325] Reports of the diminished, disparate and increasingly individualised nature of al Qaeda actors, discussed in more detail in Chapter 6, make this case harder to sustain as time goes on. It must be doubted whether attacks (or, as noted below, threats) from al Qaeda and its uncertain "associated" groups, still less the "a far-reaching network of violence and

321 *See* Chapter 5B.1.1.4, 'Self-defence and the Security Council Post 9/11'.

322 On the nature of al Qaeda and its shift from an organsiation or netwrosk to a broad umbrella ideology, and its capacity, *see* Chapter 6.B.1

323 On the intensity threshold *see* Chapter 5A.2.1.1, 'Conditions for the exercise of self defence'. *See* Lehto, note 227, on the diminished nature of al Qaeda, and the incidence of attacks in recent years.

324 "As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us." Harold Hongju Koh, Legal Adviser, U.S. Department of State, 'The Obama Administration and International Law' (Annual Meeting of the American Society of International Law, Washington, DC, 2 March 2010) accessed at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

325 *See*, e.g., Leiden Recommendations, note 59, para 11.

hatred,"[326] could conceivably be considered to constitute a continuum from the same source.[327]

5B.2.2.2 From Anticipatory Self Defence to Preventive Force?

More plausible perhaps, and consistent with the emphasis the US places on prevention, is the argument that what the US asserts is a right to act not against an existing attack but against the threat of future attacks. Other than references to al Qaeda 'continuing to attack us,' most of the administration's justifications referred to the 'on-going threats,' and the right to act to stop 'plots' and to act against those 'planning' to attack the US. It is the assertion of the right to exercise self defence 'preventively' in this way that has given rise to one of the most controversial, and most potentially significant, differences of view as to the scope and limits of self defence against terrorism post 9/11.

It is worth sketching out, therefore, the expansive doctrine of self defence against terrorism that has been advanced, in various guises, by the United States since the inception of the war on terror. In its most extreme and explicit form, it was presented in the US National Security Strategy of 2002 which states that the US will 'exercise our right of self defence by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country ... by identifying and destroying the threat before it reaches our borders'..[328] The NSS premised self defence not on an existing attack, nor indeed (expressly rejecting the *Caroline* criteria) an imminent attack, but on the threat represented by 'terrorists' on the one hand, and 'tyrants' and 'rogue states ... determined to acquire WMDs' on the other.[329] Even the threat need not yet have existed, as the US National Security Strategy envisaged military

326 *See* discussion on the scope of the entity the U.S. purports to be entitled to attack, and to be at war with in Chapter 6. *See*, e.g., President Obama's cover letter to the 2010 Strategy: "For nearly a decade, our Nation has been at war with a far-reaching network of violence and hatred;" U.S. President Barack Obama, 'The National Security Strategy of the United States of America', May 2010, p. 20, available at: http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf: 'Yet this is not a global war against a tactic – terrorism or a religion – Islam. We are at war with a specific network, al-Qa'ida, and its terrorist affiliates who support efforts to attack the United States, our allies, and partners.'

327 This logical proposition is supported e.g. in the Leiden Recommendations, note 59, para. 39.

328 Presented by President Bush on September 2002. See the doctrine being endorsed explicitly in the 2006 National Security Strategy, but it was not mentioned in the 2010 incarnation. On the extent to which this reflects a shift see later in this chapter.

329 While the link between the two is referred to throughout the U.S. National Security Strategy – by reference to the 'crossroads of radicalism and technology' and the 'overlap between states that sponsor terrorism and those that pursue weapons of mass destruction' – the basis for the assertion of this link has been the subject of controversy in relation to Iraq and beyond. See G. Miller, 'Iraq – Terrorism Link Continues to Be Problematic', *Los Angeles Times*, 9 September 2003. Note the 2010 NSS continues to note as a key threat the risk of 'extremists' accessing WMDs.

action 'against such emerging threats before they are fully formed' with an emphasis on the language of prevention, pre-emption, dissuasion and deterrence.[330] Such a policy of pre-emptive force did not apparently require clear and specific evidence of an impending attack, and it was unclear how speculative the threat might be to purport to justify the pre-emptive use of force in self defence.[331] The 2006 National Security Strategy that followed emphatically endorsed the doctrine of pre-emption, explicitly noting that 'The place of preemption in our national security strategy remains the same.'[332] It emphasized that 'to forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defence.'[333]

What remains of the NSS doctrine of pre-emption in US policy and practice?[334] The answer is not apparent on the face of President Obama's 2010 Strategy; while resoundingly different in tone, and audibly so on some substantive issues, it was hushed on the use of force, and silent on pre-emptive self defence.[335] In its immediate wake some question whether this meant an abandonment of the policy of pre-emption on the one hand, or its continuity on the other.[336] The continuity of its position in respect of the preventive use of force in self defence was, however, made resoundingly clear through the practice of increasing resort to targeted killings and the justifications presented in response.

Among the key questions arising in this respect is the nature and source of the current threat and whether it might be sufficient to trigger the exceptional right to use force in anticipatory self defence. Emanating as it does from a non-state actor, presumably absent any assertion of state responsibility, the law may require that a threat would have to be of a significant scale, real and immediate, leaving no alternative to the use of force to avert the attack.

The US has, in the course of its war on terror, sought to present a tighter approach to the sort of 'threats' that might satisfy the self defence criteria,

330 The U.S. National Security Strategy includes e.g. 'prevent[ing] our enemies from threatening us ... with WMDs' (p. 7) and to 'dissuad[ing] future military competition; deter[ing] threats against the US and against US' interests, allies and friends' (p. 29).

331 'The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively', *ibid*., section V.

332 U.S. President George W. Bush, 'The National Security Strategy of the United States of America', 16 March 2006, p. 23, available at: http://www.comw.org/qdr/fulltext/nss2006.pdf (hereinafter 'U.S. National Security Strategy 2006').

333 *Ibid*. at 18.

334 The latter question will be addressed in the 'Conclusions' later in this chapter.

335 It does emphasise tha the use of force must be a last resort, consistent with the cnouraging emphasis on alternative solutions to military force, and on multi-lateralism – see further 5.B.4. See 'Internationalism' in Chapter 5B.4.

336 Gray, *supra* note 316.

referring for example to a 'significant threat,' though the nature and scope of the threats that would justify use of force in self defence remain uncertain.[337] It has provided illustrations of such threats as ones that: 'might be posed by an individual who is an operational leader of al-Qaeda or one of its associated forces. Or perhaps the individual is himself an operative – in the midst of actually training for or planning to carry out attacks against US interests. Or perhaps the individual possesses unique operational skills that are being leveraged in a planned attack.'[338] These are real threats that many individuals around the world engaged in criminal activity might pose, and they must be addressed. However, it must be questioned whether they present the sort of exceptional situations or 'international emergency' that the law of self defence was intended to address.[339] In some guises the US has suggested that the use of force would be limited to 'high level' terrorists while in others this requirement as such is not present.[340]

Notably, while the language of pre-emption is no longer favoured or prominent, all justifications assert the right to self defence in the absence of a concrete identifiable threat of imminent attack. The emphasis on using force against those 'planning' attacks and 'intending' to carry them out[341] would appear to fall some way short of the legal pre-requisites for exceptional resort to anticipatory self defence set out in Part A.

The US at various stages appeared to reject the imminence requirement, reflected most starkly in President Bush's explicit rejection of imminence in his State of the Union address of 2003 or the NSS.[342] Obama administration representatives also appeared to shun an imminence requirement suggesting

337 As regards the nature of the threat, see also John Brennan speech 30 April 2012, hereafter Brennan speech, April 2012: "And what do we mean by a significant threat? I am not referring to some hypothetical threat – the mere possibility that a member of al-Qa'ida might try to attack us at some point in the future." http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100.

338 Brennan speech, April 2012.

339 Wilmshurst, 'Anticipatory Self Defence', note 69.

340 *See* e.g. the DOJ White Paper February 2013 note 304 which includes this requirement and the Obama speech of 23 May 2013, note 233, which does not.

341 H.Koh ASIL, Washington D.C. March 25, 2012 states: Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks." Accessed at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

342 President Bush stated '[s]ome have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late.' See also 2002 U.S. National Security Strategy, note 251: 'To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.'

that the law has become more 'relaxed in this respect'.[343] However, while there may be growing recognition of the existence of a right of anticipatory self defence, and some stretching also by others of the definition of the 'imminence' requirement that may test the limits of the term, there is little support for the call to dispense with it.[344]

Arguably, recognition that imminence is considered a requirement under international law by other states is reflected in US National Security adviser Brennan's attempts to reconcile divergent international opinions as simply differences as to how you 'define imminence,'[345] or in the DOJ White paper which acknowledged the requirement of imminence while defining it so broadly as to have lost all meaning.[346] It is uncertain how one could plausibly define it in a way that would allow attacks on al Qaeda operatives or others on the basis that they are contributing to the planning of possible future attacks.

An expansive approach to the right to act preemptive or preventively has been coupled with a broad view of related concepts that increase the potential scope of the purported right. First, a broad approach is applied to the targets of the threats that might justify self defence. This is seen, again in its most striking form, in the National Security Strategies, which included threats against 'the United States, the American people and our interests at home and abroad'.[347] The US position had long been to invoke self defence in defence of territory and (more controversially) of nationals abroad, but the ambiguity

343 Brennan speech, April 2012, claming the law had 'relaxed'. Note that Koh ASIL 2010 recognises imminence as a 'consideration', but not apparently a legal pre-requsiite: 'Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.' The DOJ White Paper of February 2013 recognises the requirement of imminence, and purports to define it but focuses on the difficulties with imminence ion the context of terrorism.

344 See the wide view of imminence put forward by the UK Attorney General, in Gray 2008, *supra* note 24 p. 215. Wilmshurst, *supra* note 69.

345 Speech of John O. Brennan at Harvard Law School, Cambridge Massechustetts 6 September 2011: Practically speaking, then, the question turns principally on how you define "imminence." He notes later "We are finding increasing recognition in the international community that a more flexible understanding of "imminence" may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts."

346 DOJ White Paper, *supra* note 304 p. 3 notes attacks outside undefined zones of hostilities would be against senior operational leaders of al Qaeda or associated forces who represent an 'imminent threat.' However, imminence is confusingly defined by reference to what it is not, including that it 'does not require clear evidence of a specific attack…,' while explaining that it should take into account various factors including that some people are "continually planning attacks" and the "likelihood of heading off future disastrous attacks" p. 7-8.

347 *See also* reference to the protection of U.S. friends and allies in U.S. National Security Strategy, note 72, p. 29.

and potentially extremely wide-reaching scope of the reference to other 'interests' begged questions as to the nature of such interests and limits thereon and went far beyond the standardd for self defence established in international law, set out in the legal framework in Chapter 5A above. More recent presentations of the US position have focused less on such broad-reaching 'interests', but have continued to refer to the prevention not only of attacks on the US but on 'allies and partners' for example.[348]

Just as the targets of attack are broadly framed, so too, critically, is the *source* of the threat, which is not limited to al Qaeda: as the 2010 NSS made clear, it includes the "growing threat from the group's allies worldwide".[349] This corresponds with reports that, in fact, members of other terrorist organisations other than al Qaeda are now being subject to attack by the US.[350] While recent attempts to move away from the 'war on terror' language are seen as an attempt to better define the enemy, they do not then greatly limit its scope, as seen for example from the explanation that "[T]his is not a global war against a tactic – terrorism or a religion – Islam. We are at war with a specific network, al-Qa'ida, and its terrorist affiliates who support efforts to attack the United States, our allies, and partners.'[351] Threats posed to other nations or interests, by other groups worldwide, appear to be embraced, broadening significantly the scope of the potential use of force for the prevention of terrorist threats worldwide.[352]

Self defence is defensive rather than preventive. It can be justified to repel or to avert an attack, always as an exceptional measure of last resort, but not to prevent the (undoubtedly often real) risks of undefined future attacks.[353] Attractive as strategies of prevention rather than response are, the general acceptance of the unilateral right to use force against global threats is irreconcil-

348 Examples include "The nation is at war with terrorist organizations that pose a threat to its security and that of other societies that cherish the principle of self-government", US National Military Strategic Plan; US National Security Strategy 2010.

349 2010 US National Security Strategy: 'Al Qa'ida's core in Pakistan remains the most dangerous component of the larger network, but we also face a growing threat from the group's allies worldwide.'

350 *See* e.g. report of the head of the Islamic Movement of Uzbekistan, 'Uzbek rebel killed in Pakistan', *BBC News*, 2 October 2009 in Lubell, 'The War against al Qaeda', note 301, p. 427.

351 *Ibid.*, at 20. See also DOJ White Paper, 4 February 2013, and President Obama 23 May 2013 speech, *supra* note 254.

352 *See* e.g. U.S. National Military Strategic Plan, note 347.

353 Wilmshurst, 'Anticipatory Self Defence', note 69, notes that 'Outside the US the Bush doctrine has had little or no support from States or commentators, and is widely rejected as impermissible under international law.' She cites e.g. the statement by the UK's Foreign Secretary, Foreign Affairs Committee, Foreign Policy Aspects of the War against Terrorism, Session 2002-2003 Cm 5793, 8; In Larger Freedom, UN. Doc A/59/2005 (2005) para. 188-192; C. Gray 'The US National Security Strategy and the New "Bush Doctrine" on Pre-emptive Self-Defence', *supra* note 251, at 437; C. Greenwood 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda and Iraq', note 87.

able with the exceptional nature of self defence, the even more exceptional nature of anticipatory self defence, and ultimately the fundamental prohibition on the use of force under international law.

5B.2.3 Necessary and Proportionate Force and Terrorism

For the reasons set out above, it is doubtful that an analysis of the legality of preventive use of force against al Qaeda members around the world would meet the requirements to trigger self defence and proceed to the necessity and proportionality test. If, however, circumstances arose in which terrorists were engaged in a large scale attack against the US, as on 9/11, or such an attack was imminent, the right to self defence may be triggered and the question to be addressed would be the necessity and proportionality of the particular measures of force proposed to avert the threat.[354]

The use of force must plainly be a last resort. A fundamental question of relevance to the lawfulness of self defence is whether criminal law, backed up with enhanced experience of prosecuting terrorism international cooperation is not available as an option.

The existence of challenges and even a certain degree of risk may be inherent in law enforcement. As the war on terror amply illustrates, detention can be a legal and political quagmire.[355] But the criminal cooperation model cannot simply be set aside as costly, inconvenient or risky and therefore unrealistic. The unilateral use of force will be lawful only if, in the particular circumstances of the individual's case, there is no prospect of averting the threat by other means. It may be noteworthy that in Afghanistan there had been indictments issued in respect of Taleban and al-Qaeda operating out of afghan territory, the government had at least in principle been asked to engage to extradite, backed up by the Security Council. By contrast, there is little suggestion by the US that all of the hundreds of individuals now being targeted are subject to international arrest warrants (open or sealed).

One of the ways in which the US doctrine of self defence has become more restricted in its presentation over the course of the war on terror has been through the apparent qualification of its right to act where the state is 'unwilling or unable' to do so.[356] Considerable emphasis has, in practice, been

354 *See* Chapter 5A.2.1.1 and the *Nicaragua* case.

355 *See* Chapter 7B 'Human Rights and Security Post September 11' and Chapter 6B 'International Humanitarian Law and the 'War on Terror'' for further discussion of detention in armed conflict. See also Chapter 8 Guantanamo Bay.

356 U.S. Attorney General Eric Holder, in an apparent attempt to appease allies, responded to concerns regarding geographic scope by stating that they only target in states which are unwilling or unable to stop the terrorists, though as noted this is relevant to *jus ad bellum*, not to IHL. 'Holder Speech on National Securirty, Northwestern University, 4 March 2012. *See also* Obama, 23 May 2013 speech, note 251, and earlier: "What I said was that

placed on states' inability or unwillingness to cooperate to avert the threats, in relation to the bin Laden operation and in other contexts,[357] and has been subject of academic commentary for example.[358] This reflects practice from other states where emphasis has been placed on the unwillingness and inability of other states to address threats as a justification for action in self defence.[359]

If the territorial state were willing and able to act, the use of force would be unnecessary. It is therefore appropriate that willingness and ability be taken into account as an element of the necessity test. It should be emphasized, however, that it is not a separate justification for the use of force under international law, and the lawfulness of the use of force depends on all of the conditions for self defence being met.

Likewise, while states are under an obligation to act to address threats and attacks emanating from their territory, the right of other states to use unilateral force is not a consequence that flows from a breach of this obligation.[360] Unwillingess and inability should therefore be understood not as providing carte blanche to a state to use force but as an aspect of the self defence test among others. This is especially important given that many aspects of the parameters of unwillingness and inability remain unclear, which may represent an area of the law ripe for legal development or clarification.[361]

Finally, the particular instance of resort to force, for example to kill or capture a particular individual, would have to be necessary (and no more than necessary) to avert the threat. This depends on reliable information being available concerning the particular role of the individual, and would by its nature appear to limit the use of force to high level individuals making a direct contribution to an attack, actual or impending, who need to be stopped to stop

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if we have actionable intelligence against bin Laden or other key al-Qaida officials ... and Pakistan is unwilling or unable to strike against them, we should." Presidential Candidates Debate Pakistan, Feb. 28, 2008, *available at* <http://www.msnbc.msn.com/id/23392577/ns/politics-decision_08.

357 Andy Merten, Presidential Candidates Debate Pakistan, MSNBC (Feb. 28, 2008, 4:24 PM), and Obama Vows to 'Take Out' Terror Targets in Pakistan, AFP (Sept. 28, 2008), available at http:// tinyurl.com/6mlznzx ("If Pakistan is unable or unwilling to act" against al-Qaida leaders, "then we should take them out."), in A. Deeks, 'Unwilling or Unable' *supra* note 105, fn 2.

358 For academic discussion of this topic, see A Deeks, *ibid*; Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case', 16 *EJIL* (2005) 963. T Waisberg, 'Colombia's Use of Force in Ecuador Against a Terrorist Organization: International Law and the Use of Force Against Non-State Actors', ASIL Insights, August 22, 2008 <http://www.asil.org/insights080822.cfm>.

359 Russia in respect of Georgia, Israel in respect of Lebanon and Turjey in respect of Northern Iraq are cited as examples in Deeks, note 105.

360 Chapter 2.

361 A former state department legal adviser A. Deeks puts forward factors for an assessment of inability and unwillingness which she states should should constrain states and provide necessary clarity to the legal framework of necessity and proportionality in self defence.

the attack.[362] Killing individuals who are suspected to make a more remote contribution, or killings causing widespread harm beyond the targets (as alleged in relation to some drone attacks), are likely to fall foul of the requirements of necessity and proportionality.[363] *A fortiori*, attacks against 'indeterminate' rather than specific concrete threats, renders impossible the application of the necessity and proportionality calculus, and must be inconsistent with the legal framework.[364]

5B.3 IRAQ

Arguably the use of force against Iraq in March 2003 should not properly be understood as a response to international terrorism at all, and should therefore lie beyond the scope of this study. However, the Iraq intervention was justified repeatedly by reference to the threat of terrorism, to an 'axis of evil' including Iraq, and both Iraq and Afghanistan were described by the Bush administration as the "front lines of the war on terror."[365] The US argued that its engagement in Iraq would be 'the death knell for terrorism.'[366]

The legal justifications for the use of force in Iraq differed from those invoked in relation to Afghanistan, and they differed as between states involved in the intervention. Unlike in Afghanistan, there was no suggestion that the targets of intervention were responsible for the events of 9/11, and in that sense Iraq was not a 'response' to September 11 at all. Though tangential links between Iraq and terrorism were floated sporadically, the Iraq intervention represented an extension of the 'war on terror' beyond terrorists to the longstanding question of the threat posed by the alleged existence of weapons of mass destruction and by Saddam Hussein's regime.

While many arguments were raised before and after the intervention, separately and cumulatively, the US appears to have relied both on self defence

362 Note however how targets are identified in practice, including through eg 'pattern of life' of doubtful consistency with this test, in Chapter 6A.3.1.

363 *See* Chapters 6B.3.1 on high levels of civilian casualties despite the purported precision compared to other weapons systems. Note that the proportionality analysis here – which requires that action be necessary and proportionate to avert the attack – is different from that under IHL which requires proportion to the concrete military advantage, which may be a broader formula.

364 Gray, *Use of* Force, *supra* note 24, p. 203.

365 Gray, *Use of Force*, *supra* note 24, p. 1. See comments by Bush in President Bush Meets with Prime Minister Blair. Remarks by the President and British Prime Minister Tony Blair', White House Press Release, available at: http://georgewbush-whitehouse.archives.gov/news/ releases/2003/01/20030131-23.html. *See* G. Miller, 'Iraq-Terrorism Link Continues to Be Problematic', *Los Angeles Times*, 9 September 2003. On lack of evidence of any such link, *see* 9/11 Commission Report Chapter 3.

366 Condoleezza Rice in P. Reynolds, 'Iraq War Helped al Qaeda Recruit', *BBC*, 19 October 2004.

and on the 'enforcement' of UN resolutions as legal bases for intervention.[367] The UK's legal justification was Security Council authorisation: that even without securing the desired further UN resolution authorising the use of force in Iraq, authorisation could be implied (or 'revived') from earlier resolutions of the Council.[368] A similar approach appears to have been adopted by the Dutch government in its decision to support the Iraq intervention.[369]

The degree of support or, at least, passive acquiescence in the use of force in Afghanistan stands in sharp distinction to the subsequent global divisions over the lawfulness of the resort to force in Iraq. While proponents of military action can be found among states and legal commentators, the Iraq intervention provoked unprecedented opposition, based in significant part on widespread concerns as to its lawfulness. Unusually outspoken statements on the unlawfulness of the Iraq intervention were heard before and after the intervention, including from many states, individually[370] and collectively,[371] the

367 After the adoption of SC Res. 1441 (2002), 8 November 2002, UN Doc. S/RES/1441 (2002), the U.S. Permanent Representative to the UN noted that the resolution 'does not constrain any state from acting to defend ... or to enforce relevant UN resolutions' (U.S. Permanent Representative to the UN Ambassador John Negroponte, Statement to the UN Security Council, U.S. Mission to the UN Press Release, 8 November 2002, available at: http://2001-2009.state.gov/p/io/rls/rm/2002/15018.htm). See generally, also W.H. Taft IV and T. Buchenwald, 'Agora: Future Implications of the Iraq Conflict: Preemption, Iraq, and International Law', 97 (2003) AJIL 557.

368 *See* 'Legal Basis for Use of Force against Iraq', opinion published by the UK Attorney General, Lord Goldsmith, on 17 March 2003, available at: http://webarchive.nationalarchives.gov.uk/+/http:/www.number10.gov.uk/Page3287. For contrary view of this opinion and evidence given in its support to the Iraq Inquiry, *see* D. Akande and M. Milanovic, 'Submission to the Inquiry on the UK's Legal Justification for the Iraq War and Lord Goldsmith's Legal Advice', 14 June 2010. The Inquiry had yet to report but was expected to do so in 2013. Letter from J. Chilcott to the Prime Minister 13 July 2012, available at:http://www.iraqinquiry.org.uk/media/54266/2012-07-13%20chilcot%20cameron.pdf. This includes an outline of the Inquiry's report.

369 Report of the Dutch Committee of Inquiry into the war in Iraq, NLIR 2010, *supra* note 194. The Dutch were not directly involved in but offered support to the Iraq intervention. The Inquiry report was critical of the lack of an adequate legal basis for the war, at p.136, including rejecting what was presented as the "corpus theory" akin to the UK approach, p.134.

370 *See*, e.g., the responses of France, Russia, China, Syria, Egypt, Saudi Arabia, Kuwait, Bahrain, Iran discussed in House of Commons Research Paper 02/64, 'Iraq and Security Council Resolution 1441', 21 November 2002, pp. 33-6, available at: http://www.parliament.uk/commons/lib/research/rp2002/rp02-064.pdf. Comments of French President Chirac, on 23 September 2003 that "The war launched without Security Council authorisation shook the multilateral system", 'Bush urges UN unity on Iraq', *BBC News*, 23 September 2002, available at: http://news.bbc.co.uk/1/hi/world/americas/3130880.stm; 'Vatican reasserts opposition to war in Iraq', *Catholic News*, 4 October 2002, available at: http://www.cathnews.com/news/210/27.php; Saudi Arabia's Foreign Minister refers to Iraq as 'war of aggression' (see Interview 17 February 2003, available at: http://news.bbc.co.uk/1/hi/world/middle_east/2773759.stm).

UN Secretary-General,[372] official enquiries,[373] legal scholars and international civil society,[374] with resignations following opposition in several cases.[375] There are some indications that governments may have recognized that lawfulness was questionable, but nonetheless supported the intervention, raising questions as to the authority of law and its relationship with legitimacy.[376]

The onus lies on states seeking to justify the use of force to demonstrate its lawfulness, and international reactions raise serious doubts as to whether this onus was discharged.[377] Among the questions arising regarding the lawfulness of the use of force in Iraq are the following: whether the Security Council 'authorised' the use of force, implicitly; whether states can act to 'enforce' earlier resolutions against Iraq, where the Council itself fails to do so; whether a broad right of anticipatory or pre-emptive self defence might be invoked to justify the use of force in this context; and whether the interven-

371 Communiqué of the Arab Summit held in Sharm El-Sheikh, 1 March 2003, available at: http://www.arabicnews.com/ansub/Daily/Day/030303/2003030324.html. ('Arab leaders declare opposition to war in Iraq', *CNN*, 2 March 2003, available at: http://www-cgi.cnn.com/2003/WORLD/meast/03/01/sprj.irq.arab.ministers).

372 P. Tyler and F. Barringer, 'Annan says US will violate Charter if it acts without approval', *New York Times*, 11 March 2003, available at: http://www.nytimes.com/2003/03/11/international/middleeast/11NATI.html.

373 See the Dutch Inquiry Report, 2010, *supra* note 194; the UK inquiry report is pending publication.

374 Opposition was evident from demonstrations around the world of unparalleled proportions. Objections came from many sources: wee e.g.: 'Letter to *The Times*', Sir Franklin Berman, UK legal adviser from 1991 to 1999, and Sir Arthur Watts, UK legal adviser from 1987 to 1991 (*The Times*, Letters, 20 March 2003); open letter to the UK Prime Minister from sixteen academic lawyers ('War Would Be Illegal', *The Guardian*, 7 March 2003); 'Coalition of the Willing – A Pre-emptive Strike on Iraq Would Constitute a Crime against Humanity, Write 43 Experts on International Law and Human Rights', *Sydney Morning Herald*, 26 February 2003; J. Sallot, 'Attack Illegal, Experts Say', *Globe and Mail*, 20 March 2003, reporting an open letter signed by 31 Canadian professors of international law.

375 E. MacAskill, 'Adviser Quits Foreign Office over Legality of War', *The Guardian*, 22 March 2003; T. Happold 'Short Quits Blair's Government', *The Guardian*, 12 May 2003; M. Tempest, 'Cook Resigns from Cabinet over Iraq', *The Guardian*, 17 March 2003; US Department of State, Daily Press Briefing by Richard Boucher, 11 March 2003, available at: http://2001-2009.state.gov/r/pa/prs/dpb/2003/18621.htm, reporting the resignation of two senior officers of the U.S. Department of State 'in relation to the situation with Iraq'.

376 O. Burkeman and J. Borger, 'War Critics Astonished as US Hawk Admits Invasion Was Illegal', *The Guardian*, 20 November 2003, noting comments by the Pentagon's Richard Perle: 'I think in this case international law stood in the way of doing the right thing.' See also legal advice by UK and Dutch legal advisers; see eg Dutch Inquiry Report, *supra* note 194, p. 108 – describing any possible legal basis under existing resolutions as 'wafer-thin'. See also the minority view in the course of the Dutch Inquiry Report itself that despite the unlawfulness, support for the intervention may be justifiable; Additional note of Peter van Walsum, Inquiry report, p. 133.

377 Article 2(4) puts the onus on states seeking to justify the use of force. See also Watts and Berman, 'Letter to *The Times*', note 374.

tion that unfolded was strictly necessary and proportionate, pursuant to its objectives.

5B.3.1 Security Council authorisation?

Questions relating to the role of the Security Council come into sharpest focus in relation to the use of force in Iraq. The first question, critical to the lawfulness of the action in Iraq, in accordance with justifications proferred by the UK at the time, is whether the Security Council had in fact implicitly authorised use of force in Iraq. This is essentially a question of the correct interpretation of the resolutions in question, though it raises broader questions regarding the proper approach to the interpretation of Chapter VII resolutions.

The background facts to the assertion of implied authorisation are, in brief, as follows.[378] In 1991, in the context of the Iraqi invasion of Kuwait, Resolution 678 authorised states to 'use all necessary means' to effect Iraqi withdrawal from Kuwait and 'to restore international peace and security in the region'. Resolution 686 marked a provisional cessation of hostilities, while expressly preserving the right to use force under Resolution 678, and Resolution 687 imposed a permanent ceasefire, without reference to the right to use force. The Resolution 687 cease-fire was conditional on Iraqi destruction of existing weapons of mass destruction and non-acquisition of others, and to this end cooperation with the UN weapons inspectors. Subsequent resolutions, including Resolution 1154, found Iraq in 'material breach' of these conditions, ordered that immediate access be given to the inspectors and warned of 'the severest consequences' of failure to do so, while explicitly noting that the Council would 'remain actively seized of the matter'.[379]

Post September 11, and post Afghanistan, the US and UK sought a further resolution on Iraq.[380] After negotiation, Resolution 1441 (2002) was passed.[381] It found Iraq in 'material breach' of earlier resolutions and gave it 'a final opportunity to comply with its disarmament obligations' by setting up an 'enhanced inspection team'. It warned that non-cooperation would constitute a 'further material breach' which would 'be reported to the Council for assessment' and that the Council would 'convene immediately ... in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security'. The Council 'Recall[ed], in that context, that the Council has repeatedly

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378 For a description of the background and facts, *see* generally Dutch Inquiry Report, 2010, *supra* note 194.

379 SC Res. 1154 (1998), 2 March 1998, UN Doc. S/RES/1154 (1998) and SC Res. 1205 (1998), 5 November 1998, UN Doc. S/RES/1205 (1998).

380 *See* C. Lynch, 'US Presses UN to Back Tough New Iraq Resolution', *Washington Post*, 7 November 2002.

381 SC Res. 1441 (2002), *supra* note 367.

warned Iraq that it will face serious consequences as a result of its continued violations of its obligations'. Subsequent attempts (driven by the UK and US) to negotiate a further resolution authorising the use of force failed.[382]

One of the legal justifications invoked for resorting to force was nonetheless Council authorisation. The US did so by focusing on the existence of a 'material breach' of the Council-imposed obligations as triggering the right to engage the use of force.[383] This argument has been aptly criticised as ignoring the collective rather than unilateral nature of the process: the decision not only whether there is material breach but also what action to take in response falls to the Council not individual states.[384] As noted in relation to 'force to enforce,' there is no unilateral right of states to take such enforcement action involving the use of force.

From the UK, the purported legal justification took the form of what might be described as a mixture of cumulative, implied, or revived authorisation. In accordance with advice of the UK Attorney General, published in summary form on March 2003,[385] the argument simply put was that the authorisation to use force in Resolution 678 was suspended conditionally (not revoked) by Resolution 687 and that once the Council had found Iraq in breach of those conditions (Resolution 1441) the original right to use force was revived.

This argument has given rise to intense controversy on various grounds, stemming from the ordinary meaning of UN resolutions, their context and purpose.[386] The first is that while Resolution 678 uncontroversially authorised force, it did so for a particular purpose, namely to address the situation occasioned by the Iraqi invasion of Kuwait, in the context of circumstances prevalent in 1990. Absent express Council indication to the contrary, such author-

382 While many states opposed the use of force, it was the French expression of intention to veto any resolution seeking to authorise force that was reported as having led the U.S. and UK to abandon 'the UN route', although the French later denied this interpretation of their words. See the speech given by the UK Prime Minister on 5 March 2003, justifying military action in Iraq and warning of the continued threat of global terrorism ('Full text: Tony Blair's speech', *The Guardian*, 5 March 2004, available at: http://politics.guardian.co.uk/iraq/story/0%2C12956%2C1162991%2C00.html).

383 *See* memoranda produced by the Office of Legal Counsel of the U.S. Department of Justice: '*Authority of the President under Domestic and International Law to Use Military Force Against Iraq*', 23 October 2002, available at: http://www.justice.gov/olc/2002/iraq-opinion-final.pdf; and '*Effect of a Recent United Nations Security Council Resolution on the Authority of the President under International Law to Use Military Force Against Iraq*', 8 November 2002, available at: http://www.fas.org/irp/agency/doj/olc/unscr.pdf. Akande and Milanovic, 'Iraq Inquiry', note 368, para. 5.

384 Akande and Milanovic, *ibid*.

385 *See* earlier discussion. The Attorney General notoriously changed his advice, a point on which he was called to account before the Iraq Inquiry. See Lord Goldsmith's draft advice to the Prime Minister of 14 January and 12 February 2003 and Lord Goldsmith's memorandum to the Prime Minister on SC Res. 1441, 7 March 2003, para. 9, and testimony to the Inquiry.

386 *See* Chapter 5.

isation cannot be interpreted as supportive of the use of force in a very different conflict, to address a very different threat, in 2003, in the context of circumstances necessarily quite distinct from those prevalent over a decade earlier.

Second, the plain wording of Resolutions 1154 and 1441, passed since the 1990 resolution, makes clear the Council's intention to remain 'seized' of the matter at each stage and to itself 'consider' how to address the situation as it unfolds.[387] The context of the debate in the Council leading to the adoption of other Iraq resolutions, and statements made thereupon, reveal no agreement that states should have a right to use force as a result of those resolutions or an automatic right to do so in the event of a further breach. Indeed such 'automaticity' was expressly rejected by certain participating states in the context of Resolution 1441.[388]

Moreover, the fact that renewed attempts were made to achieve a further resolution expressly authorising force undermine the argument, ultimately advanced, that no such resolution was necessary anyway.[389]

The controversy also spawns general questions regarding Security Council resolutions and their interpretation of broader relevance to the use of force against terrorism. These include whether the authorisation to use force can ever be implied or, given the exceptional nature of the use of force, and the stakes involved, it must be clear and explicit, and understood as limited to the context and purpose for which it was given.[390] As regards the 'shelf life' of any authorisation to use force, can the assessment of the requirements of international peace and security at one point have continued relevance many months and years later, or does it require clear revival by the Council? Could an overly flexible interpretation of resolutions have a chilling impact on the willingness of states to reach decisions within the Council in the future?[391] Can – as the notion of 'automaticity' suggests – the Council delegate to member states determinations as to what action, including the use of force, might be necessary in the event of breach of its resolutions? Or, as has been suggested, in accordance with the constitutional role of the Council is it to be doubted

387 *See* the *travaux préparatoires* to Resolutions 1154 and 1441, referred to in R. Singh and A. MacDonald, 'Legality of Use of Force against Iraq', Opinion for Peacerights, 10 September 2002, para. 58, available at: http://www.lcnp.org/global/IraqOpinion10.9.02.pdf (hereinafter 'Singh and MacDonald, Opinion on Iraq').

388 *Ibid*.

389 The AG advised that the resolution was unnecessary on this basis. For a discussion of the basis of this, see his advice to the Inquiry on 27 January 2010, and that of Elizabeth Wilmhurst then Deputy Legal Adviser on 26 January 2010, at http://www.iraqinquiry.org.uk/.

390 *See* Framework, Section A of this Chapter.

391 *See* R. Higgins, 'International Law in a Changing International System', 58 (1999) *Cambridge Law Journal* 78.

not only whether the Council *did* delegate, but also whether it *could have* delegated, such an assessment to individual states?[392]

The UK Attorney General had himself acknowledged at an earlier stage that the 'revival' argument 'is not widely accepted among academic commentators' and that he would not be confident of winning the argument 'if the matter ever came before a court'.[393] The matter is now before a UK official enquiry, which will report in due course.[394] As noted above, the Dutch Inquiry for its part completed its work in 2010 and delivered a critical report, rejecting the arguments that either the 'corpus' of resolutions read together, or material breach of prior resolutions, could constitute an adequate legal basis for the intervention.[395] The idea that prior authorisation may be relied upon many years after the fact, for purposes not contemplated at the time of the resolution, has little legal support, and if accepted would seriously destabilise the collective security system.[396]

5B.3.2 Force to enforce UN resolutions?

Explaining the US vote in favour of Security Council Resolution 1441 (2002), the US Permanent Representative to the UN, Ambassador John Negroponte, stated that '[i]f the Security Council fails to act decisively in the event of a further Iraqi violation, this resolution does not constrain any member state from acting to defend itself against the threat posed by Iraq, or *to enforce relevant UN resolutions and protect world peace and security*'.[397] In the absence of Council authorisation, can states rely on a breach of international obligations, including Security Council resolutions, to justify the use of force?

There is no legal basis for the unilateral use of force pursuant to law enforcement within the framework of international law. Statements such as that cited appear to conflate and confuse the 'inherent' right to self defence under the Charter and the right to use force to enforce law or otherwise protect international peace and security, which is not inherent and exists only if

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392 As noted in Part A, under the Charter it is for the Council to decide not only if there is a breach and if it amounts, at the relevant time, to a threat to international peace and security, but also what measures would be appropriate to address such a threat.

393 He advised therefore that the safer route would be to go for a second resolution, though he later said the better view was that the revival argument would suffice, on the apparent basis that no further resolution would be feasible. See testimony of Elzabeth Wilmshurst to the Iraq Inquiry, available at: http://www.iraqinquiry.org.uk/media/43617/100126pm-wilmshurst.pdf (hereinafter 'Wilmshurst Testimony'), and Akande and Milanovic, 'Iraq Inquiry', *supra* note 368.

394 The report is expected during 2013. See http://www.iraqinquiry.org.uk.

395 Ducth Iraq Inquiry, 2010, above, Chapter 8 including the conclusion on p. 136.

396 Akande and Milanovic, 'Iraq Inquiry', note 368, at paras. 9 and 10.

397 Statement of the U.S. Permanent Representative to the UN, Ambassador John Negroponte, following adoption of Resolution 1441, *supra* note 367.

conferred by the Security Council. As noted in Part A, the measures of self help that a state may take to enforce its own rights against an offending state cannot amount to the use of force. Moreover, while certain circumstances, such as serious violations of human rights, may give rise to the responsibility of a broader range of states to act to stop the breach, there is no unilateral use of force other than in self defence.[398]

5B.3.3 Unilateral Action where the Council Fails to Act?

In advancing this role for states, or specifically the United States, as enforcers of obligations (and thereby protectors of the 'relevance of the UN'), emphasis was placed on Security Council failure to act. In the context of the Iraq invasion, it was justified by reference to the fact that no explicit authorisation could be obtained because the veto power had been 'abused', in particular by France which had threatened its use 'unreasonably'.

This implies a doctrine of 'reasonableness' surrounding the use of the veto that international law does not recognise and which would, in practice, eviscerate the Council's authority.[399] When the Charter was adopted, the veto power for the five permanent members was inserted for political reasons, to maintain a degree of political 'balance' in the decisions of the Security Council, an inherently political body, albeit one with unique legal powers. States' reasons for voting and vetoing, which are in turn often political and controversial in nature, cannot affect the legal effect of the veto power.[400] Permitting a state to use force based on its assessment of what the Council *would* have done had all members acted 'reasonably' would clearly be a nonsense.

As noted, history does provide the precedent of the General Assembly's assumption of the Council's responsibilities where the latter was deemed unable to discharge its mandate, though a broad-reaching difference of view (as over the issue of Iraq) is of course distinct from the paralysis of the Cold War era. In any event, in the Iraq context assertions of Council failure did not give rise to assertions of an alternative role for the General Assembly or other

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398 *See* Chapter 3, para. 3.1.3. On the disputed right to intervention to prevent humanitarian catastrophe, *see* Chapter 5A.3.1 and 5B.2.1.6.

399 *See* 'Lawyers Doubt Iraq War Legality', *BBC*, 7 March 2003, available at: http://news.bbc.co.uk/1/hi/uk_politics/2829717.stm. It has also been pointed out that the position may not serve the interests of the U.S. and UK as beneficiaries of the veto power; the U.S. is the state resorting to that power most frequently.

400 Article 27 of the Charter provides that non-procedural matters require nine out of fifteen votes, including the concurring votes of the permanent members.

established collective mechanism, but rather resort to the unilateral, US-led, use of force.[401]

Both the US and UK expressed a preference for Council authorisation at an early stage, while reserving their right to use force unilaterally or multilaterally outside the UN framework if UN consensus could not be achieved and the Security Council 'fails to act decisively'.[402] (When the US formed the view that a resolution would not be feasible, both states reverted to arguing that it was not, in any event, necessary.[403]) This would appear to imply that Council authorisation is optional rather than mandatory and that, at most, resort to the Council is a remedy to be exhausted before invoking force unilaterally. Despite the rhetoric of ensuring the 'relevance' of the UN and the enforcement of its decisions, an approach whereby a State gives the Council time within which to act, threatening do so itself if the Council does not, raises broader questions relating to the ultimate impact on the legitimacy of the Charter's collective security mechanism.

Do the events surrounding the Iraq invasion therefore indicate a marginalisation of role of the Security Council in favour of unilateral or selective collective approaches, and if so what might be the impact of such a shift in other situations? Or, assessed with the benefit of a longer lens, does the extent of the harsh criticism of the use of force in Iraq indicate a backlash away from unilateralism accepted in relation to Afghanistan towards endorsement of 'the UN route'? The Iraq experience may have contributed to the momentum that grows around whether and how the Security Council system might be strengthened, reformed and made more effective.[404]

401 Neither the GA nor for that matter NATO (though, as already noted, the latter has no independent authority unless self defence) were involved in resort to force in Iraq.

402 *See*, e.g., 'Powell Says No Quid-Pro-Quos Exchanged for U.N. Vote', U.S. Department of State Press Release, 10 November 2002, available at: http://www.usembassy.it/file2002_11/alia/a2110803.htm: 'I can assure you if [Saddam Hussein] doesn't comply this time, we are going to ask the U.N. to give authorization for all necessary means. If the U.N. isn't willing to do that, the United States, with like-minded nations, will go and disarm him forcefully ...' *See also* UK Prime Minister in the House of Commons, 25 February 2003, available at: http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo030225/debtext/30225-05. '…If disarmament cannot happen by means of the UN route because Saddam Hussein is not co-operating properly, then what? We shall be left with a choice between leaving him there, with his weapons of mass destruction, in charge of Iraq – the will of the UN having therefore been set at nothing – and using force.'

403 *See* 'Wilmshurst Testimony', *supra* note 393.

404 *See* UN Doc A/59/565 (2004), *supra* note 187. Secretary-General's statement to the General Assembly on his Report 'In Larger Freedom', *United Nations*, 21 March 2005, available at: http://www.un.org/sg/statements/index.asp?nid=1355. UN Doc. A/RES/60/1 (2005), paras. 152-154. *See also* Reforming the UN Security Council in Pursuance of Collective Security, Nico Schrijver, *Journal of Conflict & Security Law* (2007), Vol. 12 No. 1, 127-138.

5B.3.4 Anticipatory self defence?

Post 9/11 the issue of anticipatory self defence first arose, to some extent, in relation to Afghanistan, as the attack committed on 9/11 was apparently over by the time the military response was launched on 7 October, although the threat of future attacks remained.[405] Perhaps as a result of the nature of the 9/11 attacks themselves, hitherto controversial questions regarding the legitimacy of anticipatory self defence were hardly raised in that context, leading to the stark assertion shortly after the Afghan invasion that 'in the changed post-September 11 environment, the concept of anticipatory self defence requires no explanation or justification'.[406] To the extent that the apparent acceptance of anticipatory self defence in Afghanistan may strengthen the case for such a right, it would, however, do so only in very limited circumstances. In Afghanistan those circumstances included (a) a prior attack (of a massive scale), (b) an expressed intention to carry out future attacks, and, arguably, (c) an indication by the Security Council that the requirements of self defence have been satisfied.[407] Any analysis of the impact of the law in this field must therefore take account of these limitations[408] and be assessed in context, in particular in light of the controversy generated over the subsequent assertions of anticipatory self defence in Iraq and elsewhere.

In relation to Iraq, the US made several references to the need to act 'to defend itself against the threat posed by Iraq'.[409] Unlike Afghanistan, there was no meaningful attempt to link Iraq to the attack of September 11 or other attacks, or indeed to al-Qaeda, and as such the justification was clearly anticipatory self defence, without any prior attack. One immediate doubt that such arguments generated in the context of Iraq was what immediate 'threat' Iraq and the alleged weapons of mass destruction posed to the intervening nations

405 *See* U.S. letter to the Security Council which emphasised the preventive and deterrent effect of the use of force.

406 W.K. Lietzau, 'Combating Terrorism: Law Enforcement or War?', in M.N. Schmitt and G.L. Beruto (eds.), *Terrorism and International Law, Challenges and Responses* (Sanremo, 2003) 75, at p. 77.

407 Preamble, SC Res. 1368 (2001), note 288, and SC Res. 1373 (2001), 28 September 2001, UN Doc. S/RES/1373 (2001).

408 Account should also be taken of the peculiarities of the Afghan situation; *see* this chapter, para. 5B.4.

409 Statement of the U.S. Representative to the UN, note 454. Similar justifications for the military action in Iraq have been put forward by the U.S. President. *See*, e.g., George W. Bush, UN General Assembly in New York City Address, 12 September 2002, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020912-1.html. *See also* Taft IV and Buchenwald, 'Agora: Future Implications', note 367; J. Yoo, 'Agora: Future Implications of the Iraq Conflict: International Law and the War in Iraq', 97 (2003) AJIL 563.

and whether it could meet the criteria for self defence.[410] In the UK, it was, with time, made clear that Iraq was not considered by the government to pose an imminent threat to the UK; but in fact no reliance had been placed by the UK on self defence.[411]

The US, however, focused on much publicised concerns regarding the possession of weapons of mass destruction by Saddam Hussein's regime, in apparent support of the right to use force to prevent 'dangerous nations' threatening the US and the world with 'destructive weapons'.[412] What is critical for an assessment of lawfulness is not what we now know about the threat (or lack of one) from WMDs in Iraq, but what the government in question reasonably believed, upon best inquiry, to have been the case at the relevant time.[413] While the possession and development of weapons of mass destruction certainly raises legal issues,[414] including the fact that Iraq specifically had obligations in this respect imposed by the Security Council,[415] unlawfulness in this respect clearly does not *per se* justify the use of force in self defence.[416] The critical question, whether any such weapons represented a real and immediate threat to the US, was not addressed by the US, which preferred to advance an expanded conception of pre-emptive self defence as enabling states to act preventively before such threats are formed.[417] If Iraq

410 *See* Chapter 5A.2.1. There was no evidence of other nations in the Middle Eastern region having requested that the intervening forces act in 'collective self defence, so the threat must have been to the intervening states'. *See* Bothe, 'Preemptive Force', *supra* note 74, at 234. Where the threat is against one of those states, others can however act in collective self defence if requested to do so by the 'victim' state.

411 In the context of the extended debate on the '45 minute claim' published by the UK Government in a dossier of evidence against Iraq, the UK Government clarified that there was not thought to be any such imminent threat to the UK from Iraq. *See* R. Norton-Taylor and N. Watt, 'No. 10 Knew: Iraq No Threat', *The Guardian*, 19 August 2003.

412 President Bush's State of the Union Address: 'I will not wait on events, while dangers gather. I will not stand by, as peril draws closer and closer. The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons.' On U.S. reliance on self defence in Iraq, see Ambassador Negroponte's intervention before the Security Council, *supra* note 367.

413 *See generally*, 'Briefings of the Security Council', 27 January, 14 February, and 7 March 2003, made by Executive Chairman of the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) Hans Blix, available at: http://www.un.org/depts/unmovic/new/pages/security_council_briefings.asp.

414 In the Advisory Opinion on *Nuclear Weapons* the ICJ noted that, under the terms of the Non-Proliferation Treaty, all states had an obligation in good faith to seek nuclear disarmament via international negotiations. See in this respect R. Falk, 'Appraising the War against Afghanistan', note 284.

415 Note Security Council resolutions directed against specific states detailing their obligations to disarm, *see*, e.g., SC Res. 687 (1991), 3 April 1991, UN Doc. S/RES/687 (1991), concerning the conditions for the ceasefire in Iraq, including disarmament, discussed in section A.

416 It may, however, be a breach of international peace and security, but, as already noted, this must be determined by the Security Council.

417 *See* 5B.3.1 and 5.B.4. *See* discussion of the controversial U.S. National Security Strategy 2002 that advanced this view prior to Iraq, below.

did not pose an immediate threat, it did, it was suggested, pose a potential threat.

Suffice to recall that the claims to lawfulness on the grounds of self defence in the context of Iraq met with short shrift from other states; indeed the Dutch Inquiry described it as 'universally recognised' that there was no such legal basis.[418] The apparent attempt, at least at the early stages, to rely on self defence arguments went undefended, and as time went on appears tohave been deemphasised by the United States itself.[419]

The fact that, as is now known, evidence did not emerge of weapons of mass destruction in Iraq following the invasion underscore the questions, highlighted above, as to the degree of evidence that should be required for the use of force against another state, and the lack of any procedure for safeguarding the application of the law of self defence, when states adopt a unilateralist approach outwith the UN framework.

5B.3.5 Humanitarian intervention?

Finally, both the US and UK peppered their discourse on Iraq, and Afghanistan, with references to the humanitarian situations in those countries, but without purporting to rely onhumanitarian intervention as a legal justification as such.[420] Some have questioned whether humanitarian intervention might not have provided a more plausible basis for legality than other arguments advanced, given the notoriety of the Taleban and Sadam Hussein's regimes.[421]

The reluctance of states to advance the argument, particularly on the part of the UK as the erstwhile proponent of a doctrine of humanitarian intervention in exceptional circumstances, may be seen to reflect the controversial nature of the right and undermine the case for its establishment in international law. Or, more compellingly, it may reflect acknowledgement that the formulae of

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418 Iraq Inquiry report, 2010, *supra* note 194.

419 See Taft IV and Buchenwald, 'Agora: Future Implications', *supra* note 409, writing in 2003, who place less emphasis on self defence than Negroponte and Bush did in the autumn of 2002; see also Statement of the U.S. Permanent Representative to the UN, note 399.

420 *See* e.g., U.S. President's Message to the Iraqi People, 10 April 2003, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2003/04/20030410-2.html and 'A Vision for Iraq and the Iraqi People', paper published by the UK Government on 17 March 2003, available at: http://collections.europarchive.org/tna/20080205132101/number-10.gov.uk/output/page3280.asp: 'The Iraqi people deserve to be lifted from tyranny and allowed to determine the future of their country for themselves....' See also the remarks made by the U.S. President on Operation Iraqi Freedom and Operation Enduring Freedom ('President Bush Reaffirms Resolve to War on Terror, Iraq and Afghanistan', White House Press Release, 19 March 2004, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2004/03/images/20040319-3_d031904-515h.html) and cf. K. Roth, 'War in Iraq: Not a Humanitarian Intervention', Human Rights Watch, *World Report 2004*.

421 See, e.g., R. Falk, 'Appraising the War against Afghanistan', note 296.

pre-requisites advanced in other contexts for such intervention – notably the requirement of imminent humanitarian catastrophe or crisis – were not satisfied, despite the undoubted brutality of the regimes in question. In addition, it may be that the timing of the interventions, following 9/11, belied the notion that the true objective (as opposed to desirable side effect) was humanitarian in nature.

5B.4 THE US NATIONAL SECURITY STRATEGIES: INTERNATIONALISM, UNILATERALISM OR EXCEPTIONALISM?

The US National Security Strategies are discussed above in relation to self defence specifically. Their approach to collective security, and to international law more broadly, also deserve mention.

The 2002 Strategy describes itself as 'based on a distinctly American internationalism'.[422] While there are several references to allies, coalitions and international institutions (in that order), it clearly presents a multilateral approach to the use of force as optional rather than mandatory and places emphasis on the readiness of the US to use pre-emptive force unilaterally. It notes that: '[w]hile the US will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self defence by acting preemptively'.[423] One striking feature of the US National Security Strategy in the post 9/11 context was therefore its readiness to unilateralism.

In this respect a notable shift is apparent in the decade of the war on terror. The 2010 NSS emphasizes engagement, diplomacy, strategic multilateralism and strengthening organisations such as UN and NATO (alongside maintaining US military supremacy).[424] The key question is of course not what is in the document but what is in the policy, and how it is given effect. The turn towards international community may be a noteworthy reflection of the lessons of the war on terror, and the effects of excessive unilateralism epitomized in the National Security Strategies of 2002 and 2006. The lauding of multilateralism currently jars, however, with the invocation of such a broad-reaching right to use force unilaterally and preemptively anywhere in the world, as discussed in the preceding section.

Finally, the prominence and relevance of international law in the US National Security Strategies is worthy of comment. As noted above, there is no apparent attempt, direct or indirect, to justify the policy of preemptive self

422 U.S. National Security Strategy, note 72, p. 1.

423 U.S. National Security Strategy, note 72, p. 7. It also notes that 'wherever possible, the U.S. will rely on regional organisations and states ... where they meet their obligations to fight terrorism' (*ibid*., p. 8).

424 Grey, CJIL para 3. See also Koh ASIL 2010, note 413.

defence by reference to international law in any of the Strategies. In 2002, international law is referred to explicitly only once, with regard not to US policy but in the characterisation of 'rogue states' which, *inter alia*, 'display no regard for international law, threaten their neighbours, and callously violate international treaties to which they are party'.[425] In 2006 it is not mentioned at all. In 2010, there are many references to international law, but they are still selective. No attempt is made to justify the policy of self defence according to international law, with the emphasis instead on enforcement of international law breaches by others. For example, it notes that 'We are strengthening international norms to isolate governments that flout them and to marshal cooperation against non-governmental actors who endanger our common security.'[426]

Regrettably, when reference is made to international law, it continues to be presented as applicable to others, rather than being expressly acknowledged as also a constraint on the United States. Conversely, it is open to question whether it envisages that the same standards – for example regarding global pre-emptive self defence – that it advances for the US should be available to others. If not, the Strategies may represent not so much to a doctrine of unilateralism as one of US exceptionalism, that challenges the universality and credibility of the international legal order that the 2010 US Strategy, encouragingly, purports to uphold.

5B.5 Implications for the Use of force against Terrorism by Other States

While the focus of this Chapter is on the practice of the US, which has led the war on terror, it bears emphasis that the practice of cross border force is far from unique to the US, and a similar model may be arising recurrently in international practice in recent years.[427]

Notably, the Russian Federation has an anti-terrorism law conferring on the Russian President the right to send Russian special forces beyond Russia's borders, potentially to any state where he considers it necessary, in order to

425 Rogue states are also described as violating human rights, being determined to acquire weapons of mass destruction, sponsoring terrorism, rejecting basic human values and 'hat[ing] the United States and everything for which it stands'. U.S. National Security Strategy, note 72, p. 14.

426 *Ibid.*, para 18. C Gray, para 4, who notes that 'a similar approach is taken in the 2010 UK National Security Strategy'; see www.number10.gov.uk/news/latest-news/2010/10/national-security-strategy-55815.

427 This chapter concerns only use of force against other states; for increasing resort to force against people in their own territory in the name of counterterrorism, the relevant framework is human rights law in Chapter 7. For example Syria justified a brutal clampdown during 2012 as action against terrorism.

take whatever measure he deems necessary, to combat terrorism.[428] Other examples emerge from practice including the open announcement by Kenya on October 2011 that it would be taking cross border action against al Shabaab militants in Somalia.[429] Turkish justified its cross-border incursions against Kurdistan Workers Party (PKK) camps in northern Iraq by reference both to self defence and 'hot pursuit.'[430] Colombian incursions into Ecuador to take action against FARC rebels based there provides another example.[431]

While each of these situations raises different issues, there has been a wave of assertions of a broad-reaching right to take cross border coercive measures in the name of the prevention of terrorism. Some of them were relevant to consideration of how the legal framework may have developed, as noted above.[432] The significance of the questions raised regarding the US's asserted right to use force against terrorists anywhere in the world are therefore heightened. The US approach may legitimise the same approach by others, as practice already indicates,[433] with significant implications for the prohibition on the use of force at the heart of the international order. It may also contribute, in the future, to a shift in the law itself.[434] It has been noted that

428 S.T. Bridge, 'Russia's New Counteracting Terrorism Law: The Legal Implications of Pursuing Terrorists Beyond the Borders of the Russian Federation', 3 (2009) *Columbia Journal of East European Law* 1.

429 E. Hughes, 'In (Hot) Pursuit of Justice? The Legality of Kenyan Military Operations in Somalia', 20 (2012) *African Journal of International and Comparative Law* 471.

430 'The U.S. has expressed solidarity with Turkey in its fight against terror, saying that it recognizes that Ankara is exercising its right to self-defense with recent air strikes against bases of the terrorist Kurdistan Workers' Party (PKK) in northern Iraq'. *Today's Zaman*, Istanbul, 23 August 2011, available at: http://www.todayszaman.com/news-254728-us-recognizes-turkeys-right-to-self-defense-in-air-strikes-over-iraq.html

431 Tams, 'The Use of Force', *supra* note 50.

432 *See* for example, shifting approaches to the question of attribution and practice post-Afghanistan, Chapter 5B.2.

433 In passing the 2006 law 'On countering terrorism' with its broad reaching right to target terrorists abroad, Russian legislators reportedly stated that they were "emulating Israeli and US actions in adopting a law allowing the use of military and special forces outside the country's borders against external threats." See Report of the Special Rapporteur on Extra-judicial executions A/HRC/14/24/Add.6 (2010), para 25. Violations in other areas of law have likewise justified further violations by others, as illustrated in Chapters 7-10.

434 Christian Tams concludes that 'in the course of two decades, the legal rules governing the use of force have been re-adjusted, so to permit forcible responses against terrorism under more lenient conditions.' See Tams, 'Use of Force' *supra* note 50, at p. 361. In some areas, e.g. on self defence being possible against 'terrorist' attacks without state attribution, that shift may already have taken place (*see* 5.A.2.1 noting that the predominant view post 9/11 seems to be that the source of an armed attack for self defence purposes need not be a state.) In others e.g. on pre-emptive self defence there is insufficient support for that proposition in internaitonal practice for there to be a shift, but that may change over time (*see* 5A.2.1 on anticipatory self defence).

'if other states were to claim the broad-based authority that the United States does, to kill people anywhere, anytime, the result would be chaos.'[435]

5B.6 CONCLUSION

The previous chapter considered the role of criminal law and international law enforcement in the struggle against international terrorism. The use of force by states is not an alternative for states where that enforcement proves challenging or even inadequate. Rather the prohibition on the use of force is one of the most fundamental norms of international law around which the current legal order is built. The use of force against terrorism can be justified only where one of the exceptions to that prohibition apply – through Security Council authorization or the conditions for self defence being met. If they are to remain exceptions, they must be strictly construed.

The use of force has, however, been a major part of the war on terror. In the early stages, it took the form of large scale military interventions in Afghanistan and Iraq, and it has evolved into a global campaign of targeted killings which has killed thousands of people in several states, and which gives every indication of being set to continue as a method of choice for years to come.

The Security Council's uncharacteristically proactive role post 9/11 is discussed in other chapters,[436] but the Council has notably not authorised the use of force.[437] This may itself reflect the reluctance on the part of the international community to endorse the use of force as an appropriate tool against terrorism. This reluctance may in turn be increased following the experience of more than a decade of a 'war on terror.' While the use of force in Iraq has been singularly condemned for its unlawfulness and having shaken

435 K. Anderson, 'Rise of the Drones: Unmanned Systems and the Future of War', Written Testimony to the U.S. House of Representatives Subcommittee on National Security and Foreign Affairs, 23 March 2010, p. 5, para. 11, available at: http://www.fas.org/irp/congress/2010_hr/032310anderson.pdf (hereinafter 'Anderson Written Testimony'). Alston, 'Statement of U.N. Special Rapporteur on U.S. Targeted Killings Without Due Process', supra note 433; *see* e.g., *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

436 See Chapter 2 and in particular Chapter 7B.1 on the Council's novel legislative and quasi-judicial roles.

437 Whether the Council had authorised force was only a real issue at all in relation to the use of force in Iraq as explained above, and the argument does not withstand scrutiny as the Dutch Inquiry's report exemplifies.

the international system,[438] the effectiveness of the use of force as a dominant approach in combating terrorism has been questioned more broadly.[439]

The real battleground of the *ad bellum* post 9/11 has been the potential scope and limits of the right of self defence. Reflecting its status as the one recognized exception to prohibition on unilateral force, the self defence blanket has been stretched, perhaps to tearing point, over a range of conduct and circumstances which it is submitted it cannot conceivably cover. The inconsistensies between practice and the law, highlighted in this chapter, have been striking. As have claims that the fabric of the law has been altered along the way, though the extent of this shift should be treated with some caution.

Assertions of legal shift are most pertinent, and most compelling, in relation to Afghanistan, where the use of force, like the September 11 attacks that preceded it, met with overwhelmingly unified international support. Arguably, this was so without a number of questions relevant to an assessment of the lawfulness of the use of force ever being asked or answered. The first question was whether the attribution of terrorist acts to a state was a prerequisite to the existence of an 'armed attack' and the right to use self defence in the territory of that state. State responses to the Afghan intervention have therefore been broadly cited as contributing to a shift in the law in this respect.[440] This appears to be supported by subsequent practice, which suggests that in the debate on the lawfulness of cross border incursions in the course of counter-terrorism operations onto other states territories, attribution is rarely raised as a legal requirement.[441]

Emphasis has instead been placed on the 'unwillingness and inability' of states on whose territory self defence is employed to address the threats of terrorism emanating from their territory. Such unwillingness or inability is a legal pre-requisite to the neceesity of action in self defence, but caution is undoubtedly due not to inflate, as some have, the significance of the assessment by one state of another as 'unwilling or unable' as somehow rendering moot the basic sovereignty concerns or the applicability of the Article 2(4) prohi-

438 Chirac, 23 September 2003, *supra* note 370. Iraq is often cited as a deterrent to further use of force in Syria and elsewhere. See also Spanish president Zapatero noting that after the Madrid attacks that 'You cannot combat terrorism with war. What war does, as has happened in Iraq, is to proliferate hate, violence and terror', *El Pais*, 16 March 2004. *See* recognition of negative impact of Iraq also in President Obama Speech on Drones and Counter-terrorism, 23 May 2013.

439 Gray, *supra* note 24, p. 2 notes that the experience of Afghan, Iraq, Lebanon and Somalia do not suggest that the use of force has been an effective response to terrorism *See also* e.g. the contrasting approach of the UN Global Strategy, Chapter 7B3 See ICJ Eminent Jurists Panel Report 2010.

440 *See* 5A.2.1.1.

441 In assessing such impact on the law the reactions must be considered in context, by reference for example to events that followed, such as the intervention in Iraq, and Israeli attacks on Syria. Eg *UN Press Release*, 5 October 2003, UN Doc. SC/7887 or the Turkish incursion into Northern Iraq. *See* Tams, 'Use of Force', supra note 50, p. 379.

bition. While the imperative of enhanced international law enforcement is clear, it does not provide legal justification for the unilateral use of force. It may support the claim of lack of alternatives to the use of force, as required be self defence, where the conditions for self defence are met.

Beyond apparently dispensing with the attribution requirement, the lasting effect of the Afghan intervention and response is less clear. Legally speaking, serious doubts must attend the proportionality of targeting in Afghanistan, and whether attacking state institutions with a view to brigning about regime change was truly necessary to avert the attack. Yet the Afghan intervention was marked by an unwillingness to question or insist on necessity and proportionality in the response to 9/11, or to raise the politically unpopular questions regarding the lawfulness of the broad scope of the intervention, including regime change. Such questions were clear in October 2001, and to the extent that self defence could plausibly be invoked in Afghanistan many years later, became glaring.

The failure to question lawfulness in reaction to Afghanistan is of course less surprising from a political perspective. Shock and revulsion at the September 11 attacks was followed by apprehension as to the response that might ensue, particularly in light of the threatening rhetoric that those not 'for' the campaign would be considered 'against' it, and held to account accordingly.[442] Afghanistan was not only a pariah state with an exceptionally notorious human rights record, for which it had been widely condemned, its de facto government was also uniquely unpopular in the region and globally. At least in the short term there was much to be lost and little to be gained geopolitically from opposition to this conflict. It is possible to speculate that certain reactions, or the absence thereof, may have been based less on a view as to the lawfulness of military action and more on flexibility borne of a reluctance to defend the Taliban or take the intervening forces to task.[443] It is unclear to what extent the many unique features of that situation may limit the extent

442 *See*, for example, the State of the Union Speech by the United States' President, 20 September 2001: 'Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.' (Selected Speeches of President George W. Bush, 2001-2008, *The White House*, p. 69, available at: http://georgewbush-whitehouse.archives.gov/infocus/bush record/documents/Selected_Speeches_George_W_Bush.pdf). *See also* 'axis of evil' speech, U.S. President George W. Bush, 'State of the Union Address', 29 January 2002, available at http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html.

443 While what states say and do is critical for the *opinio juris* rather than political motivation, where there is ambiguity, regard can legitimately be had to the context in which state reactions unfold. Such political factors may be directly relevant to assessing the precedential value, if any, of action, and the likelihood that similar 'flexibility' would be shown in the future.

to which the legacy of Afghanistan will be seen to be a broader 'relaxing' of the requirements of self defence.[444]

More recently, in particular with the shift to resort to targeted killings, the focus of controversy is on 'pre-emptive' or preventive self defence. While the assertion of the right to use force to prevent threats of terrorism, rather than responding to on-going or imminent attacks, has been a stalwark of US strategies since 9/11. The potential implications of the 'revolutionary'[445] view of self defence, advanced in the US National Security Strategies of 2002 and 2006 and continued through the practice of targeted killings, are serious. Particularly so where the expansive view of anticipatory self defence combines with the apparent loosening or abolition of the state responsibility link: the net impact is that an unclear threat from an unclear entity with unclear links to states may render those states, their representatives and citizens vulnerable to attack.

This view has, however, found little support and generated considerable controversy, leaving serious cause to doubt that there might be a shift in international law towards acceptance of such a doctrine.[446] The US National Security Strategy of 2002 and 2006, to the extent that they purported to present a legal argument as to the state of the law at all, did not garner international support.[447] When it was relied upon (among other grounds), by the US in relation to Iraq, it was not endorsed by any other state involved in that intervention and met with firm rebuke from many other states and commentators.[448] More recently, the UK once again made clear the opposition to pre-emptive self defence that it has maintained throughout the war on terror.[449] The lack of indication of acceptance of such an approach by the broader international community of states means that it is highly unlikely, however, at least for the time being, to impact on international law.[450]

444 A more flexible approach to self defence has been suggested by various academics as noted above and reflected in US policy. The dangers of e.g. acceptance of attacks from non-state actors are limited so long as self defence is otherwise curtailed by strict respect for eg necessity and proportionality, but practice to date suggests otherwise.

445 Gray, 'Bush Doctrine', *supra* note 353.

446 Gray, *ibid.* para 30 states of the U.S. decision not to include it in the 2010 NSS, "...it could be argued that the absence of express reaffirmation does weaken any claim that there is a doctrine of pre-emptive self-defense in international law."

447 See 'Iraq' B3. The isolation of the U.S. position on preemptive force is acknowledged implicitly in the Brennan speech of April 2012, where he tries, unconvincingly, to reduce the differences to different definitions of imminence.

448 *See*, e.g., the statement of the French President, Jacques Chirac, on 23 September 2003, *supra* note 370. Although Iraq was mostly about the interpretation of Council resolutions the US on occasion also referred to its right to act preemptively.

449 Foremost U.S. ally in the WOT, the UK, has consistently rejected 'preemptive' self defence (in Iraq and in 2012 in rejecting U.S. requests for assistance in relation to Iran): http://www.guardian.co.uk/world/2012/oct/26/iran-military-action-downing-street.

450 *See* the discussion on 'how international law changes' in Chapter 1.2.2.

The United States for its part has distanced itself from extreme expressions of a doctrine of preemption, reflecting at least an appreciation of the international isolation of its legal position.[451] It has presented encouraging messages regarding the importance of multilateralism, which may hint at lessons learned from aspects of its unilateral resort to force since 9/11.[452] While these statements reassure on one level, they juxtapose with the growing unilateral resort to force across borders, and the assertion by the world's dominant military power of the right to do so anywhere on the global battlefield.[453] As recent practice has clarified, there is no support in international law for the right to use force for prevention, as opposed to in response to an on-going or imminent attack. The extent to which this practice will be adopted by other states (as foreshadowed by the Russian Federation's law on the use of force), and the potential implications for the prohibition on the use of force in international law, are uncertain.

The use of force post 9/11 has certainly challenged the boundaries of the international legal framework in many ways. Resort to force has taken many different forms, provoking vastly different state reactions to them. While the use of force in Afghanistan, like the September 11 attacks that preceded it, met with perhaps unprecedented international unity, the use of force in Iraq caused international division rarely seen in the post-Cold War era. As regards the latest frontier of the war on terrorism, the broader assertion of the right to use of force against al Qaeda and the implementation of a targeted killings programme on a potential global scale, the extent to which the unfolding international response condemns, condones or endorses this may influence the ultimate impact on the *jus ad bellum*.[454]

States may become more robust in their insistence on respect for international law as forceful action continues to be used against lower level suspected terrorists, in a broader range of states. The debate may yet clarify the limits of the law's flexibility and the dangers of an unbridled unilateralism or the stretching beyond plausible limits of the notion of self defence.[455] Experience thus far, however, appears to point to a more 'flexible' understanding of standards in relation to the prohibition on the use of force, the full

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451 *See* US National Security Strategy 2010 which did not address the issue and Brennan April 2012 speech noting why it matters to find common ground on international law with other states. This may all make it less likely that the assertion of a right to use force preventively will affect the prohibition on the use of preemptive self defence in internaitonla law.

452 *See* 'Multilateralism' at 5.B.4.

453 U.S. military spending stands at half of the world's total military spending. Its military capacity is not comparable to that of any other nation. Gray, note 343, notes "But the limits of military power are clear from the US military operations in Iraq and Afghanistan, and are acknowledged in the 2010 USNSS."

454 Little condemnation was seen around the bin Laden operation, discussed separately at Chapter 9; the impact of that particular situation on the law may support the flexible approach whereby states are reluctant to condemn incursions of this type.

implications of which – for the practice of states around the world – remain to be seen.

6 International humanitarian law

> 'I observed that men rushed to war for slight causes or no causes at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.'
>
> Hugo Grotius, 1625[1]

> 'The war on terror begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.'
>
> G.W. Bush, 2001[2]

> 'We must define the nature and scope of this struggle, or else it will define us.'
>
> B. Obama, 2013[3]

Discussions around the scope and nature of international humanitarian law (IHL) have dominated legal discourse in the 'war on terror'. Whether this attention is deserved, or represents an overstretching of the notion of 'war' and with it an inflation of the relevance of IHL, is a matter of considerable dispute. IHL applies to particular conduct carried out in association with an 'armed conflict' as understood under IHL. Undoubtedly a critical preliminary matter, on which the nature of applicable law depends,[4] is whether, when and where operations aimed at counter-terrorism form part of an armed conflict properly so-called.[5] Beyond disputes concerning the applicability of IHL, are other myriad questions regarding the interpretation and application

1 H. Grotius, *On Laws of War and Peace* (Paris, 1625), para. 28.
2 Address of the former U.S. President George W. Bush to a Joint Session of Congress and the American People, 20 September 2001.
3 Address by President Obama to the National Defence University, 23 May 2013.
4 While the generally applicable framework of human rights law (IHRL) continues to apply in armed conflict alongside IHL, its content is in significant respects altered by the co-applicability of IHL. *See* Chapter 7B3.
5 See below 6A1.

of IHL, and even the adequacy of a legal framework often impugned post 9/11 as ill equipped to address a 'new war' against a new enemy.[6]

This chapter seeks to set out the legal framework as it currently governs the conduct of states and non-state parties to armed conflicts. Part A of this chapter – which sketches out the legal framework of IHL – will begin with the law that defines whether there is an armed conflict, if so what sort of conflict, and when it begins and ends. This will be followed by a summary of specific provisions of the legal framework of IHL, in relation to who may be targeted, lawful methods and means of warfare and humanitarian protections that are relevant to terrorism and action against terrorism in such armed conflicts.

Part B of this chapter explores in more detail how this legal framework has been applied in practice in the context of the 'war on terror' since 2001. The question of greatest controversy and import is whether there can be, as the US government asserts, a conflict with al-Qaeda and associates or with terrorist networks of global reach. In this context, controversies surrounding terrorist networks as 'parties' to an armed conflict, and the relevance of the lack of temporal or geographic limits to the putative war of global reach, will be highlighted. In light of current international law, it will be doubted whether there can, legally, be an armed conflict with a movement such as al-Qaeda. There have, however, undoubtedly been conflicts since 9/11, most obviously in Afghanistan, Iraq or more recently Mali for example, which are often described as linked in varying ways to the fight against terrorism, to which IHL applies. Moreover, if the US seeks to invoke IHL in support of its conduct in broader contexts it should, at a minimum, be expected to apply the law consistently, and act in accordance with its terms.

Particular practices employed in recent years – from the designation of 'enemy combatants' to the use of drones to killings of persons considered members of al-Qaeda, for example – will therefore be considered in light of the legal framework. Specific issues that have arisen in the Afghan conflict, to which IHL clearly applies, are also discussed. IHL issues will also be addressed in subsequent chapters: Chapter 7 will explore the inter-relationship between IHL and international human rights law (IHRL), and Chapters 8-10 apply the legal framework in case studies concerning the Guantanamo Bay detainees, the killing of Osama bin Laden or the Extraordinary Rendition programme.

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6 *See, e.g.*, U.S. President George W. Bush, 'State of the Union Address', 29 January 2002; Statement by Ambassador at Large, Pierre Prosper, Address at Chatham House, 20 February 2002 cited in E. Wilmshurst, *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), p. 2; *see also* discussion on the 'changing characteristics of war' in M. Berdal, 'The "New Wars" Thesis Revisited', in H. Strachan and S. Scheipers (eds.), *The Changing Character of War* (Oxford: Oxford University Press, 2011), p. 109.

6A THE LEGAL FRAMEWORK

International humanitarian law is applicable once there has been a resort to force, and an armed conflict has arisen. The threshold legal question for IHL to be relevant is whether there is an armed conflict, in accordance with the legal definition and understandings of the term discussed below. The use of the 'terrorism' label is not determinative of, and indeed not generally relevant to, the question of whether there is an armed conflict properly so-called.[7] For various reasons, chiefly political in nature, armed groups engaged in an armed conflict are often labelled 'terrorists,' particularly by opponents; this has been common historically in situations of non-international conflict, and may be more evident post 9/11.[8] Conversely, one of the unusual characteristics of the so-called 'war on terror' has been the labelling of terrorist organisations as 'enemy combatants' engaged in an armed conflict.[9]

This tendency to conflate terrorism and conflict by politicians, lawyers and the media has elicited much criticism in recent years for the confusion it generates, and its legal and practical implications.[10] The questions of whether there is an armed conflict, and whether particular acts are carried out in association with it, are preliminary legal questions, which must be determined by reference to IHL.

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7 *See, e.g., Ljube Boškoski, et al*, ICTY IT-04-82-T, Judgment, 10 July 2008, where the Macedonian government considered the group in question as 'terrorist', while the ICTY found it was party to an armed conflict. Likewise, Israel considers Hezbollah a terrorist organisation, but the report of the UN Commission of Inquiry into Lebanon noted that this did not influence the qualification of the armed conflict: UN Report of the Commission of Inquiry on Lebanon, 23 November 2006, UN Doc. A/HRC/3/2, paras. 8, 9, 57, 62.

8 A common scenario arises in which governments designate opponents 'terrorists' to delegitimize them, and to prosecute them under criminal law, rather than treating them as participants in an armed conflict with rights upon capture. References to armed groups as 'terrorists' is common in many states, such as Colombia, Sri Lanka, and Russia (with regard to Chechnya), and some suggest increasingly so since 9/11: *see* A. Bianchi and Y. Naqvi, *International Humanitarian Law and Terrorism* (Oxford: Hart 2011) p. 100. Criminal charges have reportedly been used as 'bargaining chips' e.g. in Nepal in 2006 where the government agreed to drop terrorism charges against the rebels in exchange for a ceasefire. 'Nepal calls ceasefire with rebels', *BBC News*, 3 May 2006, available at: http://news.bbc.co.uk/2/hi/south_asia/4969422.stm.

9 See discussion of US policy post 9/11 at Part B, and chapters 8 and 12. See also the Israeli Supreme Court's qualification of a 'continuous situation of armed conflict' between Israel and Palestinian 'terrorist organizations'. *The Public Committee Against Torture in Israel* v. *The Government of Israel*, HCJ 769/02, Israeli Supreme Court, 14 December 2006, para. 16 (hereinafter 'Ruling on Targeted Killings')..

10 *See, e.g.*, J. Pejic, 'Armed Conflict and Terrorism: There is a (Big) Difference', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), p. 171-204. Pejic discusses legal, political and practical reasons for keeping the terms distinct, including e.g. the risk of criminalizing lawful acts under IHL and disincentivising peace negotiations, at p. 203.

The precise content of IHL varies, to some degree, depending on the nature of the conflict. For IHL purposes, conflicts are broadly categorized into international or non-international in nature, although (as explored further below) the distinction is often unclear in practice and there are multiple variants on each form of conflict.[11] In any event, it is increasingly recognised that a common set of core of principles applies to any type of conflict. IHL imposes constraints on how a conflict may be waged, its primary objective being to protect certain persons who do not (or no longer) take part in hostilities and to limit the methods and means of warfare for the benefit of all.[12] For this reason, a key consideration under IHL – unlike human rights law for example – is the status of the individual (as a combatant, a civilian, a person participating directly in hostilities, etcetera), which determines, to some extent, whether and under what circumstances that individual can be attacked, as well as the precise rights to which he or she is entitled upon capture.[13]

Where IHL does apply, it must be applied consistently. For example, as will be discussed further below, IHL recognises that 'combatants' are entitled to engage in conflict, and therefore it deprives them of their immunity from attack, while providing that once they are *hors de combat*, they must be subject to protections associated with their status, and cannot be prosecuted for engaging in hostilities. Particular rules must not be seen in isolation, but should be considered mindful of the range of consequences that flow from the status of individuals under IHL.

IHL should also be considered in the context of broader international law. Its relationship with other areas of international law, and its distinction from them, should be borne in mind. For example, the law that governs armed conflict (sometimes known as the *jus in bello*) applies irrespective of whether or not the use of force is itself lawful (according to the *jus ad bellum*, addressed at Chapter 5). Although, as shall be seen, in practice the two are at times conflated,[14] they are separate bodies of law raising different legal issues.[15]

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11 Recent practice shows that some conflicts do not fit readily into either category, being 'transnational' in nature, as discussed further below. On classification of conflicts, *see* Pejic, 'The protective scope of Common Article 3: more than meets the eye', ICRC, Vol. 93, No. 881, March 2011, p. 195 (hereinafter 'Protective scope of CA3') and *generally* Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6.

12 The principal international instruments dealing with IHL are the four Geneva Conventions (GC) of 1949 and the two Additional Protocols to the Geneva Conventions adopted in 1977 (AP I and II). As noted by the ICJ, however, other rules are equally relevant. *See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* 8 July 1996, ICJ Reports 1996, p. 226 (hereafter '*Nuclear Weapons* Advisory Opinion'), para. 75.

13 Core principles of IHL, such as the principles of humanity, military necessity and distinction apply at all times, as do humanitarian protections under Common Article 3. *See* further below and Chapter 8.

14 *See e.g.* 6B.2.1 below on drone killings and the US justification of 'self-defence or IHL'.

Force may amount to an armed attack giving rise to a right of self defence, without amounting to an armed conflict.[16] On the other hand, the IHL rules that come into play in armed conflict sit alongside a core of international human rights law that applies in all situations. Although IHL is addressed in this chapter and IHRL in the next, it is important to have regard to both areas of law and the interplay between them in order to fully understand applicable law in particular armed conflict scenarios. As explored more fully in Chapter 7.B.3, this is particularly important where IHL may not provide specific rules on a particular issue (which we will see is especially relevant in non-international armed conflict situations).[17]

The critical preliminary question is, however, whether there is an armed conflict to which IHL applies at all, if so what sort of conflict, and when it begins and ends.

6A.1 When and where IHL applies

6A.1.1 Armed conflict: international or non-international

IHL applies in time of armed conflict. While the terminology of 'war' is often invoked, it should be noted that 'such references may prove to be more of emotional and political significance than legal'.[18] This is all the more true of emotive references in the post-September 11 world to the 'war on terror'. The same could be said of references to 'terrorism' which, as noted above, are not legally significant for the purposes of determining whether there is an 'armed conflict', and if so which rules of IHL apply.

While 'armed conflict' is not defined in IHL treaties,[19] the following definition, set down by the International Criminal Tribunal for the former Yugoslavia (ICTY), has been widely accepted:

15 The lawfulness of one does not implicate directly the lawfulness of the other: the use of force in another state's territory may be lawful in self defence while the particular action taken is unlawful under IHL (or under IHRL). Conversely, unlawful force does not necessarily imply a violation of IHL.

16 Chapter 4 discusses 9/11 as an 'armed attack', while Section B explains why it did not amount to an armed conflict.

17 *See, e.g.*, 'Persons detained by the US in relation to armed conflict and the fight against terrorism – the role of the ICRC', ICRC, 9 January 2012, available at: http://www.icrc.org/eng/resources/documents/misc/united-states-detention.htm. On sometimes difficult questions of interplay, *see* Chapter 7.B.3.

18 C. Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford: Oxford University Press, 1995), p. 39, 44.

19 *See* ICRC Commentary GC I, pp. 49-51.

> [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[20]

The question of whether an armed conflict exists involves an essentially factual assessment,[21] rather than one 'laden with legal technicalities'.[22] In this factual assessment no relevance should be attached, for example, to the existence or otherwise of a 'declaration of war', or to acknowledgement by the parties that they are in a state of war.[23] Likewise, it is irrelevant that an opposing party (or other states) recognise the status of the other party, in determining whether there is, in fact, an 'armed conflict' or its nature.[24] Instead, as discussed further below, the essential characteristic of any armed conflict, international or non-international (considered in turn below), is the resort to force between two or more identifiable parties.

In practice, it may well be difficult to distinguish between armed conflict and organised crime, as it often is to distinguish between civil unrest and non-international conflict, or between international armed conflict (IAC) and non-international armed conflict (NIAC).[25] The current legal framework is premised, however, upon IHL applying only in armed conflict, and its content varying, to some extent, depending upon the nature of the conflict.[26]

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20 *Dusko Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995 (hereinafter '*Tadić* Jurisdiction Decision'), para. 70. *See also* ICC Statute.

21 Disputes arise not infrequently as to whether particular facts satisfy the threshold particularly of non-international conflicts. See below as regards the disputed war on al-Qaeda post-September 11.

22 Greenwood, 'Scope of Application', supra note 18, p. 42.

23 *Ibid*., p. 45. Common Article 2(1).

24 As, e.g., in Afghanistan, the fact that a state party to a treaty is not represented by a recognised government does not affect the international nature of the conflict or applicable IHL. Article 4 (A)(3) and GC III. *See*, in general, D. Schindler, 'The Different Types of Armed Conflicts according to the Geneva Conventions and Protocols', (1979-II) 163 RdC 117.

25 In 2010, the UK Ministry of Defence forecast that: 'The distinction between inter-state and intra-state war, and between regular and irregular warfare, will remain blurred and categorising conflicts will often be difficult'. DCDC, 'Global Strategic Trends – Out to 2040', MOD 02/10c30(2010) and UK Strategic Defence and Security Review 2010, cited in Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6, p.4.

26 Although some propose the 'unification of international humanitarian law' into one body of law applicable to any conflict, (see L Moir, 'Towards the Unification of International Humanitarian Law', in Burchill R., White, N.D., Morris, J. (Eds.), *International Conflict and Security Law*, (Cambridge, 2005), pp 108-128) and others a redefinition of how we understand conflict itself (see infra, US position and supporters), this chapter attempts to focus on an assessment of the law as it currently stands rather than how the law might evolve in the future. See also *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment, ICC, 14 March 2012 para 539.

6A.1.1.1 International Armed Conflict

Article 2 of the Geneva Conventions, and the definition of armed conflict advanced above, both make clear that an *international* armed conflict (IAC) exists where force is directed by one state against another,[27] and this is generally thought to be the case irrespective of duration or intensity.[28]

While the proposition that the parties to international armed conflict constitute two or more states generally holds true, it is subject to qualification. Firstly, cases of total or partial military occupation, even if met with no armed resistance, and even if there is no longer any opposing party, still constitute international conflicts for the purposes of IHL.[29] Moreover, since the 1970s, wars of self-determination against colonial domination have likewise been included within the rubric of international conflicts for the purposes of IHL.[30]

An international armed conflict may also arise where a state or states intervene in a non-international conflict (NIAC), such that there are then states on both sides of the conflict.[31] They may become parties by intervening with their own troops, having other participants act on their behalf, or by rendering direct support to the military operations of one of the parties.[32] Some controversy surrounds the nature of the conflict that emerges from a state intervening on another state's territory, on the side of the state, or indeed if there is no other state involved on the conflict, such that the resulting conflict involves a (foreign) state on one side and a non-state actor on another. The majority view,[33] endorsed by the ICC, is that 'in the absence of two States opposing each other, there is no international armed conflict.'[34]

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27 Article 2 of the Geneva Conventions applies to '…any other armed conflict, which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'.

28 *See* the ICRC Commentary to Common Article 2: 'Any difference ... leading to the intervention of members of the armed forces is an armed conflict ... It makes no difference how long the conflict lasts or how much slaughter takes place'. *See, e.g.*, ICRC Commentary to GC VI, p. 19. As regards the existence, or not, of an 'intensity threshold', *see* part A.1.1.2 (i). On the *jus ad bellum* arising, *see* Chapter 5.

29 Greenwood, 'Scope of Application', supra note 18, p. 41. On occupation, *see* 6A.3.4 below.

30 See Art. 1 AP I.

31 Examples might include the recent intervention in Libya.

32 *See* ICTY, *Tadić* Jurisdiction Decision, supra note 20, paras. 137-40.

33 See a recent study of international experts under the auspices of the International Law Programme at Chatham House, in Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6, noting a minority view that the use of force by one state in the territory of another gives rise to IAC, and the majority view that extra-territorial conflicts between states and non-state actors are NIACs. *See* also G. Aldrich, 'The Laws of War on Land', 94 (2000) AJIL 42, p. 62.

34 *Lubanga* Judgment, note 26, para 541.

The Lebanon conflict of 2006 may illustrate the complexity of the issues arising in practice.[35] That scenario (although complicated by some assertions of the Lebanese state's responsibility),[36] was a situation where force was predominantly directed at Hezbollah, a non-state actor, on another state's soil. The Israeli military intervention against Hezbollah targets was considered by some to constitute an IAC on the basis of their transnational nature;[37] for others, they gave rise to a cross-border NIAC, based on the state versus non-state nature of the parties.[38] For yet others (on perhaps the best view), it gave rise to a simultaneous IAC (between Israel and Lebanon, so far as the state's facilities and airports were attacked in pursuit of the ultimate Hezbollah target) and a NIAC (between Israel and Hezbollah forces).[39] Classification of this type of transnational use of force is clearly an area where opinion is divided and law and practice are likely to develop in years to come.

A further issue, on which some uncertainty has crept into the traditional approach to international conflicts, is whether there is an 'intensity' requirement for the use of force to give rise to any kind of armed conflict. The traditional view, reflected in the ICTY definition referred to above,[40] is that inter-state use of force is *per se* sufficient to give rise to an IAC irrespective of its intensity.[41] While this view may remain dominant, it has also been questioned whether every forceful action should be seen as triggering an armed conflict,

35 For a detailed discussion of the nature of the conflict, see I. Scobbie, 'Lebanon 2006', in Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6, p. 387. The conflict is said to have began with Hezbollah cross border incursions on 12 July 2006, as it mounted operation True Promise, although some contend it began with IDF forces entering Lebanese village, p. 390.

36 In a letter dated 12 July 2006, from Israel's Permanent Representative to the UN to the President of the Security Council, Israel alleged an 'acts of war from Lebanon'; however, Israel subsequently claimed that its actions were not against Lebanon but Hezbollah: Tzipi Livni, former Vice Prime Minister of Israel, press conference, 19 July 2006; *see also ibid*, p. 392-93.

37 UN Report of the Commission of Inquiry on Lebanon, supra note 7, para. 57. *See also* J. Stewart, 'The UN Commission of Inquiry on Lebanon: A Legal Appraisal', 5 (2007) *J. Int'l Crim. Just*. 1039, 1042-43; Bianchi and Naqvi supra note 7, p. 79; *see also* Akande, 'Extraterritorial Armed Conflicts' in Wilmshurst *supra* note 33.

38 This emphasis on the nature of the parties not geography accords with the ICTY approach. It rejected the proposition that IAC could arise between a state and non-state forces, absent a relationship of 'overall control' by a state over said non-state actors; *see Tadić*, IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999 (hereinafter '*Tadić* Appeal Judgment'); *see also* Chapter 3 on different standards of attribution for state responsibility purposes.

39 Pejic, 'Protective scope of CA3', supra note 11.

40 In that definition, the intensity requirement only applies to NIACs.

41 *See* the ICRC Commentary to Common Article 2 of the Geneva Conventions, note26, and Pejic, 'Protective scope of CA3', supra note 11, p. 191-93 for policy reasons for rejecting a threshold for IACs.

and whether this may not rather depend on the 'surrounding circumstances'.[42] There was no doubt in the context of the Israeli military action (involving more than 100 airstrikes in one month) that any threshold of violence was satisfied.[43] It has been pointed out, however, that brief interventions involving force against specific terrorist targets have been a fairly common feature of practice in recent years, yet it is rare for the states involved or others to suggest that an inter-state conflict has arisen as a result.[44] While this may explained by other reasons, including in some cases doubts as to whether the force may have been based on state consent,[45] in other cases where there is apparently no such consent, reluctance to invoke the armed conflict paradigm may reflect perceptions regarding the force not having met a certain threshold.[46] Thus, while the predominant view of current law remains that there is no threshold for IAC, this may be another area of the law where there is at least scope for differences of view as to whether a certain minimal threshold of force separates random acts of force from armed conflict for IAC, as it does for NIAC, to which we now turn.

6A.1.1.2 Non-International Armed Conflict

For the most part, determining the existence of an international armed conflict is relatively straightforward, involving the use of force between states. The classification of *non-international* armed conflict (NIAC) creates somewhat greater scope for dispute as to whether a particular situation amounts to an armed conflict, as opposed to 'internal disturbances and tensions [or] isolated and

42 E.g. should arrest on another state's territory, even if unlawful under the jus ad bellum, amount to 'armed conflict' triggering IHL? *See, e.g.*, International Law Association (ILA), 'Final Report on the Meaning of Armed Conflict in International Law', The Hague Conference 2010 (hereinafter 'ILA Report'). Eg. UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Sec. 3.3.1 (OUP 2005) suggests consideration of 'surrounding circumstances' is required. The Ministry of Justice, 'War Powers and Treaties: Limiting Executive powers', Consultation Paper CP26/07, 25 October 2007, p. 25, para. 48 (available at http://www.official-documents.gov.uk/document/cm72/7239/7239.pdf) also suggests there may be some threshold. *See also* Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, supra note 8 p. 76-77.

43 Hezbollah attacked Israeli villages and captured two Israeli soldiers. Israel responded with a month of air strikes and artillery fire on targets in Lebanon, an airport blockade and ground invasion. *See* UN Report of the Commission of Inquiry on Lebanon, supra note 7; Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, supra note 8, p. 57.

44 Bianchi and Naqvi, *ibid*.

45 *See, e.g.*, lethal attacks in Yemen or Pakistan, discussed below and Chapter 5.

46 Situations where there is no such apparent consent may include the targeting of alleged al-Qaeda in Pakistan yet, while there are divergent views on conflicts in Pakistan, few allege the existence of an IAC between the US and Pakistan. *See* Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, note 8, p. 76-77.

sporadic acts of violence',[47] which are explicitly excluded by IHL from the scope of armed conflict. This has historically often been a matter of controversy, not least because, as already noted, states are reluctant to acknowledge the existence of conflict and in particular to acknowledge insurgents and confer any perceived legitimacy upon them as parties to a conflict.

The factors that are central to the factual determination of the existence of a NIAC fall into two categories: firstly, the intensity and duration of the violence,[48] and secondly, the nature and organisation of the parties.[49]

Developments in the nature and complexity of NIACs have led the ICRC in recent years to describe an expanded typology of conflict that recognises multiple scenarios as potentially giving rise to NIACs. These include conflicts on one state's territory between the state's forces and armed groups, or between such groups; conflicts where international forces or other states intervene on the side of the state; conflicts that are based in one territory and spill over to another; and conflicts between states and armed groups across borders.[50] This reflects developments in practice, to which the legal framework seeks to adjust, and the complexity and controversy surrounding questions relating to the classification of conflicts.[51] However, in each scenario, the key questions remain whether the intensity threshold has been met and whether the parties meet the organisational requirements of parties to a NIAC, both addressed in turn below.

47 'This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.' Article 1(2) AP I.

48 M. Sassòli, 'Non-International Armed Conflict: Qualification of the Conflict and Its Parties', background papers presented at the 2003 Sanremo Round Table on IHL; *see* Fleck, 'Non-International Armed Conflict', supra note 18. *See also* ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', *30th Annual Conference of the Red Cross and Red Crescent*, October 2007, available at: http://www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf , (hereinafter 'ICRC Report on IHL and Contemporary Armed Conflicts').

49 *See Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment, ICC, 14 March 2012. *See generally*, 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48; Sassòli, 'Non-International Armed Conflict', supra note 48; Fleck, 'Non-International Armed Conflict', supra note 18.

50 Pejic, 'Protective scope of CA3', supra note 10, p. 195. Another category – transnational conflicts without territorial limits, asserted by some 'almost exclusively in the United States' and addressed below – is rejected by the ICRC as not amounting to a NIAC. *See generally*, 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48; *see also Lubanga*, supra note 49.

51 *See generally* Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6.

i) The Intensity Requirement?

The factual existence of armed force,[52] of a level that distinguishes it from law enforcement, is a key criterion of non-international armed conflict.[53] Both the ICTY and the ICC have suggested that a NIAC involves 'protracted' violence; this formula put forward in *Tadić*, was endorsed to an extent more recently by the ICC in the *Lubanga* case, affirming that the groups involved need to have the ability to plan and carry out operations 'for a prolonged period of time.'[54]

Other judgements of the ICTY have placed the emphasis on the *intensity* rather than the *duration* of violence, which may better reflect the legal test.[55] This is consistent with the historical treatment of non-state actor violence, for example involving ETA or the IRA, which were certainly prolonged over an extensive period of time but may not have passed the intensity threshold at any one time and which were not, at least generally, considered to have amounted to armed conflict. This stands in contrast with the intense hostilities between Israel and Hezbollah in Lebanon in July of 2006, which, as noted above, were considered as meeting the intensity threshold for a non-international armed conflict. Regarding the sorts of factors that may contribute to an assessment of this threshold in less clear-cut instances, the ICTY has provided certain 'indicators', which assist in this assessment. These include the number of confrontations, the actors involved, the types of weaponry used and the extent of injuries and destruction.[56]

ii) The 'Parties' to a NIAC?

The parties to non-international armed conflict may be 'governmental authorities and armed groups', or two (or more) armed groups.[57] In addition, as noted above, where other states or international organisations become involved on the side of the state in a conflict, which is generally considered to remain 'non-international' so long as state forces on the one side oppose non-state actors on the other.[58] A controversial question relates to the circumstances in which an armed group may constitute a party to an armed conflict.[59]

Under IHL the non-state (or 'insurgent') groups that may constitute parties must be capable of identification as a party to the conflict and must have

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52 Report of the Commission of Inquiry on Lebanon, supra note 7, para. 51.

53 ICRC, 'International Humanitarian Law and Terrorism: Questions and Answers', 1 January 2011, available at: www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm. *See* 6A.1.1.1 above.

54 *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, para. 234. *See also Lubanga*, Judgment, supra note 49.

55 *Ramush Haradinaj,* ICTY-04-84-T, Judgment, 3 April 2008, paras. 49, 60.

56 *Ibid*. In *Lubanga*, Judgment, supra note 49.

57 *See* ICC Statute, Article 8(2)(f).

58 J. Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force', ICRC, in Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6.

59 *See* Part 6B.1.1.1 below on whether al-Qaeda or associated groups may constitute such a party.

attained a certain degree of internal organisation.[60] This has been made clear by the ICTY in several cases, including the *Haradinaj* decision, and has been followed by the ICC in the *Lubanga* judgment.[61] Jurisprudence points to several 'indicators' or 'non-exhaustive criteria' to establish whether the organisational requirement is fulfilled, which include the existence of a command structure and disciplinary rules and systems within the group, potentially (but not necessarily) involving the control of territory and the existence of an operational headquarters; the ability to procure arms and to plan and carry out controlled military operations; the extent, seriousness and intensity of military operations and the ability to coordinate and negotiate settlement of the conflict.[62] By contrast, control of territory is not a requirement to constitute a party to a non-international armed conflict (although it is a jurisdictional threshold for the application of one of the applicable treaties, Additional Protocol II).[63]

The identification of the parties to a conflict is a key criterion on which the operation of IHL rules and principles of distinction and responsibility rest. While compliance with IHL is not itself a criterion,[64] the group must be *capable* of observing the rules of IHL to constitute a party to an armed conflict.[65] The significance of this issue for the 'war on terror' will be explored in Part B below.[66]

6A.1.2 Temporal scope of IHL: defining a Start and an End Point?

When, in accordance with the criteria set out above, an armed conflict begins, involving the use of force between identifiable parties, the application of IHL is automatically triggered. IHL applies from the initiation of an armed conflict

60 The ICRC emphasises the 'identifiable nature of the parties, and those associated with them'. *See* 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48, p. 19. On discipline as a criterion, *see* Sassòli, 'Non-International Armed Conflict', supra note 48.

61 *Haradinaj*, 2008 Decision, supra note 55, paras. 49, 60; *see also Boškoski*, paras. 194-206; see ICC's 'non-exhaustive list of factors' in *Lubanga* Judgment para 536-7.

62 *See Limaj, et al.*, IT-03-66-T, Judgment, 30 November 2005, para. 90 (citing *Slobodan Milošević*, IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004 Rule, paras. 23-24); *see also Haradinaj*, supra note 55, paras. 49, 60 for a set of indicative factors. *Lubanga*, ibid.

63 The territorial requirement is however a jurisdictional threshold for the application of AP II, but not for the existence of an armed conflict under IHL; Lubanga para 536.. *See* Fleck, 'Non-International Armed Conflict', supra note 18, and Sassòli, 'Non-International Armed Conflict', supra note 48.

64 Sassòli, '*Non-International Armed Conflict*', supra note 48.

65 *See Boškoski*, supra note 5, para. 205: the 'organisational ability to comply' was relevant, not compliance itself, and the key question was 'level of organisation'. *See also* 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 47, p. 18-19.

66 *See* part 6B.1.1.2 below.

until the general close of military operations.[67] In relation to situations of occupation, while difficulties arise in identifying the beginning and end of an occupation, particularly long-term occupation,[68] the obligations of the occupying state continue until one year after the occupation comes to an end.

For international armed conflict, it is usually at least relatively straightforward to identify the point at which force between states triggers an armed conflict. For non-international armed conflict, the stage at which violence of sufficient intensity arose, or in line with the approach of the ICTY, when hostilities became 'protracted', may be less readily identifiable.

The end point of an armed conflict in turn occurs when the conditions for the establishment of a conflict cease to exist – where there is no longer use of force meeting any relevant threshold or no longer groups capable of constituting identifiable parties to the conflict. A temporary or tentative cessation of hostilities is clearly insufficient.[69] just as while a formal declaration is unnecessary to bring about an end of military operations as it was to initiate 'armed conflict'. Rather, the questions are primarily factual ones: has there been a definitive cessation of active hostilities, bringing the conflict to an end? In case of non-international armed conflict, are any on-going hostilities of insufficient scale or intensity to constitute an armed conflict, having reverted to sporadic violence? Where the other party to the conflict capitulates, or indeed no longer qualifies as a party, then it should follow that the cessation of hostilities is definitive and the conflict terminated.

6A.1.3 Identifiable Territorial scope and the reach of IHL?

In the event of an armed conflict, it has been said that 'international humanitarian law continues to apply in the whole territory of States party to international armed conflict or, in the case of non-international conflicts, the whole territory under the control of a party, whether or not actual combat takes place there'.[70] Clearly then the reach of IHL can extend beyond the immediate area of hostilities or zone of battle. Traditionally, IHL was not however considered

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67 Formulae used vary between IHL instruments, e.g. Article 6 GC IV refers to application until 'the general close of military operations', and on occupied territory until the end of occupation ; Article 118 GC III refers to the duty to repatriate at the 'cessation of active hostilities'. The *Tadić* Appeal Judgment invokes the perhaps looser phrase 'until a general conclusion of peace is reached', supra note 20, para. 70. *See also* H.-P. Gasser, 'Protection of the Civilian Population', in Fleck, *Handbook of Humanitarian Law*, supra note 18, pp. 209, 221. This does not limit specific obligations beyond the end of hostilities, e.g. to identify weapons that may continue to cause injury beyond the cessation of hostilities.

68 ICRC, 'Challenges of Contemporary Armed Conflicts', supra note 48, p. 26-27; Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6, p. 484.

69 Greenwood, 'Scope of Application', supra note 18, p. 62.

70 *Tadić* Appeal Judgment, supra note 38, para. 70. Territory includes land, rivers, territorial sea and air space. *See Lubanga*, supra note 48.

to extend to the territory of states not party to the conflict, unless those states allow their territory to be used by one of the belligerents.[71] It now seems increasingly well established that armed conflicts can and do spillover into the territories of states not party to the conflict. In respect of non-international armed conflict specifically, the ICTY has noted that while such conflicts generally arise 'within a state', the conflict need not unfold entirely within one state's geographic borders.[72] The Rwanda Statute acknowledged the same, by explicitly reflecting the cross-border history of that conflict.[73] The ICRC, and an increasing body of commentary, recognise that a non-international conflict may 'spillover' or even be 'cross border' without this necessarily altering the non-international nature of the conflict.[74]

The territorial sphere of NIACs may therefore have become more fluid, in accordance with developing realities. While a rigid approach to territorial limits of a NIAC is therefore increasingly untenable,[75] it has also been subject to much dispute whether the territorial dimension can be dispensed with entirely, as proposed by the US in relation to the controversial 'global war on terror' discussed in Part B below.[76] It has been suggested in response that some link to the territory of a state party to the Geneva Conventions, or a territorial *locus* for an armed conflict, is essential, even if it may expand beyond that state.[77] What is clear is that the key factors for determining whether a NIAC exists remain the nature of the parties to the conflict and the intensity of violence.

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71 Greenwood, 'Scope of Application of IHL', supra note 18, p. 51. If neutral territory is drawn into the area of war, and hostilities are conducted there, rival belligerents may also be entitled to take measures on that territory.

72 *Tadić* Appeal Judgment, supra note 38, para. 70

73 'The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda ... *as well as to the territory of neighbouring States* in respect of serious violations of international humanitarian law committed by Rwandan citizens.' Statute for the International Criminal Tribunal for Rwanda, UNSCR 955, 8 November 1994, Art. 7 (ICTR Statute).

74 *See* ICRC expanded typology in Pejic, 'Conflict Classification', supra note 58; *see, e.g.*, N. Schrijver and L. Herik, 'Leiden Policy Recommendations on Counterterrorism and International Law', Grotius Centre for International Legal Studies, 1 April 2010, para. 63, available at: http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20 April%202010.pdf (hereinafter 'Leiden Policy Recommendations'). 'It is possible for an armed conflict involving non-state actors to extend to the territory of more than one state, without necessarily qualifying as an international armed conflict. Such "transnational" armed conflicts would be subject to IHL applicable to non-international armed conflicts.' Cf Akande, 'Extraterritorial Armed Conflicts', supra note 33.

75 *See ibid* and Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, supra note 8, p. 30.

76 *See* Part B.1.1. below for a discussion on the 'global war' controversy.

77 The precise geographic limits of NIACs, and how such spillover or expansion airsides, is a matter of some debate as discussed in Part B. *See, e.g.*, Pejic, 'Conflict Classification', supra note 58.

6A.2 APPLICABLE LAW

The rules that govern any armed conflict depend, to a significant extent, on the international or non-international nature of the conflict discussed above. The applicability of some (but by no means all) treaty rules depends also on whether they have been ratified by all parties to the conflict. However, certain core rules of customary law are applicable irrespective of treaty ratification or the nature of the conflict.[78]

Historically, the focus of IHL was on governing international armed conflict, to which a more comprehensive body of treaty law therefore applies.[79] Developments in practice and legal thinking, however, have 'blurred' the distinction between international and non-international conflict and the rules applicable to each,[80] such that a 'common core' of customary IHL applies whatever the nature of the conflict.[81] Beyond treaties and customary law, reference must also be made to how IHL has been interpreted and applied by judicial bodies, national and international. While such jurisprudence was historically quite scarce, a noteworthy shift came with the work of international criminal tribunals, notably the UN ad hoc tribunals for the former Yugoslavia and Rwanda, as well as other ad hoc tribunals and since then the ICC.[82] By applying IHL in the context of concrete criminal cases, this jurisprudence has often led to a more rigorous analysis of the precise content and meaning of IHL.[83]

A long-established and intricate body of treaty law regulates the conduct of international conflicts and the protection of persons and property, such as the Hague Regulations of 1907,[84] the four Geneva Conventions of 1949, the

78 *See* J. Henckaerts and L. Beck, *Customary International Humanitarian Law*, ICRC, (Cambridge: Cambridge University Press, 2005 (hereinafter 'ICRC Study on Customary IHL').

79 Detailed rules governing IACs contrast to a more skeletal body of treaty law for NIACs (though the gap was narrowed by common Article 3 to the Geneva Conventions and AP II and through subsequent jurisprudence and practice). Divergence is seen e.g. in the ICC Statute Art 8.

80 The jurisprudence of the *ad hoc* tribunals found basic rules and principles in instruments addressed only to international conflict to apply to both types of conflict; s*ee e.g. Tadić* Jurisdiction Decision, supra note 20, paras. 119-24; *see also Lubanga*, supra note 48.

81 Ibid, and the ICTY's approach to a common core of war crimes; s*ee* S. Boelaert-Suominen, 'The Yugoslavia Tribunal and the Common Core of International Humanitarian Law Applicable to All Armed Conflict', 13 (2000) LJIL 619, 630.

82 International Tribunal for the former Yugoslavia, established by SC Res. 827 (1993), 25 May 1993, UN Doc. S/RES/827 (1993); ICTR, established by SC Res. 955 (1994), adopted on 8 November 1994, UN Doc. S/RES/955 (1994) and ICC Statute 1998, all discussed *in* Chapter 4.

83 Grave breaches and other serious violations of IHL may carry individual responsibility, but not *all* violations of IHL are criminal: *see* Chapter 4A.1.1.2.

84 Hague Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land (The Hague, 18 October 1907), 3 *Martens Nouveau Recueil* (Series 3) 461, in force 26 January 1910 (hereinafter '1907 Hague Regulations').

First Additional Protocol thereto of 1977 and the Hague Convention on Cultural Property of 1954.[85] To bind states parties to the conflict as treaty law,[86] the particular treaties must have been ratified or acceded to by those parties.[87] The US, UK and Afghanistan are all party to the four Geneva Conventions, for example, which were therefore binding on those states in the international armed conflict in Afghanistan as treaty law, though few other relevant treaties have been accepted by all parties.

While historically certain IHL treaty provisions only applied as treaty law if all parties to the conflict were parties to the treaty,[88] contemporary IHL rejects such a principle. The Geneva Conventions for example are binding on states parties engaged in armed conflicts, irrespective of whether other parties to the conflict are party to the Conventions. This reflects the fact that the core of IHL treaty provisions, by their nature, enshrine obligations *erga omnes* (i.e. obligations owed to all states, not merely the other parties to the treaty)[89] and that the content of many key provisions of treaties such as the Geneva Conventions is also customary law, discussed below. Moreover, where a treaty *is* applicable, its binding nature on parties to the conflict is not affected by the fact that an adversary may violate the obligations contained therein.[90] Non-observance of particular binding rules by one party does not justify violations by another.[91] In this vein, the ICTY has emphasised that crimes

85 IHL instruments relating to conduct of hostilities and to the protection of persons caught up in armed conflict, are often broadly referred to as 'Hague' and 'Geneva' law respectively

86 The nature and number of parties to a conflict is a question of fact that may change over time. For the purposes of the conflict in Afghanistan, the position of Afghanistan, the US and UK is considered.

87 *See* the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 33, in force 27 January 1980. According to Article 18, VCLT, States are also required not to defeat the object and purpose of a treaty that they have signed but not yet ratified.

88 Eg contrast the St Petersburg Declaration 1868 with the Geneva Conventions or Additional Protocols.

89 *See* Article 1 of the Geneva Conventions imposing obligations on *all* high contracting parties. *See also* ICRC Commentary to GC I: 'A State does not proclaim the principle of the protection due to wounded and sick combatants in the hope of saving a certain number of its own nationals. It does so out of respect for the human person as such.' *See also Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, ICJ Reports 1970*, p. 32; T. Meron, 'The Humanization of Humanitarian Law', 94 (2000) AJIL 239, p. 249; T. Meron, 'The Geneva Conventions as Customary Law', 81 (1987) AJIL 348, 349.

90 'Reciprocity' in the observance of IHL was a traditional principle that has been rejected in modern IHL. *See* Meron, 'Humanization', supra note 89, pp. 247-48, 251.

91 *See* Article 51(8) AP I: 'Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population.' *See also* Article 60(5) Vienna Convention on the Law of Treaties enshrining the principle that, as regards treaties of a 'humanitarian character', the breach of treaty obligations is no excuse for material breach by other parties.

committed by an adversary can never justify the perpetration of serious violations of IHL.[92]

As regards non-international armed conflicts, a far more limited body of treaty law applies, the core provisions of which are Common Article 3 of the Geneva Conventions and Additional Protocol II of 1977, which applies when certain conditions are met.[93] Given the relative dearth of treaty rules, customary law is of particular significance.[94]

Among the fundamental principles of IHL that apply, irrespective of the application of treaty law, are the competing considerations of *humanity* and *military necessity*, reflected throughout IHL, from which the particular principles of *distinction*, *proportionality* and the prohibition on causing *superfluous injury or unnecessary suffering* derive.[95] These principles can be considered customary international law, applicable to all conflicts.[96]

The treaties mentioned above remain relevant so far as they reflect or provide evidence of customary law, and the rules contained therein may therefore be binding on states whether or not they are parties to particular treaties. Among the critical treaties that are recognised to fall into this category are the Geneva Conventions of 1949 and the Hague Convention Respecting the Laws and Customs of War on Land of 1907.[97] The bulk of the provisions of the First Additional Protocol to the Geneva Conventions are recognised

92 *See* the discussion of this principle – *'tu quoque'* – in *Kupreskic et al*., IT-95-16-T, Judgment, 14 January 2000, paras. 765, 515-36 and *Martic*, IT-95-11-I, Rule 61 Decision, 8 March 1996, paras. 15-17.

93 Article 1 AP II sets out the jurisdictional threshold for the application of that treaty, requiring that the organised groups are under responsible command and exercise control over part of the state's territory.

94 For a detailed analysis of the content of the customary rules of IHL, *see* 'ICRC Study on Customary IHL'.

95 *See* 'ICRC Study on Customary IHL', supra note 78. T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Oxford University Press, 1991), p. 74, noting that 'no self respecting state' would deny the application of the principle of humanity to internal as well as international conflicts. On the 'elementary considerations of humanity' having the force of *jus cogens*, *see Delalic et al*., IT-96-21-A, Judgment (ICTY Appeals Chamber), 20 February 2001, para. 143. The principles reflect the 'dictates of public conscience' established in ICJ jurisprudence: *Corfu Channel (United Kingdom* v. *Albania), Merits, ICJ Reports 1949*, p. 4; *Nuclear Weapons* Advisory Opinion, supra note 12, para. 7.

96 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, ICJ Reports 1986*, p. 14, para. 218, and *Tadić* Jurisdiction Decision, supra note 19, para. 102, As early as 1899, the Martens Clause (Preamble to the Hague Convention Respecting the Laws and Customs on Land) provided that certain basic standards of conduct apply to all conflicts. Later common Article 3 of the Geneva Conventions enshrined the same 'principles of humanity', which are considered customary law applicable to all conflicts.

97 Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc. S25704. The report was unanimously approved by SC Res. 827 (1993), supra note 82.

as forming part of customary law.[98] As noted above, as a matter of customary law, there are now relatively few outstanding areas in which the content of legal protection in international and non-international conflict is different; some of these areas are discussed elsewhere in this book.[99]

The following section sketches out certain basic IHL rules concerning the selection of legitimate targets, lawful methods and means of warfare and the humanitarian protection due to persons affected by an armed conflict, all of which will be relevant to assessing the lawfulness of measures taken in the 'war on terror' discussed in Part B.

While little significance attaches to the use of the terrorism label as such, it should be noted that IHL prohibits the range of violent conduct that would commonly be referred to as 'terrorism' if committed outside armed conflict.[100] As discussed in Chapters 2 and 4, IHL also contains specific rules prohibiting acts of 'terrorism' or 'spreading terror among the civilian population' within armed conflict,[101] though acts of terrorism would fall foul of a broader range of IHL rules, most notably the basic principle requiring the protection of the civilian population from attack. As discussed in Section B of this chapter, the rules sketched out here are directly relevant to an assessment of the lawfulness of measures taken in response to international terrorism post 9/11.

6A.2.1 Targeting: the principle of distinction and proportionality

IHL regulates who and what may be the legitimate target of military action during armed conflict. At the heart of these rules is the principle of distinction, which counters the notion of total war and requires that civilians and civilian objects must be distinguished from military targets, and operations directed only against the latter. Distinction is the single most important principle for

98 The UK is party to AP I, but Afghanistan and the US are not, although the US signed it on 12 December 1977. However, as the ICRC notes, 'it is not disputed that most of [AP I's] norms on the conduct of hostilities also reflect customary international law.' The ICTY has describes it as 'not controversial that major parts of both Protocols reflect customary law'. *Kordić and Cerkez*, IT-95-14/2-PT, Decision on the Joint Defence Motion to Dismiss the Amended Indictment, 2 March 1999, para. 30.

99 *See* 'ICRC Study on Customary IHL', supra note 78. Issues regarding detention safeguards is an example where IHL provides little guidance in NIACs, as discussed in Chapter 7.3. The rules on POW status, e.g., do not apply in non-international armed conflict, therefore fighters in a NIAC, if captured, can be prosecuted for fighting against the state. Other protections such as humane treatment, safeguards against arbitrary detention and fair trial guarantees apply to both. *See also* Chapter 8 on rules governing Guantanamo detentions.

100 On definitions and elements of terrorism, *see* Chapter 2.

101 Art. 33 GC IV and Art. 4(2)(d) AP II address the treatment of persons in the power of the adversary. Art. 51(2) AP I and Art. 13(2) AP II specifically prohibit the infliction of acts of terror on the civilian population with the primary purpose of spreading terror.

the protection of the victims of armed conflict, and is a principle of customary law applicable to all types of armed conflict.[102]

As explained below, attacks are unlawful if they are: (a) directed specifically against civilians or civilian objects; (b) launched indiscriminately without distinction between civilians and military targets or (c) directed at military objectives, but anticipated to cause damage to civilians or civilian objects that is disproportionate to the military advantage anticipated at the time of launching the attack.[103] As regards objects, only those, which contribute to the adversary's military capability, the destruction of which would give rise to definite military advantage, may be attacked.[104] The law imposes certain positive obligations on those responsible for attacks to ensure that these rules are given meaningful effect.

6A.2.1.1 Lethal Use of Force against Combatants and Armed Groups?

In international armed conflict, members of the armed forces of an adversary are perhaps the most obvious legitimate military targets.[105] They have the 'privilege' of being entitled to use force, but it carries with it the serious implications, one of which is being susceptible to lawful targeting, as well as the privileged status of POW if captured, including immunity from prosecution for participating in hostilities, as discussed below. 'Combatants' include not only regular troops but may also comprise, under certain conditions,[106] irregular groups that fight alongside them and are '*under a command responsible to that party for the conduct of its subordinates*'.[107] Members of an armed group

102 The 'ICRC Study on Customary IHL', supra note 78, Vol. I, Ch. 1.

103 *See* Article 51(2) and (4) AP I and Article 13 AP II.

104 *See* Article 52(2) of Protocol I and Article 13 of Protocol II.

105 Article 4A(1), (2), (3) and (6) of the Third (Prisoners of War) Geneva Convention and Article 43(2) of AP I list persons who are members of armed forces or who are otherwise entitled to combatant status and thus have 'the right to participate directly in hostilities'.

106 The criteria in the Geneva Conventions have been relaxed under AP I. GC III requires that members of militias and volunteer corps other than the State's recognised regular armed forces fulfil four requirements: they must (a) have a commander responsible for subordinates; (b) have a fixed distinctive sign recognizable at a distance; (c) carry arms openly; and (d) operate in accordance with the laws and customs of war. *See also* 1907 Hague Regulations, supra note 84. However, AP I relaxed criteria (e.g., of wearing a fixed distinctive symbol) on account of having expanded the armed conflicts covered by the Protocol to include wars of liberation. Hence, carrying arms openly during military operations and being visible to the enemy preceding an attack became sufficient. *See* Pejic, 'Armed Conflict and Terrorism', supra note 10, p. 178. On these criteria being invoked to deny POW status see Chapter 8.

107 The ICRC study on customary law states that '[a]ll members of the armed forces of a party to the conflict are combatants, except medical and religious personnel' and '[t]he armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates'. 'ICRC Study on Customary IHL', supra note 78, Rules 3-4.

that 'belongs' to a party to the conflict may also be considered de facto combatants and also be susceptible to attack.[108]

The lethal targeting of those who fight with the adversary's forces, which may amount to murder if there is no armed conflict, is generally considered lawful in time of conflict under IHL. The traditional view is that a combatant in an IAC may legitimately be subject to lethal use force at all times during the conflict, even if off-duty at the time of attack, although there is a growing body of authority that where 'alternatives' to the use of lethal force prove possible in the circumstances, these should be employed, consistent with the principles of humanity and military necessity.[109]

Undoubtedly, as soon as combatants are *hors de combat* (not engaged in military action), voluntarily or involuntarily, for example through injury, illness, surrender or capture, they are no longer military objectives but become entitled to the protection of the law. Hence it is unlawful to kill a person who has been wounded, has surrendered or been captured, or is otherwise no longer participating in the conflict.[110]

In these circumstances, it is clear that the acts of killing and taking prisoner are not lawful interchangeable alternatives. While members of the armed forces are generally lawful targets, certain persons accompanying the armed forces, such as medical and religious personnel, are not.[111] It will be a question of fact, dependent on the political-military role of individuals in position of authority within the particular regime, whether they are de facto operating as part of the armed forces.Combatants among the civilian population do not necessarily deprive the entire population of its civilian character; rather, the legitimacy of targeting a 'mixed' group would depend on the question of *proportionality*, discussed below.[112]

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108 *See* D. Kretzmer, 'Use of Lethal Force against Suspected Terrorists', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (OUP, 2012), p. 638.

109 It is increasing asserted that if a party could incapacitate and capture, instead of kill, a combatant, at no added military cost, this should be done. *See, e.g.* The Power to Kill or Capture Enemy Combatants, R Goodman, *EJIL, Vol. 24, 2013*; N. Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), p. 73; Kretzmer, 'Use of Lethal Force', supra note 108, p. 639; P.Alston, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions', *Study on Targeted Killings*, Human Rights Council, U.N. Doc. A/HRC/14/24Add.6, 8 May 2010, p. 10 (hereinafter 'Alston Study on Targeted Killings'); DOJ White Paper, "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force," disclosed by NBC News, 4 Feb 2013. For the evolving US position see Part B.*See also* the related rules on direct participation of civilians in hostilities and loss of immunity below.

110 Note that for persons who are not members of the armed forces or organised groups belonging to the armed forces, they are civilians and the test is whether they are taking a 'direct part in hostilities', below. 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48, p. 22.

111 'ICRC Study on Customary IHL', supra note 78, Rule 4.

112 *See* part 6A.2.4 below.

In non-international conflict, the question of lawful targeting is more controversial. This is because treaty law governing NIACs does not provide a definition of persons who may be subject to attack (comparable to the definition of combatants applicable only in international conflicts). This is largely for the reason already alluded to- that states did not wish to recognise the right of armed groups on their territory to engage in armed conflict. As a result there is no right of belligerency as such under NIAC, and individuals engaged in conflict may be prosecuted for taking up arms.

Conversely, there is no explicitly recognised right to target such individuals, though this may be implicit. Some commentators suggest that, absent an explicit provision of IHL, rules comparable to those applicable in IAC can be read into the law of NIAC. As such, organised armed groups would be treated as legitimate targets on the same basis as combatants in IAC.[113] Others suggest, however, that as the rules are different (there being no privileges of belligerency or upon capture), such persons remain civilians under IHL. In either case, it is well recognised that they lose their protection from attack so far as they directly participate in hostilities, addressed below.

6A.2.1.2 Civilian Protection and 'Direct and Active Participation in Hostilities'

The cardinal rule of humanitarian law is that civilians must not be the object of attack. While this follows logically from the fore-mentioned rule that only military objectives may be targeted, explicit provision for civilians appears throughout humanitarian law.[114] As discussed below, attacks against civilians are prohibited not only where they are deliberately directed against the civilian population as such, but also where the attacks are 'indiscriminate' or 'disproportionate'.[115] There is no exception to this prohibition,[116] and the notion that it is limited by the principle of military necessity has been rejected.[117]

Civilian immunity from attack is lost only where the person takes an active and direct part in hostilities, as set down in IHL treaties[118] and customary law.[119] This is reflected for example in a decision by the Israeli Supreme Court, which found that the situation in the West Bank and the Gaza Strip

113 The ICRC Guidance controversially suggested that those that take up arms and participate in conflict in a "continuous combat function" may then be attacked at any time, even when they are not in fact directly participating at that time. See discussion on the ICRC Guidance below.

114 *See e.g.* Article 51(2) AP I and Article 13(2) AP II

115 While this section focuses only on military attacks directed against civilians as such, many other acts against civilians are prohibited by IHL, expressly or implicitly: *see* 6A.3.3 below.

116 'ICRC Study on Customary IHL', supra note 78, Rules 5-6.

117 For example, the Trial Chamber of the ICTY in *Galić*, supra note 115, expressly rejected the suggestion that the rule can be derogated from by invoking military necessity.

118 Article 51(3) of AP I states that "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

119 'ICRC Study on Customary IHL', supra note 78, Rule 6.

amounted to an IAC in which terrorist groups participated as civilians who had lost their immunity from attack:[120] 'terrorists participating in hostilities do not cease to be civilians but by their acts they deny themselves the aspect of their civilian status which grants them protection from military attack'.[121] Thus, according to the Israeli Supreme Court, terrorists may be targeted for military purposes where they actively and directly participate in hostilities. Yet, since 9/11 the scope of 'direct participation in hostilities' (DPH) – and the circumstances in which individual 'terrorists' might fall into this category, thereby losing their civilian immunity from attack – has been the focus of uncertainty and dispute.[122]

i) What Constitutes Direct Participation in Hostilities?

While the ICRC study notes that customary international law enshrines the principle, it acknowledges that 'a clear and uniform definition of direct participation in hostilities has not been developed in state practice'.[123] As discussed below, a subsequent ICRC document, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities', was therefore published in 2009 in an attempt to provide greater guidance on the meaning of direct participation, when and for how long civilian immunity is lost.[124] While the Guidance has itself been subject of considerable dispute from a range of sources and should not be taken as a categorical statement of the law in this area, it provides one important reference point from an undisputedly authoritative source on IHL.[125]

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120 The Supreme Court's starting point, based on previous jurisprudence, was that an armed conflict exists 'between Israel and [] various terrorist organizations…'. Targeted Killings judgment, supra note 7, para. 16. This may reflect an unduly broad approach to the definition of armed conflict, rendering it questionable whether the situation should have been governed by IHL as the Court determined. Even so, the court's approach to the *interpretation* of IHL may yet be instructive. See also Chapter 7B3 on this judgment and the interplay of IHL/IHRL.

121 *Ibid.*, at para. 31.

122 The legal framework is discussed in the section that follows. Its application and debates post-9/11 are in Part B below.

123 'ICRC Study on Customary IHL', supra note 78, p. 23.

124 Interpretative Guidance on the Notion of Direct Participation in Hostilities under IHL', ICRC, 2009 (hereinafter 'ICRC DPH Guidance').

125 Critiques and discussion of the 'ICRC DPH Guidance' abound. S*ee e.g.* R. Goodman and D. Jinks, 'The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum', 42 *N.Y.U. J. Int'l L. & Pol.* 637 (2010). See in response N. Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities', 42 *N.Y.U. J. Int'l L. & Pol.* 831 (2010). the range of concerns. See also K. Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance', 42 *N.Y.U. J. Int'l L. & Pol.* 641 (2010); M. Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements', 42 *N.Y.U. J. Int'l L. & Pol.* 697 (2010); W. H. Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally

'Direct participation in hostilities' (DPH) covers 'acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces'.[126] An 'act of war' plainly covers fighting against opposing armed forces on the one hand, while not including, for example, moral or philosophical support for or affiliation to the adversary, on the other. But many areas of uncertainty – to be assessed on the facts of each case – lie in between.[127] The ICRC 2009 Guidance noted that DPH refers to 'specific acts carried out by individuals as part of the *conduct of hostilities* between parties to an armed conflict',[128] which are designed to cause harm to the military operations or military capacity of a party to an armed conflict or, alternatively, death, injury, or destruction of protected persons or property, and have a causal nexus with that harm.[129]

By way of example, the Israeli Supreme Court found that selling food, providing strategic analysis and logistical general support, including monetary aid, were taking an *indirect* rather than a direct part in hostilities and would not meet the DPH criteria.[130] By contrast, operating weapons or collecting intelligence on armed forces was, in the Court's view, sufficiently 'direct and active' participation in hostilities to deprive the civilian of his or her civilian status.[131] The ICRC for its part in distinguishing 'direct' from 'indirect' participation, has found that 'war sustaining' roles, which do not give rise to loss of civilian immunity, 'would additionally include political, economic or media activities supporting the general war effort (e.g. political propaganda, financial transactions, production of agricultural or non-military industrial goods)'.[132]

Undoubtedly, there remain grey areas. Although one commentator has suggested that '[g]rey areas should be interpreted liberally, i.e., in favour of finding direct participation',[133] it is suggested that direct participation should be narrowly construed, in line with the fundamental nature of the protection of civilians in IHL. This is consistent with the rule that if any doubt arises as

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Incorrect', *42 N.Y.U. J. Int'l L. & Pol.* 769 (2010). Some of these authors note that the ICRC DPH Guidance is not customary international law.

126 ICRC Commentary AP 1, p. 619, para. 1944.

127 *See, e.g.*, Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed., (Cambridge: Cambridge University Press, 2010), p. 172; F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, ICRC, (Cambridge: Cambridge University Press, 2011); *see also* 'ICRC DPH Guidance', supra note 124.

128 'ICRC DPH Guidance', supra note 125, Part 1, IV.

129 *Ibid.*, Part I, V.

130 Ruling on Targeted Killings, supra note 9, para. 34.

131 *Ibid.*, para. 35.

132 'ICRC DPH Guidance', supra note 125, p. 5; Goodman and Jinks fn 123 above.

133 M. Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict', in H. Fischer, et al eds., *Crisis Management and Humanitarian Protection: Festschrift fur Dieter Fleck* (Berlin: BWV, 2004), pp. 505-09.

to whether someone is a combatant or a civilian, he or she must be presumed a civilian.[134]

ii) For How Long is Immunity from Attack Lost Through Direct Participation?
Under the relevant IHL provisions cited above, where a civilian does directly participate in hostilities, he or she loses protected status only 'for such time' as his or her participation continues. Considerable debate surrounds the interpretation of this phrase, as reflected in the ICRC Guidance. The ICRC Guidance suggests, somewhat novelly, that those civilians who have a 'continuous combat function' in hostilities may be targeted for as long as they exercise such a function.[135] By contrast, a civilian who participates on an *ad hoc* basis can only be targeted while actually engaging in the hostile acts themselves.[136]

Whether the 'continuous combat function' category reflects customary law may be doubtful, with some suggesting that the 'for such time as they take a direct part in hostilities' standard merits a narrower interpretation, whereby immunity is lost only for as long as the hostile acts themselves are underway.[137] Even before the ICRC Guidance, however, it had been recognized that some flexibility is due in this regard and that at least so far as a civilian engaged in a series or a 'chain of acts', whereby one act is completed but others being prepared, he or she may be considered still actively and directly participating in hostilities during that chain of events.[138] In the same vein, even on a narrower approach to immunity being lost only while the individual participates in the particular act(s) or operations, legal experts seem to agree that civilians preparing or returning from combat operations are still considered to be directly participating in hostilities, although a precise indication as to when such preparation begins and return ends remains controversial.[139]

iii) Limits on the Use of Force against those Directly participating in Hostilities?
The fact that a civilian directly participating in hostilities may have lost immunity from attack does not however mean that the lethal use of force against that person will always be justified. The question arises as to the extent to which, consistent with the principles of military necessity and humanity, there is an obligation under IHL to use less harmful means, short of lethal force,

134 As noted in Article 50 AP I: 'In case of doubt whether a person is a civilian, that person shall be considered a civilian'; *see* 'ICRC DPH Guidance', supra note 125, p. 71 et seq.
135 'ICRC DPH Guidance', supra note 124, Part 1, II and VII. *See also* Kretzmer, supra note 108, p. 638. Former Special Rapporteur Philip Alston criticised this as creating a status-based exception rather than a specific-acts based approach, *see* 'Alston Study on Targeted Killings', supra note 109; *see* response in Pejic, 'Conflict Classification', supra note 57.
136 'ICRC DPH Guidance', supra note 124, pp. 44-45.
137 'Alston Study on Targeted Killings', supra note 109.
138 Ruling on Targeted Killings, supra note 9, para. 39.
139 *See* 'ICRC DPH Guidance', supra note 125, p. 67.

against individuals taking direct participating in hostilities where this proves feasible.

The ICRC Guidance on DPH provides that where the circumstances are such that the armed or police forces of the government may be able to capture an individual without resorting to lethal force, without jeopardising its own forces or military advantage, the principle of humanity requires that this be done.[140] Likewise, a landmark decision by the Israeli Supreme Court adopted a parallel approach when it stated as follows:

> [A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means, which should be employed.[141]

The view that such persons, despite losing civilian immunity, still should not be killed unless less harmful means have been considered and, if possible, exhausted, may flow from principles of IHL (as emphasised by the ICRC) or the increasing cross fertilisation between IHL and human rights law, both applicable in situations of armed conflict.[142] As noted above, there is increasing support in doctrine and practice related to counter-terrorism that capture should where feasible be employed in preference to killing, though much doubt remains around questions of feasibility.[143] While it would be difficult to assert categorically where the law on this point currently stands, it is at a minimum sufficiently in flux to question the entitlement under IHL to kill civilians engaged in hostilities without careful consideration of less onerous alternatives.

6A.2.1.3 Targetable Objects

As regards objects that may be targeted, the most widely accepted definition is that in Article 52 of Additional Protocol I, which states:

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140 '[I]t would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.' *See ibid*., p. 82.

141 Ruling on Targeted Killings, supra note 9, para. 40.

142 *See* Chapter7B.3 on Interplay with human rights law. The Court's approach above is reflected in the approach of human rights bodies that e.g. 'Before resorting to the use of deadly force, all measures to arrest and detain persons suspected of being in the process of committing acts of terror must be exhausted.' 'Concluding Observations, Israel', Human Rights Committee, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 15.

143 See note 106, and the Obama administration's endorsement in principle discussed in Part B.

> In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make *an effective contribution to military action* and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, *offers a definite military advantage*.[144]

This definition has been described as almost certainly embodying customary law.[145]

The basic rule is that attacks against civilian objects are prohibited.[146] The ICTY considers the prohibition on attacking 'civilian objects' or 'dwellings and other installations that are used only by civilian populations' part of customary law, applicable to all conflicts.[147] In addition to this general rule, attacks against certain specific categories of objects, such as buildings dedicated to religion, charity, education, the arts and sciences, historic monuments[148] and cultural property[149] are specifically prohibited by particular international instruments.

Some of the most difficult issues of targeting arise in relation to objects with dual military and civilian uses, such as bridges, roads, electric-power installations or communications networks. The controversy surrounding targeting television networks, which arose during the NATO bombing of the former Yugoslavia (and again in Afghanistan),[150] is an example. The question of fact is whether the target makes an effective contribution to military action and its destruction offers direct military advantage. International humanitarian law provides that 'in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used'.[151]

Finally, while it is a serious violation of humanitarian law to deliberately put military objectives in the vicinity of civilians, doing so does not necessarily justify an attack from the adversary. If destruction of a target offers direct military advantage, that advantage must outweigh any incidental loss to

144 Article 51(2) AP I (emphasis added).

145 'ICRC Study on Customary IHL', supra note 78, Rule 8.

146 Article 52 AP I: 'General protection of civilian objects: Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.' On AP I rules governing conduct of hostilities as custom, *see* 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 47, p. 8.

147 *Tadić* Jurisdiction Decision, supra note 19, paras. 110-11 and the Trial Chamber's decision of 2 March 1999 on the joint defence motion to dismiss the amended indictment in *Kordić and Cerkez*, supra note 98, para. 31.

148 Article 56, 1907 Hague Regulations, supra note 84.

149 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, Articles 53 and 85. *See* Article 1 (definition) and Article 4; see also Article 53, AP I and Article 16, AP II. The obligation to respect cultural property 'may be waived only in cases where military necessity imperatively requires such a waiver'. Article 4(2).

150 *See* para. 6B.2.1 on targeting below.

151 Article 52(3), AP I.

civilians, all feasible steps having been taken to minimise civilian losses.[152] The lawfulness of an attack in an area where there is both a legitimate target and persons or objects that are immune from attack depends on questions of proportionality, as discussed below.

6A.2.2 Indiscriminate attacks and those causing disproportionate civilian loss

In addition to the rule that attacks must not be specifically directed against civilians and civilian objects is another that provides that attacks must not be indiscriminate, that is, directed against military and civilian objectives without distinction.[153] The prohibition on indiscriminate attacks is a fundamental aspect of the customary principle of distinction, applicable in all conflicts.[154]

Closely linked to the principle of distinction is the 'proportionality' rule, which requires that those directing attacks against military objectives must ensure that civilian losses are not disproportionate to the direct and concrete military advantage anticipated to result from the attack.[155] Proportionality is generally accepted as a norm of customary international law.[156]

There is no precise formula for this proportionality calculus, and the relative weight to be attached to civilian and military losses will depend on all the circumstances. However, a few specific points deserve emphasis. First, the military advantage anticipated must be 'direct and concrete'.[157] It cannot

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152 *See* the discussion of proportionality and precautionary measures that must be taken by commanders, including the duty to minimise civilian loss and warn civilians of impending attacks, in this part, below.

153 Article 51 AP I refers to five forms of indiscriminate attacks, all of which are prohibited: those which *are not* directed at a specific military objective (para. 4(a)), those which employ a method or means of combat which *cannot be directed* at a specific military objective (para. 4(b)), those which employ a method or means of combat the *effects of which cannot be limited* (para. 4(c)), an *area attack* treating separate and distinct military objectives in an area containing a concentration of civilians as a single military objective (para. 5(a)), and an attack which may be expected to cause incidental civilian casualties or civilian property damage *disproportionate* to the expected military advantage. Different classifications of the same principles appear in different contexts. 'ICRC Study on Customary IHL', supra note 78, Rules 11 and 12.

154 *Tadić* Jurisdiction Decision, supra note 20, para. 127; *Kordić*, supra note 98, para. 31; 'ICRC Study on Customary IHL', supra note 78, Rules 11 and 12.

155 Article 51(5) AP I.

156 *See generally* J. Gardam, 'Proportionality and Force in International Law', 87 (1993) AJIL 391; *see also* W.J. Fenrick, 'Attacking the Enemy Civilian as a Punishable Offence', 7 (1997) *Duke J. of Comparative and Int'l L.* 539, 545 noting that the proportionality rule, 'is a logically necessary part of any decision making process which attempts to reconcile humanitarian imperatives and military requirements during armed conflict'. *See* generally W.H. Parks, 'Air War and the Law of War', 32 (1990) *Air Force L. Rev.* 1; 'ICRC Study on Customary IHL', supra note 78, Rule 14.

157 Article 57(2) AP I.

be long-term or speculative. The assessment of military advantage against potential loss must be made in relation to a *particular* military operation, not in relation to a battle, still less to a conflict as a whole.[158] Such an evaluation is not to be made after the fact, when the number of civilian and military casualties can be compared, but based on the information available at the relevant time and in the context of all the prevailing circumstances.

Finally, a mistaken evaluation of proportionality, just like a mistaken identification of a target, is not necessarily unlawful. However, ignorance as to the nature of the target, its military contribution or the extent of civilian losses is not *per se* an excuse. IHL lays down certain duties on those responsible for attacks that safeguard the principles of distinction and proportionality; if civilian losses result from a situation where these duties have not been observed, then a violation of IHL has occurred (and a crime may also have been committed by the person responsible for ordering the attack as discussed at Chapter 4, Section B).

6A.2.3 Necessary precautions in attack

Complicated issues of targeting may arise, for example in respect of defended cities with 'dual use' facilities and the close intermingling of civilian and military elements. Likewise, rural terrain and guerrilla tactics may make target identification difficult. However, core principles of international humanitarian law require that every responsible military commander must take certain feasible precautions to ensure the lawfulness of a military attack.[159]

These include the commander's duty to verify the nature of the target. It is no excuse that a commander or other person who plans or decides upon an attack does not have the information available as to the true nature of a target, as IHL imposes a duty to inquire. If a commander cannot, upon inquiry, obtain the necessary information, he or she cannot attack assuming the target to be legitimate. On the contrary, if in doubt, the assumption must be that the target is protected.[160]

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158 *See* L. Doswald-Beck, 'The Value of the 1977 Geneva Protocols for the Protection of Civilians', in M.A. Meyer (ed.), *Armed Conflict and the New Law. Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (London, 1989), pp. 137 ff. Note, however, that many states appear to take a broader view of the proportionality calculus, and the ICC Statute's reference to proportionality as involving an assessment of the 'overall military advantage anticipated,'Article 8(2)(b)(iv).

159 Article 57 AP I; 'ICRC Study on Customary IHL', supra note 78, Rule 15 and 16.

160 This principle is reflected in Article 50(1) AP I, which states that 'in case of doubt whether a person is a civilian, that person shall be considered to be a civilian'. *See also Blaskić*, Judgment, Case IT-95-14-T. As noted above, a similar principle is reflected in Article 50 in respect of objects.

While an attacking side will understandably want to protect its forces, this does not take priority over precautions to protect civilians in the planning and execution of an attack, whose protection IHL clearly emphasises.[161] Thus in the choice of weapons and systems, it is obliged to use systems that provide for and enable reliable target identification.

Moreover, even if a target is identified and is legitimate (being a military objective that satisfies the proportionality rule), commanders must take all feasible steps to *minimise* the damage to civilian life and objects resulting from the military action. These include giving warnings of attacks that may affect the civilian population[162] and, where there is a choice of targets, choosing those least injurious to civilian life or objects.[163]

6A.2.4 Methods and means of warfare: unnecessary suffering

The prohibition on waging war in a manner that causes unnecessary suffering and superfluous injury is a fundamental tenet of international law. The expression 'unnecessary suffering and superfluous injury' is used in a number of legal instruments, yet nowhere is it defined.[164] The concept is, however, clearly linked to the customary principle that all suffering caused in conflict should be pursuant, and proportionate, to military necessity. As such, the ICJ

161 *See* 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 47, p. 13.

162 'ICRC Study on Customary IHL', supra note 78, Rule 20 identifies this requirement for both IACs and NIACs; Article 57(2)(c) AP I; *see* Meron, '*Human Rights and Humanitarian Norms*', supra note 95, p. 65, noting that an expert study on behalf of the Joint Chiefs of Staff acknowledged this duty as customary law.

163 *See* Article 57(2) AP I: '(a) Those who plan or decide upon an attack shall: (i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; (iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.' *See also* Article 50(7) AP I.

164 *See* Article 23(e) 1907 Hague Regulations, supra note 84; Article 35 AP I; CCW Convention 1980.

has described causing 'unnecessary suffering to combatants' as causing 'harm greater than that unavoidable to achieve legitimate military objectives'.[165]

An evaluation of what amounts to unnecessary suffering has to be case and context specific. However, certain methods and means of warfare, or particular weapons systems, are considered by definition to cause unnecessary suffering, as reflected n the specific treaty provisions that regulate the use of particular weapons[166] and the case by case determinations – of for example homemade mortars to nuclear weapons – by international courts.[167] The customary law prohibition on weapons causing unnecessary suffering covers those that are either (a) cruel or excessive in the nature and degree of suffering they cause, or (b) incapable of distinguishing combatant from civilian.[168] Among the first group are weapons considered so *inherently abhorrent* that they are banned absolutely, even when directed against combatants or other lawful targets, such as blinding laser weapons or poisons.[169] The second group covers weapons that are banned due to their inability to distinguish between civilian and soldier and hence *inherently indiscriminate* by nature, which arguably includes anti-personnel landmines.[170]

Controversy has centred on whether particular weapons systems fall within this definition and are prohibited by general international law. This is exemplified by the serious questions raised as to the lawfulness of the use of cluster bombs,[171] on two main grounds. First, because they are designed to disperse

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165 *Nuclear Weapons* Advisory Opinion, supra note 11, para. 78. On the status of the principle as 'established custom', *see* 'ICRC Study on Customary IHL', supra note 78, p. 241 et seq.

166 *See e.g.* Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997, 2056 UNTS 577, in force 1 March 1999 (hereinafter 'Landmines Convention'); Article 23(e) 1907 Hague Regulations, supra note 84; Article 35 AP I; Biological Weapons Convention, London, 10 April 1972, in force 26 March 1975; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, 13 January 1993, in force 29 April 1997 (hereinafter 'Chemical Weapons Convention').

167 In *Blaskić*, supra note 160, paras. 501, 512 where use of homemade mortars constituted an indiscriminate attack. *See also Nuclear Weapons* Advisory Opinion, supra note 12, para. 95.

168 In its *Nuclear Weapons* Advisory Opinion, ibid, para. 78, the ICJ held: 'States must never ... use weapons that are incapable of distinguishing between civilian and military targets.'

169 Eg CCW Convention's four Protocols prohibiting the use of specific conventional weapons on 'Non-Detectable Fragments' (1980), 'Mines, Booby Traps and Other Devices' (1980 amended 1996),'Incendiary Weapons'(1980) and 'Blinding Laser Weapons' (1995). *See also* Second Hague Declaration 1899; Article 23(a) of the 1907 Hague Regulations; Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1928; *Nuclear Weapons* Advisory Opinion, ibid para. 54.

170 Eg anti-personnel landmines have often been cited as violative of these principles, due to their inability to distinguish civilian from military limbs. See also Landmines Convention and CCW protocol II above.

171 There is a NATO policy prohibiting the use of cluster munitions in Afghanistan, in place since 2007. The inherent lawfulness of cluster bombs has not been adjudicated but s*ee* ICTY decision in the preliminary hearing in the case of *Martić*, IT-95-11-R61, Review of the Indictment, 8 March 1996, discussed below; *see also* 'Ticking Time Bombs: NATO's Use

submunitions over a wide area and cannot be confined within the parameters of a military target.[172] Second, due to a high reported initial failure rate – estimated at seven percent on cluster bombs employed by the US – a significant amount of bomblets do not detonate immediately, lying dormant until disturbed at some future point.[173] The unpredictability of the person or object that will ultimately detonate the bomblets is such that the impact of these bomblets may be considered indiscriminate. In these circumstances, they effectively act as landmines, which have been subject to a widely ratified comprehensive treaty prohibition[174] and which are considered a violation of the prohibition on the use of indiscriminate weapons.[175] Cluster bombs were prohibited in a specific Convention which entered into force in 2010,[176] consolidating earlier doubts as to their lawfulness reflected in international practice,[177] and in earlier US practice in other contexts.[178]

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of Cluster Munitions in Yugoslavia', Human Rights Watch Report, June 1999, available at: http://www.hrw.org/reports/1999/05/11/natos-use-cluster-munitions-yugoslavia ; *see also* 'Cluster Bomblets Litter Afghanistan', Human Rights Watch Press Release, 16 November 2001, available at: http://www.hrw.org/press/2001/11/CBAfgh1116.htm.

172 *See* para. 6B.2.2 below; *see also* 'Strange Victory: A Critical Appraisal of Operation Enduring Freedom and the Afghanistan War', n. 3, Project on Defense Alternatives, Research Monograph No. 6, 30 January 2002, available at http://www.comw.org/pda.

173 *See* 'Long After the Air Raids, Bomblets Bring More Death', *The Guardian*, 28 January 2002, availableat:http://www.guardian.co.uk/world/2002/jan/28/afghanistan.suzannegoldenberg.

174 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997, 2056 UNTS, in force 1 March 1999. As of 5 December 2012, 159 states are party to the Landmines Convention. Data available at: http://www.icbl.org/ratification.

175 *See also* Human Rights Watch, 'International Humanitarian Law Issues and the Afghan Conflict: Open Letter to North Atlantic Treaty Organization (NATO) Defense Ministers', 17 October 2001, available at: http://www.hrw.org/press/2001/10/nato1017-ltr.htm.

176 The Convention on Cluster Munitions, which prohibits the use, transfer and stockpiling of cluster bombs, came into force in August 2010. The United Kingdom and Afghanistan are States Parties, but the US has neither signed nor ratified the Convention.

177 *See* reports in the context of Afghanistan, above. For earlier reports, *see, e.g.*, HRW, 'Ticking Time Bombs, supra note 171; HRW, 'Cluster Bomblets', supra note 173. See preliminary hearing in the case of *Martić*, IT-95-11-R61, Review of the Indictment, 8 March 1996, above, indicated that the use of cluster bombs in the circumstances of that case may provide the basis for an indiscriminate attack charge. The Prosecutor's office of the ICTY noted a'clear trend' towards their prohibition, in 'Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia', 12 June 2000, 39 (2000) ILM 1257.

178 Reportedly during the 1995 Operation Deliberate Force in Bosnia, air combat commander Major-General Michael Ryan prohibited the use of cluster bombs, in recognition of the inherent danger to civilians. See also US Air-Force-sponsored study cited in HRW, 'International Humanitarian Law Issues', supra note 175; HRW, 'Cluster Bomblets', supra note 171.

6A.2.5 Humanitarian protections

IHL governs not only the conduct of hostilities, addressed above, but also affords protection to persons in the hands of 'the enemy'. The key provisions of the Geneva Conventions provide that such persons are considered 'protected' from the moment when they fall into the hands of the adverse party.[179]

All persons taking no active part, or no longer taking part, in hostilities are entitled to protection under IHL; protections are due both to those who have never taken part in hostilities and to those who once did but are now *hors de combat*. Common Article 3 to the Geneva Conventions, which is customary international law applicable in all situations, provides that such persons must be treated humanely, without discrimination, and specifically prohibits violence to life and person, including cruel treatment, hostage-taking, outrages upon personal dignity and carrying out of sentences and executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees.[180] Beyond Article 3, more detailed provisions are contained elsewhere in the Geneva Conventions and Protocols, many of which reflect and give expression to fundamental principles of IHL, in particular the principle of humanity, and may as such reflect customary law.

6A.2.5.1 Civilians

The duty to protect the civilian population lies at the heart of IHL. Rules regarding targeting of civilians are described above. As noted, for as long as civilians take up arms and participate directly in hostilities they may lose their immunity from attack, and they may also be prosecuted under domestic laws for engaging in conflict.[181] However all civilians, whether or not they took up arms, are entitled to the humanitarian protections set out in Common Article 3[182] and customary law applicable to all conflicts.[183] Additional provisions in the Fourth Geneva Convention (which applies to civilians that 'find themselves ... in the hands of a Party to the Conflict or Occupying

179 Human rights provisions, outlined in Chapter 7, apply to persons detained on a state's territory or under its jurisdiction and supplement the specific provisions of IHL. See 7B3 on interplay between the two branches.

180 'Common Article 3.

181 It is not a violation of IHL or a war crime to engage in conflict as such, but nor does IHL offer protection from prosecution under domestic law, other than for privileged combatants entitled to POW status.

182 Common Article 3 provides humanitarian protection to all persons who do not, or no longer, take active part in hostilities.

183 'ICRC Study on Customary IHL', supra note 78, Part VII, especially Ch. 32 'fundamental guarantees'.

Power[184] of which they are not nationals')[185] and Additional Protocol I apply to international conflicts.

The power into whose hands protected persons fall is obliged to refrain from violating their rights, but also to take necessary proactive steps to ensure their protection.[186] IHL makes explicit reference to a range of human rights protections,[187] for example respect for 'honour, family rights, their religious convictions and their manners and customs',[188] procedural rights relating to detention and fair trial,[189] property rights,[190] and particular groups, such as children, are entitled to special additional protection.[191] The duty of humanitarian protection extends also to ensuring that relief operations are conducted for the benefit of civilians, in territory under the control of a party to the conflict.[192]

6A.2.5.2 Prisoners of war and the wounded or sick

Although combatants and other persons taking a direct part in hostilities are military objectives and may be attacked, the moment such persons surrender or are rendered *hors de combat*, they become entitled to protection.[193] That protection is provided for all conflicts by common Article 3 and for international conflicts in the First and Third Geneva Conventions relating to the treatment of the 'wounded, sick and shipwrecked' and 'prisoners of war', respectively,[194] supplemented by Additional Protocol I. As noted above, these

184 Specific obligations relating to Occupying Powers are addressed at 6A.3.4 below.
185 *See* Article 4 GC IV and *Tadić* Jurisdiction Decision, supra note 19, para. 578-84.
186 This includes 'all measures required to ensure the safety of civilians ...'. Gasser, supra note 67, p. 212.
187 Article 38 GC IV – medical care, religion, freedom to leave territory, as discussed by Gasser, supra note 67, p. 283, and Article 39 GC IV (right to work).
188 Article 27(1) GC IV.
189 See provisions of GC IV and AP I in Chapter 8 on Guantanamo Bay.
190 The guarantee of property rights is found principally in Article 46(2) of the 1907 Hague Regulations rather than the Geneva Conventions, although *see also* Article 53 GC IV.
191 Article 24 GC IV; *see also* Article 77 AP I. These rights under IHL are supplemented by those enshrined in human rights law, which applies to all persons within a state's territory and subject to its jurisdiction, irrespective of nationality, as described in the following chapter.
192 *See* Article 59 GC IV on the duties of occupying powers to 'allow and facilitate rapid and unimpeded passage' of relief operations and Article 23 GC IV which imposes a similar obligation on all high contracting parties. Article 70 AP I extended the obligation to accept humanitarian relief to civilians in any territory of a party to the conflict.
193 This section deals with POWs and Sick and Wounded. *See* the basic rights to which all detainees are entitled in Chapter 8 in relation to the Guantanamo detainees.
194 GC I and III.

Conventions are binding as treaty law, but the key provisions are in any event customary in nature.[195]

As regards 'prisoner of war' status, which arises in international armed conflict, the Third Geneva Convention imposes limits on those who are entitled to such status. These include: (a) members of the armed forces of the opposing party, whether they belong to a recognised government or not, (b) members of militia or volunteer corps, provided they satisfy certain conditions, namely 'being commanded by a person responsible for his subordinates; having a fixed distinctive sign recognisable at a distance; carrying arms openly; conducting their operations in accordance with the laws and customs of war'[196] and (c) *levées en masse*.[197] AP I recognises some loosening of these criteria,[198] and commentators have noted the need for flexibility in order 'to avoid paralysing the legal process as much as possible and, in the case of humanitarian conventions, to enable them to serve their protective goals'.[199]

Among the most basic protections owed to POWs under the Convention are the duties to treat them humanely and protect them from danger,[200] to supply them with food, clothing and medical care[201] and to protect them from public curiosity.[202] The procedural guarantees due to POWs are discussed in detail in relation to the detainees held at Guantanamo Bay at Chapter 8. In brief, they are also entitled to elaborate due process guarantees, including trial by courts that respect the same standards of justice as those respected by the courts that would try members of the military of the detaining state.[203] They may not be subject to any coercion in order to extract information from them and are entitled to disclose only their names, date of birth and rank or position within the armed forces.[204] POWs may not be subject to any punishment or reprisal for action taken by the forces on whose side they fought. A POW may not then be prosecuted by the capturing power for participation in hostilities or for any lawful acts of war; however, consistent with the duty to prosecute war crimes,[205] serious violations of IHL are subject to prosecution.

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195 *See, e.g.*, Report of the UN Secretary General introducing the Statute of the ICTY, supra note 97. Note that POW status does not however apply in non-international armed conflict, although, as noted below, the principles may be applied in that context, too. 'ICRC Study on Customary IHL', supra note 78, Ch. 32 and 33.

196 Article 4(A) GC III.

197 Article 4(6) GC III.

198 *See* Article 44(3) AP I.

199 T. Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout', 92 (1998) *AJIL* 236. But see co-application of IHRL in Chapter 7B3.

200 Article 19 GC III.

201 Article 20 GC III.

202 Article 13 GC III.

203 *See* Article 84 and Articles 99-108 GC III.

204 Article 17 GC III.

205 The Geneva Conventions expressly oblige states to prosecute grave breaches, applicable in international conflict, while other sources, including the preamble to the ICC Statute, suggest an obligation to prosecute war crimes in all conflicts.

When hostilities have ceased POWs must be repatriated.[206] Other detailed rules regarding, *inter alia*, personal possessions, camps, structure, complaints and correspondence are set out in the Convention.[207]

If any doubt arises as to entitlement to POW status, a competent tribunal must determine the matter.[208] Pending such determination, the captured individual shall in any case enjoy the protection guaranteed to prisoners of war by the Third Geneva Convention.[209] Moreover, on numerous occasions, states have, as a matter of practice, extended POW status to cover persons not strictly entitled to such status under IHL, as was for example the practice of the United States in Vietnam.[210] This may reflect in part the core humanitarian IHL principles manifest in the specific provisions of GC III, as well as the desire to ensure similar treatment of their own forces if captured.

In any event, if the prisoners in question do not qualify for POW protection under the Geneva Convention itself, to the extent that certain of the provisions of that Convention are derived from the principles of humanity (and military necessity), they may apply as customary law. Moreover, as discussed in more detail in Chapter 8, they are, in any event, entitled to other protections under GC IV or, at a minimum, under common Article 3 and Article 75 AP I.[211]

With regard to the sick or wounded, as noted above they may not be subject to attack and, as with all persons *hors de combat*, they are entitled to humane treatment. In addition, there is a positive obligation under the First Geneva Convention to search for and collect the sick and wounded.[212] They must be protected, cared for and their medical needs attended to.[213] To this end, protection must also be afforded to medical personnel and equipment.[214] The First Geneva Convention concerns only the injured or sick among the armed forces. However, AP I extends its coverage also to civilians and others in medical need. Even when AP I is not binding as treaty law,[215] the principle of caring for sick and wounded civilians is consistent with the basic principle

206 Article 118 GC III provides that 'POWs shall be released and repatriated without delay after the cessation of active hostilities.'

207 *See* for example, H. Fischer, 'Protection of Prisoners of War', in Fleck, *Handbook of Humanitarian Law*, supra note 17, p. 321, and H. McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflict* (Dartmouth Publishing Co. Ltd., 1990), pp. 89-108.

208 GC III, Article 5. While the tribunal must be 'independent' it need not necessarily be international, according to existing rules. The inclusion of an international element in that tribunal has been proposed to safeguard its independence. *See* Gasser, 'International Humanitarian Law: An Introduction' in H. Haug (ed.), *Humanity for all: the International Red Cross and Red Crescent Movement* (ICRC, Geneva, 1993), p. 22.

209 Article 5 GC III.

210 *See* the description of US practice in Vietnam, in Gasser, supra note 67.

211 *Tadić* Jurisdiction Decision, supra note 20, para. 102, citing the ICJ in the *Nicaragua* para. 218.

212 Article 15 GC I.

213 *Ibid.*; Article 12 GC I; Article 10 AP I; Article 7 AP III.

214 Articles 24 and 25 GC I.

215 The US and Afghanistan are not parties to AP I.

of humanity and the general duty to protect civilians, under customary law.[216]

6A.2.6 Occupiers' obligations

IHL enshrines obligations specifically directed towards territory 'placed under the control of the hostile army', or 'occupied', during armed conflict.[217] Where a power is present on the territory in question and exercises *de facto* control of it, it is in occupation. The key criterion is whether the state exercised effective control, which may transcend the formal assumption of responsibility by a new authority. The obligations set out in IHL apply whether or not the occupying power meets with armed resistance.[218] The obligations incumbent on the occupying power are found in the Fourth Geneva Convention, the Hague law that preceded it[219] and the subsequent provisions of AP I; the bulk of these provisions reflect customary law.[220] As with other areas, these obligations supplement those of IHRL, which apply wherever the state exercises its authority or control.[221]

On the one hand, IHL establishes positive obligations on the occupying power to administer the territory, including establishing or maintaining law and order and a functioning legal system,[222] and protecting the population from attacks from their troops and private parties.[223] The human rights of the occupied population must be respected[224] and they must not be detained except where (and for as long as) 'imperative reasons of security' so justify, and then subject to procedural safeguards.[225] The power must ensure that the population has adequate food, medical supplies and facilities and, where necessary, that relief operations can be carried out.[226] On the other hand, IHL limits the authority of the occupying power, reflecting the transitional

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216 *See* W. Rabus, 'Protection of the Wounded, Sick and Shipwrecked', in Fleck, *Handbook of Humanitarian Law*, supra note 18, p. 293, 294. Rabus notes that AP I Articles 6 and 8 extend the definition of the sick to cover those civilians who need medical assistance.

217 Article 42, 1907 Hague Regulations, supra note 84. On the sources and the extent of the obligation of the occupying powers both under IHL and IHRL s*ee* ICJ Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paras. 123-31.

218 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 47, p. 14.

219 In particular, the 1907 Hague Regulations, supra note 84.

220 *See* 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 47, p. 8.

221 *See* Chapter 7 Section A, the IHRL Framework for controversy as to extra-territorial application of IHRL in certain circumstances including application to occupied Iraq.

222 Article 43, 1907 Hague Regulations, supra note 84.

223 Article 47, 1907 Hague Regulations, supra note 84. For the IHRL obligations Chapter 7A.4.1.

224 Article 27 GC IV enshrines the general obligation: specific rights are provided for elsewhere, e.g., rights to fair trial in Article 75(1) GC IV.

225 These include appeal and six-monthly review.

226 *See* Articles 55-60 GC IV.

nature of occupation, to prevent it from benefiting from the occupation at the expense of the local population, or from making far-reaching or unnecessary changes in the political structure or legal system during its occupation.[227] The Fourth Geneva Convention on the Protection of Civilians also prohibits the transfer or deportation of individuals from occupied territory.[228]

6A.2.7 Responsibility and ensuring compliance with IHL

Parties to an armed conflict are bound to respect the applicable rules of IHL. They will be responsible for violations of those rules by their own armed forces, and by other irregular forces that fight alongside their own forces, where these could be said to fall under their 'overall control'; such control arises where the Party 'has a role in organising, co-ordinating or planning the military actions of the military group'.[229]

Moreover, all states party to the Geneva Conventions have obligations to 'ensure respect' for the Conventions by all states.[230] Article 1 common to the Geneva Conventions imposes the duty on all High Contracting Parties to *respect* and to *ensure respect* for the Conventions, meaning that they should 'do everything in their power to ensure that it is respected universally'.[231] In 1968 and 1977 this positive obligation was reaffirmed without controversy by a broad representation of states, as a result of which the First Additional Protocol makes similar provision.[232] Whether or not party to a conflict, states parties to the Geneva Conventions are therefore obliged to take reasonable

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227 *See, e.g.,* Articles 43 and 64 GC IV. The fact that this limitation is subject to exception in the interests of the population may provide a basis for the non-application of laws that would violate human rights law, as some human rights groups have noted.

228 Article 49, GC IV. *See* Chapter 10 on Extraordinary Renditions.

229 *Tadić* Jurisdiction Decision, supra note 20, para. 137. *See* Chapter 3, above. Note that this test of responsibility of a party to the conflict under IHL is distinct from the state responsibility test (Chapter 3) or the individual criminal responsibility that may attach to a commander or other superior in respect of the acts or omissions of his or her subordinates (Chapter 4A.1.2).

230 Common Article 1 of the Geneva Conventions. 'The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.' *See* ICRC Commentary on GC IV, p. 16.

231 *Ibid*, Common Article 1. This positive obligation was reaffirmed without controversy during the negotiation of AP I. *See* W.T. Mallison and S.V. Mallison, 'The Juridical Status of Privileged Combatants under the Geneva Protocol of 1977 concerning International Conflicts', 42 (1978) *Law and Contemporary Problems* 4, 12.

232 Mallison and Mallison, ibid, note that Article 1(1) of AP I paraphrases the obligations set forth in Article 1 of the 1949 Conventions.

and appropriate measures to ensure that other parties observe the Conventions.[233] This obligation applies in respect of international and non-international armed conflicts.[234]

It follows from this obligation on all states parties that they should not directly facilitate or encourage violations, for example by cooperating with an offending state in criminal or military matters,[235] where it is believed that IHL is being violated.[236] Moreover, beyond desisting from committing, encouraging or assisting such violations, the positive obligation to ensure respect requires positive measures to prevent violations by other states parties. As the ICJ noted in *The Wall*:

> In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[237]

States parties would enjoy discretion to decide what measures they deem necessary or effective, which may entail invoking the under-utilised inter-state judicial mechanisms,[238] or, at a minimum, making diplomatic representations regarding violations. As observance of humanitarian law transcends the sphere of interest of any individual state, action should not be taken only by states parties to the conflict, nor should it be limited to representations or other measures directed towards the protection of a state's own nationals.

Finally, while not all violations of IHL carry individual criminal responsibility, serious violations may also amount to war crimes for which individuals can be held to account before national or international courts.[239] As discussed

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233 ICRC Commentary to AP I, p. 18. This reflects the fundamental nature of IHL obligations as obligations *erga omnes*, *see* Introduction.

234 *See* 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48, p. 21.

235 Criminal cooperation may include transferring individuals through extradition or other process, while military assistance may include provisions of weapons or other logistical assistance or certain types of training.

236 *See* Meron, 'Geneva Conventions', supra note 89, at 349. The ICJ in the *Nicaragua* case, supra note 96, para. 220, asserted the customary nature of such an obligation.

237 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 159.

238 Recourse to the ICJ is available between states, and human rights bodies such as the Human Rights Committee under the ICCPR could be invoked by one state against another for the application of human rights law (which as discussed in 7.B.3 would have to be interpreted in light of IHL in armed conflict situations).

239 All violations involve the responsibility of the party to the conflict, but only some serious violations entail individual criminal responsibility under customary or conventional law as discussed at Chapter 4. See, e.g., Article 3 Statute of the ICTY or Article 8 ICC Statute. Where violations do amount to war crimes they may be subject to prosecution on the national or international level and certain war crimes carry universal jurisdiction – Chapter 4A3. *See* W. J. Fenrick, 'Article 8. War Crimes', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999), pp. 173.

at Chapter 4, responsibility may be direct – for committing, ordering or aiding and abetting the commission of violations – or indirect, for superiors who fail to take necessary and reasonable measures to prevent violations by formal or informal subordinates. A specific additional positive obligation on states parties to the Geneva Conventions is the duty, in the event of grave breaches of the Conventions, such as mistreatment of POWs or depriving them of the rights of a fair trial, to seek out and prosecute those individuals responsible.[240] Then Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, has emphasised the obligation to ensure accountability for violations under IHL.[241]

Despite these obligations, it is often noted that the challenge to IHL lies in ensuring effective compliance. Beyond the responsibility of states, outlined above, the ICRC has a crucial, but limited, role as monitor of compliance with IHL and protector of persons caught up in armed conflict.[242] Other mechanisms exist in principle,[243] but in practice are not utilised, or grossly underutilised, with the result that it is doubtful whether any meaningful IHL mechanism currently exists for rendering accountable parties that violate IHL, still less to provide individual or collective redress for victims of violations. Human rights mechanisms may, in certain circumstances, fulfil this role, to the extent that they apply human rights law alongside IHL, in times of armed conflict.[244]

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240 'Grave breaches' provisions appear in all four Geneva Conventions and AP I. *See, e.g.*, Articles 147 and 148 of GC IV and Article 85 AP I. For direct and indirect criminal responsibility, *see* Chapter 4, para. 4A.1.2.1. See discussion of this and interplay with IHRL obligations to investigate in Chapter 7B3.

241 *See, e.g.*, 'Alston Study on Targeted Killings', supra note 109, pp. 25-26.

242 For a detailed analysis of the role of the 'watchdog function' of the ICRC, *see*, in general, Y. Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law* (Geneva, 1998). However, the ICRC's strength is also its limitation, in that it generally works confidentially and without publicly condemning any party. In relation to Guantanamo Bay and Iraq, the ICRC may have adopted an unusually visible and vocal approach: s*ee e.g.*, ICRC, 'Guantanamo Bay: Overview of the ICRC's work for internees', 30 January 2004, available at: http://www.icrc.org/eng/resources/documents/misc/5qrc5v.htm. A report leaked in 2009 on 'High Value Detainees' indicates the sort of confidential communication between the ICRC and States, available at: http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf, discussed in Chapter 10.

243 The Geneva Conventions set up the institution of Protecting Powers, i.e., neutral states or some other entity that, following designation by the parties to the conflict, would act to protect the interests of wounded or sick personnel, prisoners of war, internees, or other persons controlled by a hostile power. This has rarely been used and generally lacks credibility: ICRC Commentary to AP I, p. 77; Y. Sandoz, 'Mechanisms of Implementation under IHL, International Human Rights Law and Refugee Law', paper presented at the 2003 Sanremo Round Table on IHL, 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48.

244 The approach of human rights courts and bodies and their willingness to engage with IHL alongside HRL vary. *See* H. Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight Against Terrorism', in L. van den Herik and N. Schrijver (eds.), *Counterterrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge: Cambridge University Press, 2013) and Chapter 7B.3. The 'ICRC

The need and/or desirability of an additional mechanism specifically directed towards IHL has long been under discussion but remains contentious.[245] In this context the paramount role of international community of states in ensuring compliance with IHL is particularly critical.

6B INTERNATIONAL HUMANITARIAN LAW AND THE 'WAR ON TERROR'

Since September 11 the world has been constantly reminded that it is at war, albeit 'a different kind of war.'[246] A correct understanding of whether IHL applies in any given situation depends on an understanding of whether there is in fact an armed conflict, if so with whom, and the nature of that conflict.

The first part of this chapter therefore considers basic questions relating to the existence, scope and nature of armed conflicts that may have arisen post-9/11. Is there, or can there be, an armed conflict of global reach with al-Qaeda and associates or other terrorist networks, and what is the nature of the conflicts in Afghanistan and Iraq? The second part of the chapter highlights specific questions to have arisen regarding the IHL framework, including in relation to targeting and the use of force – such as the extensive practice of drone killings of suspected al Qaeda or related terrorists in Pakistan, Yemen or Somalia, or the identification of drug lords and other 'supporters' of al Qaeda as legitimate targets in Afghanistan – or the compatibility of 'war on terror' detention policy with IHL rules.[247]

Report on IHL and Contemporary Armed Conflicts', supra note 48, p. 23, notes that the role of human rights mechanisms in this respect was encouraged.

245 *See* proposals to establish a mechanism for individual complaint under IHL, advanced at the Hague centennial conference 1999, in 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48.

246 'The President has made very plain to the American people that the war on terrorism is not a traditional war ... in the sense that there is one known battlefield or one known nation or one known region. The President has made clear that we will fight the war on terrorism wherever we need to fight the war on terrorism ... this is a different kind of war, with a different kind of battlefield, where known political boundaries, which previously existed in traditional wars do not exist in the war on terrorism.' Press Gaggle by Ari Fleischer, Aboard Air Force One, 5 November 2002, available at: www.whitehouse.archives.gov/news/releases/2002/11/20021105-2.html; *see also* Bush, 'State of the Union Address', supra note 6; Statement by Ambassador at Large, Pierre Prosper, supra note 6. The Obama administration also asserts it is engaged in a 'current, novel type of armed conflict' ('Respondents' memorandum regarding the Government's detention authority relative to detainees held at Guantanamo Bay', Misc. No. 08-442 (TFH), p. 1, para. 2) and 'a different kind of war', (Speech by President Obama, National Defense University, 23 May 2013).

247 Detention is touched upon here and developed in other chapters; *see* Chapter 7B3 on interplay of IHL and IHRL and Chapter 8 on Guantanamo.

6B.1 ARMED CONFLICTS SINCE 9/11

6B.1.1 Conflict with 'al-Qaeda and associated groups'?

It has at times been tempting to dismiss post 9/11 references to the 'war on terror' as simply a rhetorical device with no more meaning than the wars on drugs or on crime oft-invoked in political circles. While there clearly cannot be an armed conflict with an abstract phenomenon, too much sleight of hand would overlook the seriousness with which the view was and is advanced by governments and at least some commentators, that there is an armed conflict with al-Qaeda, and other unidentified terrorist individuals, networks or organisations.

Since 9/11, successive US administrations have argued, in varying forms of words, that they were or are engaged in an armed conflict of global reach with al-Qaeda and "associated" forces.[248] The position of the Bush administration originally suggested that this conflict was akin to an international conflict, albeit a new kind of conflict that did not fit into any of the IHL categories.[249] This conflict was asserted to exist alongside the further international conflict in Afghanistan, although on occasion the two were conflated into 'in *an armed conflict* with al Qaida, the Taliban, and their supporters'.[250]

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248 'The United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces. Members of al Qaeda were responsible for the attacks on the United States of September 11, 2001, and for many other terrorist attacks, including against the United States, its personnel, and its allies throughout the world. These forces continue to fight the United States and its allies in Afghanistan, Iraq, and elsewhere, and they continue to plan additional acts of terror throughout the world.' G. Bush, 'Executive Order: Interpretation of the Geneva Convention Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency', *Executive Order 13440*, 20 July 2007, available at: http://www.fas.org/irp/offdocs/eo/eo-13440.htm. See also Bush 2001 speech. note 1. The Obama administration essentially followed this line: see inter alia, speech by President Obama 23 May 2013, note 106; US National Security Strategy 2010; H. Koh, 'The Obama Administration and International Law', Remarks at the Annual Meeting of the American Society of International Law (ASIL), 25 March 2010, available at: http://www.state.gov/s/l/releases/remarks/139119.htm (hereinafter 'ASIL Speech') and further examples below.

249 See *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 630 (2006) on the government's position, accepted by the Court of Appeals. After the *Hamdan* judgement, it shifted to contemplating that the conflict may have been non-international.

250 For more recent statements under the Obama administration *see, e.g.*, submission to the UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: United States of America', UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008, p. 3, para. 12. The US claimed: 'The United States is engaged in an armed conflict with al Qaida, the Taliban, and their supporters.' Koh, 'ASIL Speech', supra note 248; *Executive Order 13440*, 20 July 2007, available at http://www.fas.org/irp/offdocs/eo/eo-13440.htm like Obama speech of 23 may 2013, provided that: 'The United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces.'

The Obama administration came to power heralding a radical shift of approach by appearing to have promptly abandoned the 'war on terror' epithet.[251] Media reports that the 'war on terror' was dead[252] were, however, themselves short-lived. In his national security remarks on May 21, 2009 President Obama stated: 'Now let me be clear. We are indeed at war with al Qaeda and its affiliates.'[253] That this was more than simple political rhetoric was made clear from the US administration's legal position in subsequent litigation and from multiple high level speeches since, which have confirmed that the US considers itself engaged in an 'armed conflict with al-Qaeda, the Taliban and associated forces.'[254] Despite rejecting over time the broad 'war on a tactic'[255] and acknowledging the need to move away from a 'perpetual

251 In The Hague in March 2009, Secretary of State Hillary Clinton stated: 'The [Obama] administration has stopped using the phrase and I think that speaks for itself ....', *Reuters*, 30 March 2009, available at: http://www.reuters.com/article/2009/03/30/us-obama-rhetoric-idUSTRE52T7MH2 0090330; *see also* A. Kamen, 'The End of the Global War on Terror', *The Washington Post*, 24 March 2009, available at: http://voices.washingtonpost.com/44/2009/03/23/ the_end_of_the_global_war_on_t.html, referring to a leaked memo from the Office of Security Review, which states: 'This Administration prefers to avoid using the term "Long War" or "Global War on Terror" [GWOT]. Please use "Overseas Contingency Operation."

252 *See, e.g.*, Kamen, 'The End of the Global War on Terror', ibid, '[t]he decade-long global war on terror, which effectively ended with the killing of Osama bin Laden', in 'Goodbye, good riddance to the global war on terror', *Globe and Mail*, 7 September 2011 at: http://www.theglobeandmail.com/news/opinions/opinion/goodbye-good-riddance-to-the-global-war-on-terror/article2155295.

253 B. Obama, 'Remarks by the President on National Security', *The White House Office of the Press Secretary*, 21 May 2009, available at: http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/; *see also*, Obama, 'Inaugural Address', 20 January 2009, available at: http://www.whitehouse.gov/blog/inaugural-address/. 'Our nation is at war, against a far-reaching network of violence and hatred' and 23 May 2013 speech note 106.

254 Koh 'ASIL Speech', supra note 248. *See also* E. Holder, Attorney General, Department of Justice, Address at Northwestern University School of Law, 5 March 2012), available at: http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html(hereinafter 'Holder Speech on Targeted Killing'); J. Johnson, 'National security law, lawyers and lawyering in the Obama Administration', Speech at the Yale Law School on 22 February 2012, transcript available at: http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/ (hereinafter 'Johnson Speech on National Security'); J. O. Brennan, 'Remarks at the Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws', 16 September 2011, available at: http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an ; *see also* J. O. Brennan, 'Speech at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy', 30 April 2012, available at: http://www.whitehouse.gov/blog/2012/04/30/watch-live-john-brennan-president-s-counterterrorism-strategy.

255 Background Briefing by Senior Administration Officials on the President's Speech on Counterterrorism, 23 May 2013 at http://www.whitehouse.gov.

war' paradigm, the administration's assertion that it is at war with al Qaeda and associated forces remained intact.[256]

As is relatively common for parties to a conflict, its approach to the *nature* of that conflict is less clearly articulated. It appears however to have evolved from considering the purported conflict with al-Qaeda an international conflict,[257] to considering it non-international in nature.[258] Such a shift may reflect the decision of the US Supreme Court in *Hamdan* v *Rumsfeld*, where the Court found that Common Article 3 applies to detainees captured pursuant to the 'war on terror'.[259] This has been cited in support of the existence of a non-international conflict with al Qaeda, though whether the Supreme Court judgement really provides support for this view, as opposed to upholding the applicability of minimal protective rules to any person detained, has itself proved contentious. While some read *Hamdan* as at least assuming that there is a global NIAC against al-Qaeda,[260] others question whether the Court in fact took any position on the existence or nature of the armed conflict(s) in Afghanistan or beyond.[261] In any event it has been relied upon by the US administration as providing legal imprimatur to its position that it is engaged in a NIAC with al-Qaeda and others.

The position of the United States administration regarding the existence of an armed conflict with al Qaeda contrasts starkly with the positions and practice of other states, including close US allies in the war on terror. Attacks in London, Madrid, Denmark and elsewhere did not provoke claims from affected states that an armed conflict had arisen, and indeed those governments

256 Obama, May 2013 speech, note 246.

257 *See, e.g.*, J. Pejic, '"Unlawful/Enemy Combatants": Interpretations and Consequences', in M. Schmitt and Pejic (eds.) *International Law and Armed Conflict: Exploring the Faultlines* (Brill, 2007), p. 341.

258 The Obama administration has referred to a 'current, novel type of armed conflict' and appears to rely on the interpretation of the Supreme Court in *Hamdan* to support the existence of a non-international conflict against armed groups, such as al-Qaeda and the Taleban.

259 *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 630 (2006).

260 *See, e.g.*, J. Ku and J. Yoo, 'Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch', *Constitutional Commentary*, Vol. 23, 2006, p. 111. '[T]he Court held that Common Article 3...applied to the U.S. conflict with al Qaeda...The Court concluded that the war with al Qaeda in Afghanistan...qualifies as a 'conflict not of an international character occurring in the territory of one of the High Contracting Parties.'

261 *See, e.g.*, J. Cerone, 'Status of Detainees in Non-International Armed Conflict, and Their Protection in the Course of Criminal Proceedings: The Case of Hamdan v. Rumsfeld', American Society for International Law (ASIL), Volume 10, Issue 17, 26 February 2009, para. 12. 'Ultimately, the Court chose not to take a position on whether there were two separate conflicts, and refrained from characterizing the nature of the conflict(s).' *Eg* E. Shamir-Borer, 'Revisiting *Hamdan v. Rumsfeld*'s Analysis of the Laws of Armed Conflict', 21 *Emory Int'l L. Rev.* 601, 607-08 (2007) noting the Court 'reserved its position on the nature and classification of the conflict'.

distanced themselves from the war paradigm.[262] Despite close alliances between the US and UK in counter-terrorism, the UK former Attorney General is among those who described the notion of a war on terror as 'not only misleading but positively dangerous'.[263] Examples abound of international actors, including the ICRC, other inter-governmental organisations and authoritative commentators rejecting the notion of an armed conflict with al-Qaeda.[264]

The question that has been pivotal in much of this international discourse, and which has lead to a gaping transatlantic rift,[265] is this: can or should al-Qaeda and other networks be considered parties to an armed conflict, to be defeated militarily in accordance with IHL, or should they properly be understood as criminal organisations, requiring effective law enforcement? Many policy arguments, emphasising the merits and demerits of considering al-Qaeda to be a party to a conflict have been advanced since September 11,

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262 'On the contrary, the post September 11 terrorist bombings in London, Madrid and Bali were not treated as acts of war, but as criminal acts, and the authorities applied law enforcement, not military, means to address them.' Eminent Jurists Panel, 'Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights: Assessing Damage, Urging Action', *International Commission of Jurists*, 2009, retrieved from http://ejp.icj.org/IMG/EJP-Report.pdf (hereinafter 'Eminent Jurists Panel Report'). *See, e.g.* then Director of Public Prosecutions: 'London is not a battlefield. Those innocents who were murdered on July 7 2005 were not victims of war... We need to be very clear about this. On the streets of London, there is no such thing as a "war on terror", just as there can be no such thing as a "war on drugs" ... The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement.' K. Macdonald, 'Security and Rights', *Crown Prosecution Service*, 23 January 2007, available at: http://www.cps.gov.uk/news/articles/security_ rights/ last visited 6 December 2012.

263 Lord Goldsmith, Attorney General from 2001 to 2007, 'Justice and the Rule of Law', 43 *Int'l Lawyer* 27, 29 (2009): '... saying "War on Terror" then justifies holding people without trial after the international armed conflict has come to an end until this amorphous "War on Terror" has come to an end-and who is going to say when it has?' K. MacDonald, ibid.

264 *See, e.g.*, ICRC, 'Challenges of Contemporary Armed Conflicts', supra note 47. 'On the basis of an analysis of the available facts, the ICRC does not share the view that a global war is being waged and it takes a case-by-case approach to the legal qualification of situations of violence that are colloquially referred to as part of the "war on terror."' European Commission for Democracy Through Law, 'Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners', *Venice Commission 66th Plenary Session,* 17-18 March 2006, available at: http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp#_ftnref47 ; Eminent Jurists Panel, supra note 262.

265 Proponents of a global war with al-Qaeda are described as 'almost exclusively in the US'. Pejic, 'Protective scope of CA3', supra note 10, p. 195. In support of the armed conflict model, *see* Bellinger, 'Armed Conflict with Al Qaida?', *Opinio Juris,* 15 January 2007, para. 9, available at: http://opiniojuris.org/2007/01/15/armed-conflict-with-al-qaida. On the divide, s*ee, e.g.*, A. Dworkin, 'Beyond the War on Terror: Towards a New Transatlantic Framework for Counterterrorism', *European Council on Foreign Relations*, May 2009, available at: http://hiram7.files.wordpress.com/2009/05/towards-a-new-transatlantic-framework-for-counterterrorism.pdf.

of relevance to on-going discussions as to whether and if so how IHL might develop in the future. The focus of this section, however, is on whether, under current international law, the relationship between the US or other states and al-Qaeda and associates can meet the criteria for the contemporary definition of armed conflict.

As set out in the legal framework in Part A of this chapter, the key criteria require firstly, the use of force, and secondly, the existence of identifiable parties to the conflict with particular characteristics. Additional questions that have emerged regarding the reach of 'conflict' – temporally, as regards the 'long war' that may never end, or spatially, as regards whether an armed conflict can be geographically limitless and 'global' in scope. The legal criteria set out in Part A fall to be considered in relation to the questions whether there might in fact be an international or a non-international armed conflict with al-Qaeda. These categories of conflict are considered in turn below.

6B.1.1.1 An 'International' armed conflict with al-Qaeda and associated groups?

September 11 left no room for doubt that terrorist entities such as al-Qaeda can and do resort to the 'use of force' across international frontiers, satisfying the first criterion for an IAC. While some question the intensity of that force over time, the predominant view is that there is no threshold of intensity required in international (as opposed to non-international) armed conflict.[266] The more difficult question regarding qualification as an IAC relates to the nature of the 'parties' to an international conflict, which, according to current IHL, must be states. Exceptions to the inter-state model of IAC – including 'liberation movements' engaged in a struggle against colonial domination[267] or perhaps non-state entities exercising 'quasi-state' functions – do not seem relevant to al-Qaeda and related entities.[268]

Armed groups such as al-Qaeda, or armed individuals, may of course act under the authority of a state or states, but only if their conduct is attributable to the state, as set out in Chapter 3.[269] As noted there, and in Chapter 5 in relation to the use of force in response to 9/11, there has been no serious assertion of state responsibility for al-Qaeda terrorist attacks. Even in the

266 As noted in Part A, above, some now suggest that there is an intensity threshold even for IAC. *See* 'ILA Report', supra note 28; Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, supra note 8, p. 76-77. If this is so, there may be questions as to whether it has been met; *see* below in relation to NIAC, Intensity.

267 Article 1(4) AP I includes 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in their exercise of the right of self-determination' within the definition of international armed conflict within the meaning of Common Article 2 of the 1949 Geneva Conventions.

268 While these exceptions are at least conceivably relevant to some armed groups that may be labelled 'terrorist', they do not appear relevant to the situation in respect of al-Qaeda.

269 On legal standards for attributing the conduct of private actors to states, *see* Chapter 3.1.1.

immediate aftermath of 9/11, when many allegations were levelled at the Taleban, there was little suggestion that Afghanistan was legally responsible for the September 11 attacks or that the criteria whereby acts are attributable to states were satisfied through that state (or any other's) relationship of control over al-Qaeda or its conduct.

Members of terrorist groups may, however, constitute irregulars fighting alongside state forces in an IAC, provided they meet certain conditions and are under the states command and control.[270] Some suggest this may have been the case for certain al Qaeda associates in Afghanistan in 2001, depending on their relationship with Taleban forces.[271] The overwhelming weight of opinion would however suggest that they cannot themselves constitute a party to an international conflict against the US absent such state support.[272] Despite the first glance attraction of the original US position that if there is a conflict arising out of acts of 'international terrorism', it should be considered 'international' in nature,[273] there is decreasing reliance on such an argument, either by the administration or others,[274] and it finds little support in the criteria for international armed conflict under current international law.[275] Whether there might be a conflict with al Qaeda or others depends therefore on it falling within the definition of a non-international armed conflict.

6B.1.1.2 A 'non-international armed conflict' with al-Qaeda and associated groups?

As regards the criteria for the existence of a non-international armed conflict set out in Part A above, the first is that the use of force employed must reach a certain threshold of intensity and be distinguishable from sporadic or isolated acts of violence. If, in accordance with the weight of international practice,

270 *See Chapter 6*A.2.1 above referring to criteria to constitute a combatant under Art. 4 GCIII and AP I.

271 *See* generally, Dworkin, supra note 265; *see also* A2.1 on the definition of combatant and of 'armed forces' as comprising also armed groups that meet certain conditions and fight alongside a party to a conflict.

272 Cross ref to definition in part A.1. As noted, this no longer even appears to be the US position. Nor can al Qaeda and associates be a party to a NIAC for reasons set out below.

273 *See, e.g.*, 'Humane Treatment of al Qaeda and Taliban detainees', supra note 248, §2c; Pejic, 'Protective scope of CA3', supra note 11, p. 195.

274 The view now advanced by the US administration appears to be that there is a 'non-international' armed conflict, albeit of global reach, with al-Qaeda and associates. Both administrations have at times conflated the Afghan conflict which was international at the outset with this broader alleged conflict so it can be difficult to discern into which category the administrations would put the conflict at various stages.

275 See part A.1.1.1 'p. 32 for a minority view that such conflict is international and the 'more common view' is that such a conflict would be international, in Wilmshurst, Classification, p. 32.

the attack were measured in intensity, without regard to duration,[276] the scale of the September 11 attacks would have comfortably reached the intensity threshold. More difficult, however, is the question whether violence by 'al-Qaeda and associates' continues to meet the intensity threshold many years later, and in light of developments since then. It has been questioned whether the frequency, scale and nature of al Qaeda attacks is such that the force involved can be considered sufficient to amount to an armed conflict rather than sporadic – albeit deadly – violence.[277]

It has been observed that it would be necessary to amalgamate, and consider as one conflict, all acts attributed to al-Qaeda and associates in its diverse forms in recent years, including the attacks in Madrid, Bali, London, Denmark, Glasgow and elsewhere to meet the threshold. Yet, despite occasional reference to a 'conflict with the United States and its allies',[278] such an approach is belied by the fact that the governments in those states – unlike the US – very much rejected the idea of the attacks as acts of armed conflict.[279] Moreover, as explored further before (in relation to the parties to the conflict), it must be doubted to what extent the various attacks can meaningfully be said to have emanated from the same source, so as to constitute an attack that might meet the intensity threshold of hostilities.

It is, in any event, the second prong of the test, regarding the nature of the 'parties' to an armed conflict that is perhaps more problematic for proponents of the 'war with al Qaeda and associates' paradigm. It is to be seriously doubted that an entity such as al-Qaeda could possess the characteristics of an 'armed group' as understood by IHL, such that it can be a party to a non-international armed conflict. As set out in Part A, the jurisprudence of the ICTY makes clear that an armed conflict can only exist with non-state actors that enjoy a certain level of organisation, which may be assessed by reference to

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276 *See* Part 6A.1.1.2 above. See also ICTY intensity 'indicators', e.g.. number of confrontations, the actors involved, types of weaponry used and extent of injuries and destruction in *Haradinaj*, supra note 55, paras. 49, 60. *Haradinaj* also notes the criterion of protracted violence refers *more* to the intensity than duration.

277 *See, e.g.*, Eminent Jurists Panel Report, supra note 262, p. 54; *see generally* Pejic, 'Protective scope of CA3', supra note 10; *see also* the 'Intensity' threshold and *Haradinaj*, ibid..

278 Eg'[t]hese forces continue to fight the United States and its allies ...' and '[t]o succeed, we and our friends and allies must reverse the Taliban's gains'. *See* Bush, Executive Order 13440, and Obama, 'Remarks by the President on a New Strategy for Afghanistan and Pakistan', 27 March 2009, available at: http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-a-New-Strategy-for-Afghanistan-and-Pakistan/.

279 *See* Eminent Jurists Panel, supra note 262, p. 54, '[t]he Panel, however, received no information indicating that any of these [ally] States consider themselves to be engaged in an armed conflict with these [terrorist] groups'. However, in response to the kidnapping and murder of a French citizen by al-Qaeda forces, France's Prime Minister Francois Fillon did recently state: 'We are at war with al Qaeda and that's why we have been supporting Mauritanian forces fighting al Qaeda for months... the fight against terrorism will continue and will be reinforced.' P. Taylor, 'PM Fillon says France "at war" with al Qaeda', *Reuters*, 27 July 2010, available at: http://af.reuters.com/article/worldNews/idAFTRE66Q1B920100727.

'indicative' factors.[280] These include whether the group has sufficiently identifiable scope and membership, sufficient organisation and structure, and the capability of abiding by the rules of IHL.[281]

Since 9/11, al-Qaeda has variously been described as an organisation, a 'network of networks',[282] 'a series of loosely connected operational and support cells',[283] an 'ideology' or even 'a far-reaching network of violence and hatred'.[284] There is little in what is known about the entity, or movement, that is al Qaeda, still less 'associates' that would suggest it meets the requirements of structured organisation, under military command and control, as envisaged by the legal standards.[285]

Moreover, in this context, identifying the alleged 'party' is itself problematic; it is unclear whether al Qaeda should be conceived of as one organisation, or as disparate regional, national, local or individual manifestations of a broadly similar ideology.[286] To borrow the phrase of the Director of the FBI, would all the 'al Qaeda franchises' form part of the party to the conflict?[287] The matter is clearly further complicated by the consistent assertion of being in conflict also with the unidentified 'affiliates' or 'associates' of al-Qaeda.[288] The identification of parties to a conflict is essential to the rationale of IHL,

280 *See* A.1.1.2 for indicative factors. In *Haradinaj*, supra note 55, para. 49, 60.

281 *Haradinaj*, supra note 55, para. 60; *see* the factors in *Boškoski*, supra note 7, para. 194; *see generally* Sassòli, 'Non-International Armed Conflict', supra note 48.

282 N. Lubell, 'Classification of Conflicts', in Wilmshurst, *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2013), p. 424.

283 The UK Government relies on this definition, first provided in the letter of 19 September 2002 from the Chairman of the Security Council Committee established pursuant to Resolution 1267 of 1999: *see* 'SIAC "Generic Determination"', 29 October 2003, cases SC/1/2002; SC/6/2002; SC/7/2002; SC/9/2002; SC/10/2002, para. 130: *Ajouaou and others* v. *Secretary of State for the Home Department*, available at http://www.courtservice.gov.uk/judgments/siac/outcomes/Generic Determination.htm.

284 'Our nation is at war, against a far-reaching network of violence and hatred.' B. Obama, 'Inaugural Address', supra note 253.

285 *See, e.g.*, M. Lehto, 'War on Terror – Armed Conflict with Al Qaeda?', *Nordic Journal of Int'l Law*, Vol. 78, No. 4, 2009, p. 508: 'While Al-Qaida may be able to issue statements and claim responsibility for different attacks, its coherence and grip are arguably not at a level that allows for meticulous planning of each and every attack, as these are increasingly left for autonomous action by groups that are only loosely if at all connected to wider regional or global networks. Scholars and experts debate the degree of organisation versus autonomy within Al-Qaida, but there is a fairly general perception that a distinction must be made between the structure of the movement during the period from 1996 to 2001 and its structure today.'

286 As reflected in Obama's May 2013 speech, the diffuse and individualised nature of the evolving threat counters the notion of al Qaeda as a party to an armed conflict as such..

287 R. Mueller, Director FBI, 'From 9/11 to 7/7: Global Terrorism Today and the Challenges of Tomorrow', Chatham House, 7 April 2008, available at: http://www.chathamhouse.org.uk/files/11301_070408mueller.pdf.

288 There is emerging evidence of U.S. attacks on persons associated with other groups, such as al Shabaab in Somalia (*see* below B.2.2.1) or the Islamic Movement of Uzbekistan (in Lubell, 'Classification of Conflicts', supra note 282, p. 427).

yet the identity of these associates is shrouded in secrecy. The US has maintained a long list of quite disparate 'terrorists and terrorist groups' whose affiliates are classified as 'enemy combatants', signalling the potential breadth of those that may be covered, and raising further doubts as to the identification of the precise parameters of the putative party to the conflict.

Related uncertainties concern how one can define and identify with sufficient clarity the relationship between particular individuals and their membership, support or sympathy for this group or groups. Judicial inquiries following the attacks in Madrid in March 2004 and London in July 2005 revealed that 'their authors were perhaps not linked to Al Qaeda by anything other than consulting the same websites and harbouring the same hate against Western societies as Al Qaeda apparently does'.[289] Yet the logic, structure and effective operation of IHL depend precisely on the ability to identify and distinguish the opposing party, with critical implications for targeting and humanitarian protection.[290]

While these doubts were already present in 2001, they have increased in recent years, as knowledge of al-Qaeda has grown on the one hand, and as its capacity and core structure have apparently been depleted on the other.[291] While some reports have raised concerns about swelling numbers of individual terrorist volunteers in the wake of controversial 'counter-terrorist' practices and the conflict in Iraq,[292] indications are that the higher ranks and resources have been greatly depleted,[293] further diminishing the claim to military organisation, control or coordination. One commentator recently described 'a new generation of Islamic terrorists who act alone, abetted by Jihadi web

289 M. Sassòli, 'Transnational Armed Groups and International Humanitarian Law', *HPCR Occasional Paper Series*, Winter 2006, No. 6, p. 10, available at: www.hpcrresearch.org/sites/default/files/ publications/OccasionalPaper6.pdf. This was true of numerous smaller attacks since then e.g. the Boston marathon attacks in early 2013,.

290 *See* 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48, p. 19; *see* generally, Paust, 'There is No Need to Revise the Laws of War in Light of September 11', ASIL Task Force Papers, November 2002, available at: http://www.asil.org/taskforce/paust.pdf last visited 7 December 2012.

291 *See, e.g.*, M. Lehto, 'War on Terror – Armed Conflict with Al Qaeda?', supra note 289, p. 508: '… there is a fairly general perception that a distinction must be made between the structure of the movement during the period from 1996 to 2001 and its structure today.'

292 Eg P. Reynolds, 'Iraq War Helped al Qaeda Recruit', *BBC*, 19 October 2004, available at: news.bbc.co.uk/2/hi/middle_east/3756650.stm; M. Mazzeti, 'Spy Agencies Say Iraq War Worsens Terrorism Threat', *New York Times*, 24 September 2006, available at: http://www.nytimes.com/2006/09/24/world/middleeast/24terror.html?pagewanted=andU.S. National Security Strategy, May 2010, pp. 21-22, 36, available at: http://www.whitehouse.gov/sites/default/files/rss_viewer /national_security_strategy.pdf.

293 *See* Obama, 'Address on the War in Afghanistan', 1 December 2009, available at: http://www.nytimes.com/2009/12/02/world/asia/02prexy.text.html?pagewanted=all last noting 'Within a matter of months [of sending troops to Afghanistan], al Qaeda was scattered and many of its operatives were killed... '. See also 23 May 2013 speech.

sites ...',[294] which bears no relation to the requirements of structure and control implicit in IHL. The image that prevails is of an al-Qaeda that is increasingly disparate and decentralized, embodied in individual, sporadic, unpredictable and largely uncoordinated attacks.[295] While the threat may be no less real, and the need for concerted international measures of prevention no less pressing, its claim to constitute an identifiable, organised party to an armed conflict is surely less compelling.

There is, therefore, good reason for the widespread view among governments, IGOs, international experts and commentators alike, that al-Qaeda and related groups lack the characteristics of armed groups under IHL, and that there is no armed conflict with al Qaeda and associates.[296] While al-Qaeda may have had a role in the NIAC in Afghanistan alongside the Taleban, and may on some views have constituted a party to the conflict at that point, it has been noted that 'this legal status would have certainly been lost as a consequence of Al Qaeda's subsequent transformation into a rather loosely connected network of terrorist cells. And most certainly, individual terrorist action all over the globe carried out on the basis of an "Al Qaeda franchise model" cannot be attributed to Al Qaeda as a non-State party to a non-international armed conflict of global reach'.[297]

Despite re-packaging the 'war on terror,' the US has consistently maintained the right to wage war on suspected terrorists and terrorist groups. However, treating them as parties to an armed conflict, rather than organised criminals

294 In light of the terrorist attack against a Jewish school in Toulouse in March 2012, French counter-terrorist analyst John-Louis Bruguière referred to a 'new generation of Islamic terrorists who act alone, abetted by jihadi Web sites and their own anger'. D. Bilefksy and M. de la Baume, 'French Gunman Seen as Homegrown Militant', *The New York Times*, 21 March 2012, available at: http://www.nytimes.com/2012/03/22/world/europe/mohammed-merah-france-shooting-suspect-seen-as-home-grown-militant.html?pagewanted=all.

295 *See* M. Lehto, 'War on Terror – Armed Conflict with Al Qaeda?', supra note 285, pp. 509-10. 'The infrastructure of Al-Qaida in Afghanistan, according to most accounts, was largely destroyed by the US-led military campaign in 2001-2002 ... . It is not always possible to ascertain whether a particular terrorist act has been directed, facilitated or just inspired by Al-Qaida ... . [I]t is hard to *see* how Al-Qaida, in particular in its present decentralized and dispersed form, could qualify as a party to an armed conflict.'

296 *See, e.g.*, Eminent Jurists Panel Report, supra note 262, p. 54 that '[t]he dominant view seems to be that al-Qaeda is a loosely connected network rather than a single transnational organisation. However, even if al-Qaeda were considered to be a cohesive and well-ordered collective that shared common strategies and tactics, it is still difficult to conceive of it as a unitary armed force and, as such, a party to the conflict. The inclusion of indeterminate "associated groups" makes it even more difficult ... Both practically and legally, there is no identifiable party to the conflict with which negotiation, defeat or surrender can occur.' See also the many voices cited above.

297 C. Kreâ, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts', *Journal of Conflict & Security Law*, Vol. 15, No. 2, 15 July 2010, p. 8; on the analysis of al-Qaeda as a 'franchise model', *see also* 'America and al-Qaeda: The killing of Osama bin Laden', *The Economist*, 2 May 2011, available at: www.economist.com/blogs/lexington/2011 /05/america_and_al-qaeda.

that resort to the use of force, has little support in the international legal framework. As the ICRC has noted:

> '"Terrorism" is a phenomenon. Both practically and legally, war cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. For these reasons, it would be more appropriate to speak of a multifaceted "fight against terrorism" rather than a "war on terrorism."'[298]

6B.1.1.3 The 'Global' War: Territorial Limits and Armed Conflict?

One of the most novel aspects of the US government's claim to be engaged in an armed conflict with al-Qaeda *et al* is the assertion that there can be an armed conflict that is territorially limitless – a conflict against a non-state actor of 'global' reach.[299] This adds a further layer of controversy to the assertion of being at war with al-Qaeda and associated groups. Is there, in the language of one commentator, a 'legal geography of war',[300] a territorial dimension to the definition of armed conflict? Does IHL only apply in a particular state where the criteria for 'armed conflict' are met, or can it travel with those participating in a conflict from afar? Or indeed as the US appears to suggest, can IHL apply on a global scale to a potentially limitless conflict with no territorial nexus at all?

The US government's positionis that its armed conflict with al-Qaeda is not limited to any specified territory, but 'follows' the members and associates of al-Qaeda, thus providing a basis to invoke 'law of war' rules on targeting and detention anywhere in the world.[301] This has been described as a 'funda-

298 ICRC, 'International Humanitarian Law and Terrorism: Questions and Answers', supra note 52. *See also* Pejic, 'Armed Conflict and Terrorism', supra note 10.

299 *See, e.g.*, Press Gaggle by Ari Fleischer, supra note 248; *see also* Bush, 'State of the Union Address', supra note 4; Statement by Ambassador at Large, Pierre Prosper, supra note 4; 'Johnson Speech on National Security', supra note 256 (reiterating argument that US has the right under the AUMF to the use of force against al-Qaeda and associated forces, and not all terrorists, but reaffirmed the right to do so 'without a geographic limitation'); A. Deeks, 'Pakistan's Sovereignty and the Killing of Osama bin Laden', *ASIL Insights*, 5 May 2011, Vol. 5, Iss. 11, p. 2, available at: http://www.asil.org/insights110505.cfm.

300 K. Anderson, 'Targeted Killing and Drone Warfare: How We Came to Debate Whether there Is a Legal Geography of War', *Hoover Institution Online Volume Essay 'Future Challenges'*, forthcoming, SSRN Working Paper Version 26 April 2011, pp. 3-15. The author describes the view that 'there is no legal geography of war beyond the conduct of hostilities'.

301 Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss at 1, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10 Civ. 1469). See also Deeks, 'Pakistan's Sovereignty and the Killing of Osama bin Laden', supra note 303, p. 2: 'For the United States (and others that adopt this position), once a state is in an armed conflict with a non-state armed group, that conflict follows the members of that group wherever they go, as long as the group's members continue to engage in hostilities against that state (either on the "hot battlefield" or from their new location).'

mentally new aspect to the arguments' concerning armed conflict with non-state groups.[302]

As the legal framework set out in Part A made clear,[303] developments in practice have lead to a flexible approach to the territorial scope of armed conflict, whereby it is well accepted, for example, that a NIAC can 'spill over' – or occur across – territorial borders.[304] Yet the US assertion that there are *no* geographic limits has caused international consternation,[305] and has been described as 'perhaps the most controversial aspect' of the US position.[306] Perhaps this is because the notion of a limitless global conflict jars with the inherently limited, definable and exceptional nature of armed conflict (and applicable law).[307] Or it may be the increased vulnerability of states to the use of force on their territories, and the potential for escalation of conflict which the international community committed through the UN Charter to avoid, that brings with it a particular degree of international caution.[308]

Proponents of the 'global' armed conflict suggest that it is necessary to ensure that individuals forming part of an armed conflict, but operating outside of the zone of conflict, cannot escape the consequences of applicable IHL.[309] If the reality is that individuals are engaged in hostilities (e.g., ordering or planning) from another state's territory, the law must allow them to be targeted on the same basis as those participating in a traditional zone of battle.[310]

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302 M. Lehto, 'War on Terror – Armed Conflict with Al Qaeda?', supra note 285, p. 505-06.

303 S*ee* 6A.1.3 on the evolving approach to territorial scope of conflict in IHL and examples.

304 Pejic, 'Protective scope of CA3', supra note 11, p. 195.

305 *See ibid*. Pejic suggests there must be a 'hook' to a national territory to constitute a NIAC under current IHL, and that support for the opposite view is limited to the US. The ICRC like many others appears to reject the 'global' war notion: 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48, p. 10; *see also* M. Lehto, 'War on Terror – Armed Conflict with Al Qaeda?', supra note 285, p. 508: '[A]lthough a non-international conflict can extend to the territory of several states, the geographical scope of the conflict must be defined.' *See, e.g.*, G. Rona, 'Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"', in the Fletcher Forum of World Affairs, vol. 27:2, Summer/Fall 2003, p. 64. *See also* Schrijver and Herik, 'Leiden Policy Recommendations', supra note 74.

306 Deeks, 'Pakistan's Sovereignty and the Killing of Osama bin Laden', supra note 303, p. 2.

307 It is the existence of armed conflict that carries with it the applicable rules on IHL and affects at least some of the applicable rules of IHRL, with important consequences: s*ee* Chapter7A.3.4 and 7B3.

308 UN Charter Arts 1 and 2(4).

309 *See, e.g.*, M. Lewis, 'The Boundaries of the Battlefield', *Opinio Juris*, 15 May 2011, para. 5, available at: http://opiniojuris.org/2011/05/15/the-boundaries-of-the-battlefield/ last visited 8 December 2012. Lewis expresses concern that individuals should not be 'immune from targeting based purely on geography'; *see also* K. Anderson, '"Ten Years In" Conference at BU Law School', 15 October 2011, available at: http://volokh.com/2011/10/15/ten-years-in-conference-at-bu-law-school/.

310 *Ibid.*

On the other hand, others note that while conflicts undoubtedly can extend beyond one state's borders, the legal definition of armed conflict still requires that for IHL to be invoked in any state, the threshold of conflict would need to be met *within that particular state*.[311] Otherwise, IHL standards may be brought to bear in states where the threshold is not met, in response to threats or sporadic attacks, which are precisely the sort of situations intended to be covered by law enforcement and excluded from the ambit of IHL. Increased difficulties arise in identifying one organised armed group that might meet the criteria of a party to a conflict where the entity operates, in various incarnations, on a global scale. In this respect it may be that concerns raised in relation to the global battlefield are closely related to the need to meet the legal criteria for the definition of armed conflict (of threshold and parties) mentioned above.

At a minimum, it would seem that there must be at least *some* nexus to a particular locus of an armed conflict where the legal criteria are met, for IHL to apply.[312] If individuals are to be targeted remotely, it must be in accordance with the rules regarding legitimate targeting in respect of that conflict. A greater onus may rest with a state to establish that individuals' thousands of miles from a conflict in fact belonged to a party to the conflict or were direct participants in hostilities from afar. Moreover, it should be noted that even if one accepts the application of IHL in principle, the geographic locus far from the 'battlefield' scenario may, in certain circumstances, make it more likely that capturing rather than killing the individual is feasible, which IHL may therefore require.[313] The applicability of IHL may therefore not have the effect in all situations that some suggest of entitling the state to engage in the use of lethal force anywhere in the world.[314]

The wide-ranging notion of a world at war without any geographic definition causes clear legal and policy discomfort and has been described as having little support outside the US.[315] In this respect, in testimony to the US House of Representatives, one American commentator noted that the US is 'remarkably indifferent to the increasingly vehement and pronounced rejection' of the view

311 Schrijver and Herik, 'Leiden Policy Recommendations', para. 63: '[I]t is possible for an armed conflict involving non-state actors to extend to the territory of more than one state ... subject to IHL applicable to non-international armed conflicts. This will, however, depend on whether, *within any particular state*, the factual conditions are met for an armed conflict to exist.'

312 *Ibid*.

313 See 'direct participation in hostilities' 'ICRC DPH Guidance', supra note 124, p.7, and 7B3 on IHL and IHRL.

314 This is true even under the rules of IHL (or of course the law *ad bellum* or IHRL that co-applies alongside IHL addressed in the next chapter).

315 Proponents of a global war with al-Qaeda are described as 'almost exclusively in the US'. Pejic, 'Protective scope of CA3', supra note 11, p. 195.

that the US can 'simply follow combatants anywhere and attack them'.[316] Undoubtedly, however, the debate concerning the extent to which armed conflict is territorially linked or limited are questions of increasing international attention, and areas where the law is likely to continue to be debated and potentially developed.[317]

The significance of interpreting IHL to permit attacks on the basis of conflicts 'travelling' in this way goes beyond US practices. In 2012, a court in Qatar convicted two Russian intelligence agents for the assassination of the former Chechen separatist leader Zelimkhan Yandarbiyev, whose car exploded outside a mosque in Doha, Qatar.[318] Counter-terror legislation in the Russian Federation has been criticized for enshrining in law a broad reaching authority to use force to eliminate the terrorist threat wherever it arises around the globe.[319] Serious concern regarding such 'international assassinations' by Russian intelligence agents – of individuals considered by the authorities to be supportive of Chechen rebels – is a reminder of the dangers of opening up the possibility of resort to force anywhere in the world on the basis of a connection to an armed conflict states or continents away.

6B.1.1.4 The 'War without End'?

A further concern that is often voiced in this context is the indefinite, or interminable, nature of what has been described as the 'long war'.[320] The Bush administration characterized the position with over-reaching declarations that the war would not end 'until until every terrorist group of global reach

316 K. Anderson, 'Rise of the Drones: Unmanned Systems and the Future of War', Written Testimony to the U.S. House of Representatives Subcommittee on National Security and Foreign Affairs, 23 March 2010, p. 5, para. 11, available at: http://www.fas.org/irp/congress/2010_hr/032310anderson.pdf (hereinafter 'Anderson Written Testimony'). 'P. Alston, 'Statement of U.N. Special Rapporteur on U.S. Targeted Killings Without Due Process', 3 August 2010, available at: http://www.aclu.org/national-security/statement-un-special-rapporteur-us-targeted-killings-without-due-process; *see, e.g.*, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010). US Attorney General Eric Holder responded to concerns regarding geographic scope by stating that they only target in states which are unwilling or unable to stop the terrorists, though as noted this is relevant to the *jus ad bellum* of Chapter 5, not to IHL. 'Holder Speech on Targeted Killing'.

317 *See, e.g.*, Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6.

318 S.L. Myers, 'Qatar Court Convicts 2 Russians in Top Chechen's Death', *The New York Times*, 1 July 2004, available at: http://www.nytimes.com/2004/07/01/world/qatar-court-convicts-2-russians-in-top-chechen-s-death.html?pagewanted=all&src=pm.

319 *See* generally, S. Bridge, 'Russia's New Counteracting Terrorism Law: The Legal Implications of Pursuing Terrorists beyond the Borders of the Russian Federation', 3 *Colum. J. E. Eur. L.* 1 (2009).

320 *See, e.g.*, D. Roper, 'Global Counterinsurgency: Strategic Clarity for the Long War', *Parameters*, Autumn 2008, available at: http://usacac.army.mil/cac2/coin/repository/Global_COIN.pdf.

has been found, stopped and defeated'.[321] The Obama administration may have been mindful of the disquiet concerning the end point of his alleged armed conflict with al-Qaeda and others when he shifted the language employed, from the 'long war' to 'overseas contingency operations,'[322] and warned against seepage into a 'perpetual war'.[323] But the continuing proposition that there is a potential global armed conflict with al-Qaeda, associated forces and others, raises questions as to when and how such a conflict – and the lethal use of force model or indefinite detention justified pursuant to it – might ever end.

Armed conflicts end when the conditions that qualify as conflict cease to exist. In practice, armed conflicts often last an extremely long time: it would be absurd to suggest that the decades-long conflicts in Guatemala, the Philippines or Congo for example were any less armed conflicts for their duration. But one question is whether this is distinguishable from a situation that may not, realistically, be *capable* of being brought to a definitive end. Terrorism has always been a feature of human existence and as President Obama acknowledged, his predecessor's promised day when it comes to an end will never materialise.[324] As regards the alleged conflict with al-Qaeda and 'associates' or related 'terrorist networks of violence', doubts as to its nature as a loose ideological network rather than an organised armed group, discussed above, compound doubts as to when, if ever, it can be definitively quashed, and if it were, how would we know?

The political determination to end any conflict, real or perceived, is critically important.[325] In legal terms, however, armed conflict ends when hostilities of a certain threshold (for NIAC) between identifiable parties no longer exist; the key questions are therefore same as for establishment of conflict in the first place. Rather than constituting separate legal criteria, the concerns regarding 'war without end' are perhaps additional policy reasons for rejecting the notion of an amorphous armed conflict with al-Qaeda in the first place.

Uncertainty and obfuscation as to the existence and scope of the 'war(s)', and against whom they are being fought, spills over, inevitably, into confusion as to when, if ever, they will end, which are critical determinations for applicable law and those affected for example by detention powers.[326] Understand-

321 Bush, 'Address to a Joint Session of Congress and the American People', 20 September 2001, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html.

322 Kamen, 'The End of the Global War on Terror', supra.

323 Obama, National Defense University speech, 23 May 2013.

324 See recognition of this in President Obama's 23 May 2013 speech, note 244 and Bush note 1.

325 Obama 23 May 2013. See Bush at note 1 above.

326 As noted above, persons detained in the context of an international conflict in Afghanistan are entitled to release upon the cessation of the international conflict, so implications for prisoners are serious. The IHL framework in armed conflict (which modifies the IHRL framework that normally applies), is by its nature exceptional and for a limited period of time, with a potentially identifiable and verifiable end-point.

ing the parameters of the conflict, as arising between identifiable parties in the particular context of Afghanistan (or Iraq), rather than against terrorism more broadly in the world at large, is the first step towards meaningful implementation of, and monitoring of respect for, IHL.[327]

6B.1.2 Real armed conflicts post 9/11: Afghanistan, Iraq and beyond?

6B.1.2.1 Nature of the conflict in Afghanistan

By contrast to the uncertainty surrounding ambiguous notions as to the 'war on terror' or being at war with terrorists, relative clarity attends the fact that an international armed conflict arose in Afghanistan, with the military action that commenced on 7 October 2001, if not before. The parties to the conflict in Afghanistan on and following 7 October 2001 were the armed forces of the US and its allies on the one hand, and Afghanistan represented by the Taleban and its supporters (including elements of al-Qaeda), on the other.[328]

There was also an armed conflict in Afghanistan before the 2001 intervention, between the Northern Alliance and the Taliban, though it was probably non-international in nature since the Russian withdrawal from Afghanistan many years before 2011[329] The intervention of several allied states on that date resulted in an international conflict, albeit one that appears to have been waged alongside, and in connection with, the continuing non-international conflict between the Northern Alliance and the Taleban.

Somewhat more difficult questions relate to the nature of the conflict as it evolved in the later stages. It should be noted that murkiness often stems in part from assertions concerning a broader conflict with al-Qaeda and associates, discussed above, and its uncertain relationship with the conflict in Afghanistan. Successive US administrations, and to some extent the US Supreme Court, have contributed to this by intermingling references to an 'armed conflict with al-Qaeda, the Taliban and associated forces,' in Afghanistan and beyond.[330] While it is at times unclear to what extent the Afghan conflict

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327 *See* Chapter 7, para. 7A.3.4 on the relationship between IHL and IHRL during armed conflict.

328 Questions arise as to the relationship between al Qaeda in Afghanistan and the Taliban – whether the former fell under the overall control of the latter, or vice versa, and whether they were one and the same party to the conflict or not. Francoise Hampson suggests that for all intents and purposes there was one international conflict at this time. F. J. Hampson, 'Afghanistan 2001-2010', in Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6, p. 242.

329 Contentions that Pakistan fought alongside the Taleban prior to 7 October 2001, if true, suggest the conflict may already have been internationalised. Paust, 'There is No Need to Revise the Laws of War in Light of September 11', p. 3. Note, however, the difference of view on international vs. non-international nature of a conflict where an intervening state fights alongside government as opposed to insurgents, above.

330 See above Bush, Obama and Koh's references to the conflict discussed previously.

is considered to have been subsumed by the broader claim of global armed conflict with al-Qaeda, or vice versa, as noted above there is little support for such a broader conflict with al Qaeda as a matter of law in any event. Legally, therefore, the question is the nature of the conflict – or conflicts – in Afghanistan, and whether military action that purports to be taken against al Qaeda operatives worldwide can be justified as a 'spillover' from, and arguably the remote engagement in, such an armed conflict.[331]

On 19 June 2002, once the Taleban government had been definitively removed from power and the *Loya Jirga* constituted,[332] the state of Afghanistan came to be represented by a government and forces friendly to the US and allied states, Afghanistan's erstwhile opponent in the international armed conflict. From that point, rebel forces on the one hand (presumably a mixture of al-Qaeda and remnants of the Taleban which had transformed from de facto government to non-state armed group) fought against the state of Afghanistan and other states.

As such, the net result was armed conflict(s) between states and armed groups, apparently therefore of the non-international variety.[333] Some suggest that there have been, and at time of writing still are, three related but distinct non-international conflicts that have unfolded in Afghanistan since 2002.[334] One is the conflict between the government of Afghanistan established in June 2002 and the remnants of the Taleban and, perhaps, al-Qaeda.[335] The situation in Afghanistan where a non-international armed conflict existed before the military intervention of 7 October 2001, appears to have reverted to a situation of non-international armed conflict post-June 2002, albeit with the rebels and government forces having changed face. A second conflict is the continuation of Operation Enduring Freedom launched by the US on 7 October 2001 and which continues to the present time, with the aim of preventing attacks 'from Al Qaeda and Taleban remnants.'[336] The third is conflict in which the ISAF

331 *See* examples below in relation to 'Targeting' of al-Qaeda worldwide at 6B.3.1.

332 *See* 'Karzai sworn in as president', *BBC News*, 19 June 2002, available at: http://news.bbc.co.uk/1/hi/world/south_asia/2052680.stm.

333 It is a question of fact whether the remnants of the Taleban meet the requirements of a 'party' to a conflict, set out above, though it seems very likely that they would. Their relationship with al Qaeda also remains unclear. *See* Hampson, 'Afghanistan 2001-2010', supra note 334, p. 256.

334 Hampson, 'Afghanistan 2001-2010', supra note 334. The extent to which they form one conflict with various parties or separate conflicts may be a matter of dispute, but the parties appear to recognize the very different nature of the interventions by Operation Enduring Freedom and the ISAF forces for example.

335 'Al Qaeda's Diminished Role Stirs Afghan Troop Debate', *The Wall Street Journal*, 5 October 2009, available at: http://online.wsj.com/article/SB125469118585462615.html.

336 Secretary of State for the Defence to UK House of Commons, 20 June 2002, cited in Hampson, 'Afghanistan 2001-2010', supra note 334, p. 255

forces are engaged, mandated under SC Resolution 1386 and subsequent resolutions, against the Taleban and related non-state party.[337]

While a certain degree of controversy arises concerning the impact on the classification of conflict of the engagement of outside states, there is little support in current international law and doctrine for the continuing involvement of the US or others beyond June 2002 meaning that the conflict remains international.[338]A related question is when the Afghan conflict might end.[339] As noted, the international armed conflict in Afghanistan appears to have ended on 19 June 2002 when Hamid Karzai was sworn in as President of Afghanistan. If the international conflict is over, another legal basis for detaining persons originally held pursuant to IHL applicable in international conflicts, under IHL applicable in non-international conflicts or IHRL, must be relied upon.[340] POWs, for example, should be released at the end of the international conflict, unless prosecuted, or some other legal basis exists to justify their continued detention.[341]

As regards the non-international armed conflict(s) post-June 2002, the question whether the relevant criteria for armed conflict continue to be satisfied must be assessed on an on-going basis, including following the US withdrawal in 2014.[342] At a certain point the requirement of on-going violence of significant intensity (as opposed to isolated or sporadic acts of violence) will no

337 As noted in Chapter 5, the International Security Assistance Force (ISAF) was established by the U.N. Security Council at the end of December 2001, and NATO assumed responsibility for the force as of 2003. Over forty nations have committed personnel. It operates alongside Operation Enduring Freedom led by the U.S. Some uncertainty and differences of approach from within ISAF are reported to surround the identification of the nature of the opposing 'party,' which has had an effect on disputes regarding targeting discussed further below. *See* A. Cole, 'Legal Issues in Forming the Coalition', in M. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, (2009) Vol. 85, US Naval War College International Law Studies, p. 146; *see also* Hampson, 'Afghanistan 2001-2010', supra note 334, p. 260.

338 Part 6A.1.1. on limited dispute remaining over whether the support of outside states on the side of state forces (as in Mali in 2013) automatically renders a conflict international. *See* Hampson, 'Afghanistan 2001-2010', supra note 334.

339 The official position of the US Government is that the war *against* Afghanistan ended, though its role in Afghanistan continues: *see, e.g.*, 'In coordination with the government of Afghanistan, the coalition here continues to train the Afghan National Army, provide civil affairs support, and disrupt, deny, and destroy terrorist and anti-government forces in order to establish a stable and secure Afghanistan.' Press release of the US Department of Defense, 10 January 2004, available at: http://www.defendamerica.mil/afghanistan/update/feb2004/au022804.html. It is clear, however, in practice that military operations conducted by coalition forces are very much on-going as of 2012, often justified by reference to the prevention of terrorism. *See* Koh, 'ASIL Speech', supra note 248; 'Johnson Speech on National Security', supra note 254.

340 See Chapter 7, part B.3 on 'Interplay' as to what this legal basis might be.

341 On lawful bases for detention *see* Chapter 8B.4.1. Once international armed conflict ends, and becomes non-international, prisoners can no longer be held as POWs. They should then be released or put on trial, unless there is another basis for their detention (in accordance with IHRL).

342 E.g. President Obama, State of the Union address, 2013.

longer be satisfied. At a certain point the Taleban may also be definitively defeated in such a way that the party to the conflict may cease to exist and (as there is unlikely to be any conflict with al-Qaeda as such, as discussed above) what was an armed conflict will revert to acts of violence regulated not by IHL but by other areas of law, notably criminal and human rights law.

6B.1.2.2 The conflict in Iraq and obligations of occupying forces

International forces intervened militarily in Iraq on 19 March 2003, giving rise to an international armed conflict.[343] Shortly thereafter there ensued a situation of occupation, also governed by the law of IHL applicable to international armed conflict.[344] The existence and nature of the Iraqi belligerent occupation was relatively straightforward, with controversy focusing instead on compliance with such obligations[345] and when the coalition forces' 'occupier's obligations' ceased.[346] On 1 May 2003, then US President George Bush declared that 'major combat operations in Iraq have ended'.[347] The institution of a new government in Iraq took effect in June 2004, but as noted above, the transfer of formal authority does not necessarily end the occupier's responsibilities, unless an alternative functioning government has assumed *de facto* control over its population and territory and the determination of the point at which effective control was assumed by the new Iraqi government is a question of fact.[348] The law of occupation applies, moreover, until one year after there

343 *See* SC Res. 1483 (2003), 22 May 2003, UN Doc. S/RES/1483, recognising the Iraq situation as an international armed conflict. For more detailed analysis of the background, classification of the conflict at various stages, *see* M. N. Schmitt, 'Iraq (2003 onwards)' in Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6, p. 356.

344 Applicable IHL includes specific obligations incumbent on occupying forces, described above, 6A.3.4.

345 Many questions arise as to the satisfaction of those obligations by coalition forces, which are not explored here. See torture and ill-treatment, Chapter 7B6, and procedural rights of detainees, below and Chapter 8.

346 The test for occupation is a factual one based on the effective control of territory or persons. However, IHL provides that the rules continue to apply to occupation one year after withdrawal. *See* Article 6 GC IV. Schmitt suggests that as of June 2004 and SC Resolution 1546 (referring to looking forward to the end of the occupation), the occupation ceased. Schmitt, 'Iraq (2003 onwards)', supra note 343, p. 369.

347 Bush, 'President Bush Announces Major Combat Operations in Iraq Have Ended', 1 May 2003, para. 1, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030501-15.html.

348 *See* ICRC, 'Iraq: civilians continue to pay the highest price in the conflict', Press Briefing, 30 November 2006, available at: http://www.icrc.org/eng/resources/documents/press-briefing/iraq-briefing-301106.htm. For dispute regarding the nature of the conflict in Iraq, *see* Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, supra note 5, p. 114. ICRC statements in respect of the situation in Iraq long after the 2004 handover indicated that IHL continued to apply to the situation in Iraq.

is a general close of military operations or the occupying power ceases to exercise such effective control.[349]

In assessing the law applicable to the conduct of the occupying forces during that period, it should be borne in mind that the parallel application of human rights law alongside these rules of IHL is particularly essential in occupation, where the state assumes responsibility for a broad range of aspects of civilian life.[350] At a certain point, following Security Council resolution and the acceptance by the legal community of the sovereign responsibilities of the new Iraqi government, the conflict came to be recognised as a non-international armed conflict with external involvement.[351]

The existence of armed conflict is a legal question to be addressed on the basis of ever evolving facts. In addition to the two large scale post 9/11 military interventions highlighted above, questions frequently arise regarding the existence of conflicts in other states and areas affected by the war on terror, notably Pakistan, but also Yemen, Somalia, and beyond, of relevance to the lawfulness of measures taken against international terrorism in recent years. Whether there are conflicts, and if so their nature and applicable law, are issues on which there are differing views, as will be noted further in relation to particular issues of IHL below.[352]

6B.2 Particular issues of IHL in the Post 9/11 "wars"

6B.2.1 'Enemy Combatants'

The status of individuals is critical under IHL, as set out in Part A. It determines applicable law, governing whether (and if so when) the individuals can lawfully be attacked, and to some extent the rights to which they are entitled upon capture.[353] Departures from the existing legal framework in relation to the particular issues addressed below, on targeting and detention for example, has to a large extent been foreshadowed by the rejection of established categories of persons, and confusion and obfuscation as to whether there are 'new' categories, or gaps in the categorization of persons caught up in an armed

349 As noted above, it continues for longer where the occupying power continues to exercise control in the territory. *See* Article 6(3) GC IV and Article 3(b) AP I.

350 *See, e.g.*, *Case of al-Skeini* v. *The United Kingdom*, ECHR Grand Chamber, Judgment, 7 July 2011.

351 Schmitt describes the Security Council and the legal community embracing the 'legal fiction' of Iraqi control, and the end of occupation. Schmitt, 'Iraq (2003 onwards)', supra note 343, p. 369. The conflict became non-international, as recognised by the ICRC, despite not being explicitly referred to as such by the US or UK. ICRC 'protecting Persons Deprived of Freedom Remains a Priority' ICRC, June 2004.

352 See below 6B2.2.

353 Eg Chapter 7B3 and Chapter 9.

conflict.[354] Invariably these putative gaps or uncertainties have been relied upon to justify broader approaches to who may be targeted and narrowed approaches to the protections to which individuals are entitled upon capture.

The introduction of a novel category of 'unlawful enemy combatants' was promoted by the US post-9/11 and remains in force.[355] It has been noted that the term 'enemy combatant' is confusing, not least because 'combatants' is a term of relevance only in IAC (which, as noted above, is not generally considered relevant to the alleged conflict with al-Qaeda or to the situation in Afghanistan post 2002 for example). More significantly, the notion of 'unlawful' participation in conflict, or 'unprivileged belligerency', as it is more traditionally called, is not in fact new to IHL but is regulated by it in some detail.[356] Persons who engage in hostilities without the 'privilege' to do so are considered civilians directly participating in hostilities. As reflected above, IHL allows such individuals to be targeted, subject to certain constraints, for as long as they engage in hostilities. They can also be prosecuted for that engagement. Finally, they can be detained if 'imperative reasons of security so require', which is a threshold likely to be met for those actively engaged in hostilities. It has thus been questioned why a 'new' category, or indeed additional measures beyond those permitted by current IHL, could be necessary, at least without 'a complete departure from the values that underpin international humanitarian law'.[357]

However, the introduction of a novel category of 'unlawful enemy combatants' was promoted in support of the view that such persons were not adequately covered by existing IHL; this accorded with the controversial view of the legal adviser that 'there is a category of behaviour not covered by the

354 *See* Chapter 8 for discussion of the lack of 'gaps' between categories of persons: as the Pictet Commentary makes clear, all have some status under IHL.

355 The term 'unlawful enemy combatant' was first put into legislation in Section 948a of The Military Commissions Act of 2006: 'The term 'unlawful enemy combatant' means – (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.'

356 Pejic, '"Unlawful/Enemy Combatants": Interpretations and Consequences', supra note 257, p. 341.

357 'Unless one is advocating a complete departure from the values that underpin international humanitarian law, it is difficult to see why the current rules, inadequate in some aspects as they may be, present an obstacle to dealing with civilians who have taken a direct part in hostilities. It has yet to be explained what additional measures could be implemented with respect to "unlawful combatants" that would not run the risk of leading to violations of the right to life, physical integrity and human dignity that lie at the core of humanitarian law.' *Ibid.*, p. 342.

legal system.'[358] The enemy combatant label provided the pretext, as will be seen, for targeting individuals as 'combatants', but providing none of the privileges or protections associated with that or any other status under IHL upon capture. Although the Obama administration changed the nomenclature in some contexts to 'unprivileged belligerent', it retained the approach to the implications of this classification, namely susceptibility to attack on the same basis as a combatant but without the protections associated with that status in international law.[359] The rules on targeting and detention, and their application, interpretation and/or disregard in practice, are addressed further below.

6B.2.2 Targeting and the Lethal Use of Force

As noted in the legal framework section above, one of the most important consequences of armed conflict and the applicability of IHL is the potential for the lawful use of force against the adversary. IHL rules that permit targeting of particular groups of individuals engaged in conflict stand in sharp distinction to the human rights framework governing in time of peace, under which the use of force will only very exceptionally be lawful.[360] The determination of whether a situation is genuinely an armed conflict, the status of individuals and whether they are legitimate targets within it, is therefore literally life or death determinations of fundamental importance. In many of the circumstances in which the lethal use of force has been used in the 'war on terror' or 'war with al Qaeda and associated groups', including many of those addressed below, the critical question is whether the IHL framework applies at all, in light of the issues highlighted in the previous section.

Additional questions arise, addressed below, concerning whether particular policies and practices are consistent with that 'law of war' framework on which protagonists seek to rely to justify their conduct. The following are among the many practices that have brought into question respect for rules on targeting under IHL.

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358 'Why is it so hard for people to understand that there is a category of behaviour not covered by the legal system?' J. Yoo, legal counsel to former US President George W. Bush, quoted in J. Mayer, 'Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program', *The New Yorker*, 8 February 2005.

359 In Guantanamo litigation the Obama administration preferred 'unprivileged enemy belligerent'. This is mirrored in The Military Commissions Act of 2009, amending the 2006 version, and providing: 'The term 'unprivileged enemy belligerent' means an individual (other than a privileged belligerent) who – (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.' H. R. 2647-385, 28 October 2009, Sec. 948a(6)-(7).

360 Chapter 7A5.1 'The Right to Life' and 7B.3 The 'War' and Human Rights'.

6B.2.2.1 Targeted Killings and Drone Attacks on Terrorist suspects worldwide?

Among the most contentious measures against suspected terrorists is the lethal targeting, beyond zones of hostilities, of 'those persons who [the US considers] were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners'.[361] In particular, the widespread use of remotely operated weapons systems – 'unmanned aerial vehicles' (UAVs) commonly referred to as 'drones,' has been the subject of a considerable, and growing, body of international legal analysis.[362]

Drones were originally developed for intelligence gathering and surveillance purposes, but have been adapted as weapons systems. Their benefits are said to include their surveillance capability, ability to attack remote inaccessible areas, and their relative accuracy and precision.[363] Their unique feature and perhaps their primary appeal for states lies in their remote operation, hence involving little or no risk to the state's own forces when carrying out attacks. The CIA operates 'Predator' and 'Reaper'[364] drones from its head-

361 In 2012 Jeh Charles Johnson, the General Counsel of the Department of Defense, sought to clarify the Obama administration's targeting practice in these terms, to reassure that the unidentified ""associated force" is not any terrorist group in the world that merely embraces the al Qaeda ideology,' though as noted many questions remain regarding the parties to the putative conflict. See full speech, Johnson Speech on National Security', supra note 254. See also speech by Obama's National Defense University speech, May 2013, supra.

362 Government positions, and numerous NGO and UN reports, are referred to below. See eg. 'Advisory Report on Armed Drones', Advisory Committee on Issues of Public International Law to the Dutch government and parliament, Report No. 23, July 2013.Among the academic commentary see e.g. T.M. McDonnell, 'Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists', 44 *Geo. Wash. Int'l L. Rev*. 243, 253 (2012); *See also* M. E. O'Connell, 'Unlawful Killing with Combat Drones; A Case Study of Pakistan, 2004-2009', in S. Bronitt (ed.), Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force (Hart, 2012). J. Masters, 'Targeted Killings', *Council on Foreign Relations*, 8 January 2013, available at: http://www.cfr.org/counterterrorism/targeted-killings/p9627. Issues also arise regarding targeted operations by special forces – see also Chapter 9 on the killing of bin Laden.

363 Leon Panetta asserted in 2009 that drone attacks are 'precise and cause only limited collateral damage;' s*ee also* 'A Defense of Drones', Editorial (Anonymous), *Wall Street Journal* (Eastern Edition), 2 April 2010, p. A.16. On the potential 'humanitarian law' advantages of drones, see B. Emmerson, Special Rapporteur on Terrorism, 'Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations' ('Interim Report') 18 September 2013, A/68/389. Cf. Counter-terrorism experts David Kilcullen and Andrew Exum estimated that for every one intended fatal target there are 50 unintended deaths. O'Connell, 'Unlawful Killing with Combat Drones', ibid; see also reports on civilian casualties below.

364 The Reaper is newer, 'larger and more powerful than the MQ-1 Predator'. *U.S. Air Force*, 'MQ-9 Reaper', 5 January 2012, available at: http://www.af.mil/information/ factsheets/factsheet.asp?id=6405.

quarters in Langley, Virginia, though reports indicate the expansion of its drone bases to various states around the world.[365]

Since the first use of drones in the war on terror in 2002, attacks have expanded in geographic scope and grown exponentially in their numbers and impact. Drones were employed by the armed forces of the US and UK in Afghanistan and Iraq,[366] but gave rise to greatest concern as information emerged as to their widespread use by the CIA to kill targeted individuals beyond zones of armed conflict.[367] Thus far, drones have killed in Pakistan, Yemen and Somalia, though the potential geographic scope of the 'capture or kill' programme has been made clear by US representatives open assertion of the right to kill persons who 'attack US interests' whoever, or wherever, they may be.[368]

As regards the extent of lethal strikes by drones or otherwise, reliable estimates vary and there is a dearth of official information.[369] Extensive emerging media, NGO and academic studies, and to some extent official information, renders beyond reasonable dispute, however, the massive scale of operations in recent years. Credible reports put the number killed in

365 *See* e.g. 'US Building Secret Drone Bases in Africa, Arabian Peninsula', *Washington Post*, 20 September 2011, available at: http://articles.washingtonpost.com/2011-09-20/world/35273162_1_undeclared-drone-wars-seychelles-president-james-michel-unmanned-aircraft (reporting new bases in Africa and the Arabian Peninsula). Another report suggests that the US operates 57 drone bases: N. Turse, 'Mapping America's Shadowy Drone Wars', *Tom Dispatch*, 16 October 2011, cited in McDonnell, 'Sow What You Reap?', supra note 374, p. 253.

366 R. Evans and R. Norton-Taylor, 'RAF "relying" on drones in Afghanistan Guardian', *The Guardian*, 7 February 2010, available at: http://www.guardian.co.uk/uk/2010/feb/07/raf-drones-afghanistan; *see* 'Alston Study on Targeted Killings', supra note 109, p. 7; L. Ure, 'Armchair pilots striking Afghanistan by remote control', *CNN*, 9 July 2008, available at: http://articles.cnn.com/2008-07-09/tech/remote.fighters_1_unmanned-aircraft-uavs-pilots?_s=PM:TECH last visited 13 December 2012.

367 *See* 'Alston Study on Targeted Killings', supra note 109, p. 7; *see also* M. Hosenball, 'Secret panel can put Americans on "kill list"', *Reuters*, 5 October 2011, available at: http://www.reuters.com/article/2011/10/05/us-cia-killlist-idUSTRE79475C20111005 "There is no public record of the operations or decisions of the panel...Neither is there any law establishing its existence or setting out the rules by which it is supposed to operate.' *See also* G. Miller, 'U.S. citizen in CIA's cross hairs', *The Los Angeles Times*, 31 January 2010, available at: http://articles.latimes.com/2010/jan/31/world/la-fg-cia-awlaki31-2010jan31 last visited 13 December 2012.

368 Statement by Brennan June 2010, in E. Lake, 'Dozens of Americans believed to have joined terrorists', *The Washington Times*, 24 June 2012, available at: http://www.washingtontimes.com/news/2010/jun/24/dozens-from-us-on-list-of-targets-as-terrorists. 'If an American person or citizen is in a Yemen or in a Pakistan or in Somalia or another place, and they are trying to carry out attacks against U.S. interests, they will also face the full brunt of a U.S. response'.

369 *See* further below on Drones, transparency and accountability.

Pakistan alone by 2012 at around three thousand.[370] According to one report at least 174 of the 'militants' attacked have been children,[371] while some of those have been mistakes (as illustrated by the killing of Pakistani soldiers for example).[372] As information emerges it becomes clearer that the nature and numbers of those dead goes far beyond the select, high level and highly dangerous terrorists that are referred to in government statements.[373]

Although remote from the intensity of strikes in Pakistan, Yemen was the site of the first drone attack of this nature, against al-Harithi and others in 2002,[374] followed by the killing of US citizen Al-Aulaqi (described as 'the leader of external operations for Al Qaeda in the Arabian Peninsula')[375] and his 16 year old son in 2011,[376] and of numerous attacks thereafter.[377] In Somalia, it would appear that numerous attacks have also been lodged, against

370 The Bureau of Investigative Journalism (TBIJ), an independent journalist organization, reports that available data indicate that drone strikes killed 2,562-3,325 people in Pakistan from June 2004 through mid-September 2012. *See* TBIJ, available at: http://www.thebureauinvestigates.com/category/projects/drones last visited 5 December 2012; see likewise the thorough reports 'Living Under Drones: Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan', Stanford Law School and NYU Law School, September 2012, ('Living Under Drones') and Amnesty International, 'Will I be next? US Drone Strikes in Pakistan,' ASA 33/013/2013, October 2013. On the dramatic increase under Obama's administration, see e.g. P. Bergen and K. Tiedemann, 'Washington's Phantom War: The Effects of the U.S. Drone Program in Pakistan', *The Council on Foreign Affairs*, July/August 2011, available at: http://www.foreignaffairs.com/articles/67939/peter-bergen-and-katherine-tiedemann/washingtons-phantom-war.

371 *Ibid.*

372 See also e.g. 'Obama maintains NATO drone strike that killed 24 Pakistani soldiers was not deliberate... but stops short of offering apology', *The Daily Mail*, 5 December 2011, available at: http://www.dailymail.co.uk/news/article-2070067/Obama-maintains-NATO-drone-strike-killed-24-Pakistani-soldiers-deliberate.html#ixzz1 ryJDpoHO. On significant drone failure rates, see McDonnell, 'Sow What You Reap?', supra note 374, p. 258 (noting that government reports indicate that 'unmanned aerial systems experience a failure rate 100 times greater than that of manned aircraft.

373 C. Stafford Smith, 'Sleepwalking into the Drone Age', *The Observer,* 3 June 2012, p. 31. See also part 6B.3.1.2, below.

374 Qaed Senyan al-Harthi, a former bin Laden security guard, was killed, along with six others, in Yemen when his car was attacked with a missile from a Predator drone. 'Sources: US kills Cole suspect', *CNN*, 4 November 2002, available at: http://articles.cnn.com/2002-11-04/world/yemen.blast_1_cia-drone-marib-international-killers.

375 M. Mazzetti, E. Schmitt and R. Worth, 'Two-Year Manhunt Led to Killing of Awlaki in Yemen', *The New York Times*, 30 September 2011, available at: http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html. See also 'Holder Speech on Targeted Killing', supra note 254.

376 P. Finn and G. Miller, 'Anwar al-Awlaki's family speaks out against his son's death in airstrike', *The Washington Post*, 17 October 2011. *See also* 'Holder Speech', ibid.

377 TBIJ puts Yemen casualties since 2002 at between 362-1,052 (reported) with between 53-63 confirmed US operations in Yemen over this time. *See* http://www.thebureauinvestigates.com/category/projects/drones last visited 5 December 2012. See Human Rights Watch, "Between a Drone and Al-Qaeda: The Civilian Cost of US Targeted Killings in Yemen", October 2013 which examines a series of strikes it suggests were unlawful during 2012/13.

al-Qaeda targets and militant group al Shabaab that is reported to have links with al-Qaeda.[378]

Controversy and uncertainty surrounds most aspects of the drone programme. This includes: who is subject to attack, whether in fact it is limited to the high-level leaders that some but not all government accounts suggest and who are the unidentified "associated" forces that the US is targeting;[379] what 'threat' those targets represent (to the US, its nationals, its interests or those of its allies); what is the extent of the impact, direct or indirect, on the civilian population; what is the broader strategic impact on terrorism and counter-terrorism;[380] by whom are they employed, or might they be employed in the future;[381]; and is there meaningful oversight and accountability.[382] Despite this, the programme is described as one of the successes of President Obama's counter-terror strategy and the US President has acknowledged that he personally approves each incidence of lethal killing.[383]

International reaction to the resort to and increase in drone killings post-9/11 has been neglectfully slow. Media and human rights groups have been accused of focusing on Guantanamo and detentions policy to the neglect of a policy of targeted killings that has spread stealthily throughout the war on terror.[384] To some extent this has changed over time, so far as drone killings have moved centre stage as matters of international attention and concern. States have, individually and collectively, continued to show extreme reluctance to outspoken condemnation, the implications of which, for the practice by a

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378 'Qaeda leader says Somalia's Shabaab joins group', *Reuters*, 9 February 2012, available at: http://www.reuters.com/article/2012/02/09/ozatp-qaeda-shabaab-idAFJOE8180BP20120209. See also E. Schmitt and J. Gettleman, 'Qaeda Leader Reported Killed in Somalia', *The New York Times*, 2 May 2008. TBIJ has reported that 170 people have been killed since 2007, and 23 US strikes and 9 drone strikes between 2007 and 2012.

379 Obama's 23 May 2013 speech does not limit targeting to high level officials but the leaked White paper, note 106, did.

380 See e.g. Living Under Drones, p125-146.

381 Special operations forces can also be involved in targeted killings: see e.g. N. Davies, 'Afghanistan war logs: Task Force 373 – special forces hunting top Taliban', *The Guardian*, 25 July 2010, available at: http://www.guardian.co.uk/world/2010/jul/25/task-force-373-secret-afghanistan-taliban and Chapter 9. Reports also suggest that private contractors may have some role in implementing the CIA programme though the extent of this remains unclear. *See, e.g.*, 'Alston Study on Targeted Killings', supra note 109, p. 7.

382 Although the Obama administration originally refused to comment on targeting policy, under increasing pressure it has acknowledged their use, that the president personally approves the list and the parameters of its legal position, while refusing to release legal advice. Obama has also stated the government is considering safeguards for their use. See e.g. White Paper and Obama 23 May 2013 speech, supra note 106. Koh notes there is no obligation to provide judicial process under IHL before using lethal force. Koh, 'ASIL Speech', supra note 245.

383 'Secret Kill List Tests Obama's Principles and Will', *The New York Times*, 29 June 2012, available at: http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html.

384 McDonnell, 'Sow What You Reap?', supra note 362, p. 261.

range of states in the future and for international standards, is a matter of speculation.[385] These muted responses have been coupled with emergent questions regarding other states cooperation with, and potentially shared responsibility in, the US drone programme.[386]

In the absence of clear state responses, those of international entities become all the more important in clarifying where practices fall foul of the legal framework. Several UN experts have, to varying degrees, expressed their concern over the lawfulness of drone killings,[387] and suggested that while there may be 'no need for new law,'[388] there is a need for a "comprehensive overview by the international community" of targeted killings.[389] There is growing concern that, in the words of a former Special Rapporteur on extra-judicial, summary or arbitrary executions:

> "The United States' assertion of ill-defined license to commit targeted killings against individuals around the globe, without accountability, does grave damage to the international legal frameworks designed to protect the right to life.[390]"

Targeted killings are, of course, neither new[391] nor unique to the US.[392] While the scale of the CIA attacks, and muted responses to them, may set them apart, the practice is echoed in that of other states which employ force against those they label terrorist, such as the notorious practice of Israeli targeted

385 Eg. A Dworkin, Drones and Targeted Killing: Defining a European Position, ECFR/84 July 2013.

386 Information remains elusive, though see emerging allegations in e.g. Drone Strike Prompts Suit, Raising Fears for U.S. Allies, R. Somaiya, NY Times, 30 Jan 2013; Drone Killing Debate: Germany Limits Information Exchange with US Intelligence, *H. Stark, de Speigal, 27 May 2011.*Amnesty International mentions Germany, UK and Australia in 'Will I be Next', supra, p. 54.

387 Statement to UN by C. Heyns and B. Emmerson, Special Rapporteurs on Extra-judicial executions and Terrorism respectively, 25 Oct 2013, 'Drone attacks: UN rights experts express concern about the potential illegal use of armed drones' http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13905&LangID=E. Ben Emmerson's report on drones is spending publication, expected in 2014, but see Interim Report 2013. 'UN launches Inquiry into Drone Killings', *BBC*, 24 January 2013, available at: http://www.bbc.co.uk/news/world-21176279; and B. Emmerson, Interim Report, 18 September 2013.

388 B. Emmerson, Interim Report, ibid.

389 Christof Heyns, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 20 October 2011, GA/SHC/4016, available at: http://www.un.org/News/Press/docs/2011/gashc4016.doc.htm.

390 'If other states were to claim the broad-based authority that the United States does, to kill people anywhere, anytime, the result would be chaos.' Alston, 'Statement of U.N. Special Rapporteur on U.S. Targeted Killings without Due Process', supra note 322.

391 McDonnell refers to examples such as the unsuccessful attempt on Castro's life by the US or the assassination of Harai, allegedly by Syria. McDonnell, 'Sow What You Reap?', supra note 362, p. 263.

392 *See* 'Alston Study on Targeted Killings', supra note 109, p. 5.

killings,[393] the killings of members of Jeemaah Islamiyah in Indonesia and other South East Asian countries,[394] or the Russian Federation's policy of targeted killings of those it identifies as Chechen terrorists.[395] As one UN Expert noted: 'The problems caused by terrorism and asymmetrical warfare are real and cannot be ignored. However, part of the concern about a State killing its opponents in other countries halfway around the world, far from any armed conflict, is the precedent it sets for all States to act in this way…'.[396] In this respect it is chilling to reflect that over 50 states reportedly already possess drones or the technology to produce them,[397] heightening further the importance of clarity as regards the legal framework and strict adherence to it.

6B.2.2.2 Legal Justifications for the Use of Drone Killings?

The US administration purports to justify the lawfulness of such killings by reference to self-defence and IHL.[398] This is one of numerous examples of the blurring of the boundaries of *jus ad bellum* and *in bello*; the criteria for lawful use of force in self defence, addressed in Chapter 4,[399] are distinct from the legal question whether drone killings can be justified by a strict

393 *Ibid*. See Emmerson Interim Report for examples.

394 *See, e.g.*, 'Indonesia: Police Kill 5 Suspects in Terrorist Ring', *The New York Times*, 20 March 2012, available at: http://www.nytimes.com/2012/03/20/world/asia/indonesia-police-kill-5-suspects-in-terrorist-ring.html ; F. Whaley, 'Philippine Officials Say Raid Killed Militants', *The New York Times*, 2 February 2012, available at: http://www.nytimes.com/2012/02/03/world/asia/philippines-says-raid-killed-senior-militants.html. Jeemaah Islamiyah is described as a radical Islamic organization based in Indonesia with 'links to Al Qaeda', which was responsible for, inter alia, the notorious attack on a Bali nightclub that killed 202 people in October 2002.

395 'Alston Study on Targeted Killings', supra note 109, p. 8.

396 Statement by Christof Heyns, Special Rapporteur on Extra Judicial executions; Alston, note 387.

397 'Alston Study on Targeted Killings', supra note 109, p. 9. Alston noted that many states have or are acquiring this technology, which may also become available to non-state actors. *See also*, 'UN launches Inquiry into Drone Killings', supra note 402. The Special Rapporteur on counter-terrorism and human rights, Ben Emmerson, stated that 51 states had the technology to use drones. *See e.g.*. W. Wan and P. Finn, 'Global Race on to Match U.S. Drone Capabilities', *The Washington Post*, 4 July 2011, available at: http://www.washingtonpost.com/world/national-security/globalrace-on-to-match-us-drone-capabilities/2011/06/30/gHQACWdmxH_story.html.

398 *See* Koh, 'ASIL Speech', supra note 248; 'Holder Speech on Targeted Killing', supra note 248; 'Johnson Speech on National Security', supra note 254.

399 Self-defence is an exception to the prohibition on the use of force against another state, but requires that the force be necessary and proportionate to a threat being defended against. *See* Chapter 5.

application of IHL.[400] It also illustrates the selective reference to the legal framework by neglecting the relevance of international human rights law. As discussed in Chapter 7, if the attacks are in fact carried out in the context of armed conflict, IHRL remains relevant alongside (and must be interpreted in light of) IHL.[401] More significantly perhaps, to the extent that those targeted are not in fact killed in the context of an armed conflict, the distinct rules of IHRL govern, under which the targeting of individuals could rarely, if ever, be lawful.[402]

A preliminary question on which lawfulness depends, which must be answered in relation to any operation, is therefore whether IHL is applicable at all. If so, it must be established that the individuals identified and targeted were legitimate targets, as party to a conflict in which the US is engaged, or as civilians taking a direct part in hostilities when they are attacked. There must have been sufficient and reliable information to establish the lawfulness of the target and its context, including the nature and extent of civilian casualties anticipated. Civilian losses must have been proportionate to concrete military advantage and minimized. It may also be essential to determine whether the lethal use of force was militarily necessary, or whether there were, in any of these cases, circumstances in which it may have been feasible to detain rather than kill the target.[403] Allegedly unlawful strikes should be investigated, and where appropriate victims offered a remedy for their wrongs.

In light of the legal framework, some question whether these weapons might be considered inherently unlawful.[404] This question will undoubtedly be the subject of future legal attention, taking into account the weapons systems capabilities and limitations, and whether necessary military assess-

400 Eg. President Obama's National Defense University speech of May 2013 stated that members of Al-Qaeda and undefined "associated forces" would be targeted if they were part of a "continuous and imminent threat" to the United States. This may be relevant to whether there is a right to act in self defence under Chapter 4, but not to whether particular actions were justified under IHL.

401 See e.g.. IHRL on the right to life in Chapter 7A.5.1 and practice at Chapter 7B.3.

402 *Ibid*. Chapter 7 will explain why it is difficult, or perhaps impossible, to justify the systematic targeted killings of terrorist suspects, by drones or otherwise, outside genuine armed conflict.

403 Obama has stated, in his May 2013 speech that drones would only be used where capture was not feasible, though an on the spot assessment of this is precluded by the nature of the weapons system. On this controversial area of international law, see Part A above e.g. 6A2.1.2 and 7B3.

404 M. Wardrop, 'Unmanned drones could be banned, says senior judge', *The Telegraph*, 6 July 2009, available at: http://www.telegraph.co.uk/news/uknews/defence/5755446/Unmanned-drones-could-be-banned-says-senior-judge.html. Former Attorney General Ramsey Clark has stated that '[d]rones inherently violate the laws of the United States and international law'.http://www.syracuse.com/news/index.ssf/2011/11/former_us_attorney_general_ram.html.

ments and responses are possible from a remote location?[405] There may well be calls for legal development in response to the expanding reality of drone warfare, as there have been in response to other technological developments and emerging weapons systems in the past. For the time being, however, it may be doubtful that the weapons system is inherently unlawful[406] with the more fruitful question is how these weapons technologies are being employed in practice and whether or not, in each particular case, the existing framework of law is being respected.

6B.2.2.3 Drone Killings as part of Armed Conflicts in Pakistan, Yemen and beyond?

Pakistan has been the hotbed of drone activity in recent years, giving rise to a controversial preliminary question whether there is an armed conflict in Pakistan to which IHL applies, and if so, between which parties? The existence of armed conflict(s) in Pakistan is a matter of some dispute,[407] as is the question whether, if there is an armed conflict, the US is a party to it. While these are questions of fact, to be assessed at any particular point in time, there is reason to doubt whether the US could be said to be engaged in a separate conflict with the Tehrik-i-Taliban Pakistan (TTP),[408] or whether (especially given the formally condemnatory position of the Pakistani authorities) the US might be intervening (on the side of Pakistan) in a NIAC between Pakistan and the TTP.[409] If not, another possibility may be that parts of the state, notably north-western Pakistan, may be in conflict as a result of a spillover from the

405 Eg drones are necessarily directed towards killing not capturing; while hardly a unique feature of a weapons system, it contrasts to forces on the ground (in e.g. Chapter 9). This raises legal issues in light of the framework above, and at a minimum militates further in favour of an exceptional rather than the expansive approach.

406 See Dutch Advisory Committee on Drones, *supra.*

407 'At the time of writing, the situation [in Pakistan and Yemen] is yet to reach the one of armed conflict, which is why drone attacks, as well as other acts of violence, are to be assessed under the law enforcement model' in S. Breau, M. Aronsson, R. Joyce, 'Discussion Paper 2: Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict', Oxford Research Group, June 2011, p. 9, available at: http://www.oxfordresearchgroup.org.uk/sites/default/files/ORG%20Drone%20Attacks%20and%20International%20Law%20Report.pdf ('Oxford Research Group'). *C.f.*, B. Saul, 'Delivered from Evil… to a minefield of law and consequence', *ABC*, 6 May 2011, available at: http://www.abc.net.au/unleashed/1433114.html.

408 Whether there is a conflict between the Pakistan authorities and the group is separate from whether there is a conflict in which the US is engaged. There is relatively little support for such a view but *see, e.g.*, Saul, *ibid.*

409 The extent of the government's criticism of the attacks casts serious doubt on this scenario. While some question the transparency of the government's protestations (*e.g.* Khatchadourian, 'Bin Laden: The Rules of Engagement', *The New Yorker*, 4 May 2011, citing Pakistan's Prime Minister telling the American ambassador "I don't care if they do it as long as they get the right people ...We'll protest in the National Assembly and then ignore it"), this is plainly different from being jointly engaged in a conflict. *See also, e.g.*, Waraich, supra note 380.

conflict in Afghanistan.[410] Although notably not the justification advanced by the US, in such a spillover situation, there may well be a basis for legitimate use of lethal force under IHL, but naturally only against individuals participating in the Afghan conflict against the US.[411]

A different scenario arises in relation to Yemen, due to its greater relative distance, geographically and otherwise, from the Afghan conflict. The drone killing of American Mr Al-Aulaqi and his son brought the controversy surrounding drone strikes in Yemen into sharp focus,[412] though reports of the wide-reaching effects of numerous attacks since have intensified this.[413] While Mr al-Aulaqi's infamous exhortations of violence would have rendered him susceptible to criminal charges, questions arise as to whether his alleged role in al-Qaeda would render him an active participant in a genuine armed conflict.[414]

A key question of fact, to be assessed on an on-going basis, is whether the intensity threshold would be met for a conflict in Yemen itself. While opinion varies, it has been suggested that the level of unfolding violence in Yemen may have reached the threshold for non-international armed conflict between Al Qaeda and in the Arabian Peninsula and the Yemeni government, perhaps since 2011.[415] There would appear to be little force to the claim that there was an armed conflict therefore in relation to the first known use of drone targeted killings by the CIA in the Harithi case in 2002, or for other attacks resumed in 2009. An outstanding question however is whether the US is a party to any conflict, which it does not appear to have claimed is the case.[416] The

410 N. Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford: Oxford University Press, 2010), p. 225; 'Oxford Research Group', supra note 416, p. 12: 'The drone attacks conducted by the United States in north-west Pakistan are a 'spillover' effect from the conflict in Afghanistan ... the drone attacks taking place outside north-western Pakistan (FATA and NWFP) shall be assessed under the rules of the law enforcement model.'

411 Lubell, 'Classification of Conflicts', supra note 281, p. 255 on the Afghan conflict 'crossing borders' and noting that ' if the individual or group are continuing to engage in the armed conflict from their new location, then operations taken against them could be considered to be part of the armed conflict.'

412 Part of this controversy and attention was political, related to his U.S. nationality.

413 Between a Drone and al Qaeda, HRW, October 2013, supra.

414 *See* background to *Al Aulaqi* in US litigation, supra; for another view, *see* Chesney, 'Who May Be Killed?', Anwar al-Awlaki as a Case study in the International Legal Regulation of Lethal Force', 2 February 2011, Yearbook of International Humanitarian, Vol. 13, M.N. Schmitt et al, eds., 2010, p. 32; supra note 343 and targeting criteria in A6.2.1 and further in the next section.

415 Human Rights Watch, 'Between a Drone and al Qaeda,'p.84; cf. Oxford Research group, supra.

416 'Between a Drone and al Qaeda, ibid, p. 84-85.

same doubts regarding the nature of the – parties to the broader putative global conflict addressed above – would arise.[417]

6B.2.2.4 Drones and questions of Lawful Targeting: Identification, Capture and 'Signature Strikes'?

If there is reliable information that the individual is fighting in an armed conflict against the US, he may well be a legitimate target. Much remains unknown about the basis on which targets for drone killings are identified. Reports indicate that targets are identified by a range of means, which include the use of local informants, who are paid for information,[418] which perhaps inevitably has given rise to allegations of dubious reliability.[419] It has repeatedly been recalled that it is critical that states have procedural safeguards to ensure intelligence is accurate and verifiable.[420]

One noteworthy feature of drone strikes has been so-called 'signature strikes' against people not known and identified as targets individually, but targeted on a 'pattern of life' analysis or otherwise.[421] Lawful targeting on the basis that the person is directly participating in hostilities must however be based on the individual's conduct,[422] which must in turn be based on verifiable and reliable information. In conflict situation where individuals are not identified by their uniforms, it is undoubtedly more challenging, but also all the more important, to make careful assessments of individual involvement, not least given the grave and irreversible nature of the stakes. While some

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417 See criteria for parties to the conflict issue addressed above in 6A.1.1. The question is whether Al Qaeda in the Arabina Peninsula (active in Yemen) meets the criteria for a party to a NIAC are different questions of fact from whether al Qaeda and associates globally do so. The US conflict with the latter is more readily dismissed, as set out in earlier sections.

418 *See also* below Section B.2.3 on bounties.

419 'Drones wars and state secrecy – how Barack Obama became a hardliner', *The Guardian*, 2 June 2012, available at: http://www.guardian.co.uk/world/2012/jun/02/drone-wars-secrecy-barack-obama. See also C. Stafford Smith, 'Sleepwalking into the Drone Age', *The Observer*, 3 June 2012, p. 31.

420 Alston, *ibid*.

421 'Pattern of life' analysis used by CIA means that unidentified persons are targeted for killing based on patterns of behaviour. G. Miller, 'At CIA, a convert to Islam leads the terrorism hunt', *The Washington Post*, March 24 2012, available at: http://www.washingtonpost.com/world/national-security/at-cia-a-convert-to-islam-leads-the-terrorism-hunt/2012/03/23/gIQA2mSqYS_print.html. See also 'US offered advanced warnings, limits for drone strikes', *The Tribune*, 27 March 2012, available at: http://tribune.com.pk/story/355884/us-offered-advanced-warnings-limits-for-drone-strikes-report/; 'Signature strikes target groups of men believed to be militants ... but whose identities aren't always known. The bulk of CIA's drone strikes are signature strikes' in A. Entous, S. Gorman and J. Barnes, 'U.S. Tightens Drone Rules', *The Wall Street Journal*, 4 November 2011, available at: http://online.wsj.com/article/SB10001424052970204621904577013982672973836.html

422 *See* Pejic, 'Conflict Classification', supra note 57, for a response to the criticism of Alston. Despite differences, both Alston and Pejic emphasise that the targeting of persons directly participating must be based on the conduct of the individual.

have suggested use of force in this context depends on an assessment of imminent harm from an individual, this is open to question,[423] but it clearly does involve an assessment that the particular individual is in fact directly engaged in hostilities. They may be targeted so long as they are directly so engaged, or, if the flexible standard of the ICRC Guidance is to be followed, so long as they are personally engaged in a 'continuous combat function.'[424]

The sheer scale of drone attacks, and the apparent references to broad categorizations of groups of individuals based on 'pattern of life' analysis bring into question whether there has been a rigorous application of targeting rules in each case. If there is any doubt as to an individual's civilian status, presumptions must operate in favour of the individual.

In addition, assuming the individual is in principle a legitimate target in a real armed conflict, an assessment must still be made of whether all the conditions for lawful targeting were met.[425] These include the critical question of whether the least onerous measures were adopted, and the controversial obligation to capture rather than kill, or to harm rather than kill, where feasible.[426]

Significantly, the Obama administration appears to have accepted that lethal force should only be use as a last resort, where "capture is not feasible."[427] While questions remain as to what renders capture 'feasible,' and respect for this in practice,[428] this acknowledgment by the administration is significant, and may make a contribution to evolving standards in this field.[429] However, the use of drones, like other forms of aerial attack, by their nature precludes the possibility of capturing rather than killing proving feasible in the particular

423 'In armed conflicts against non-state armed groups who do not wear uniforms and are often difficult to distinguish from the civilian population, targeting determinations rightfully require a higher threshold of imminent harm.' G. Rona, 'US Targeted Killing Policy Unjustified', *JURIST*, 24 February 2011, available at: http://jurist.org/hotline/2012/02/gabor-rona-targeted-killing.php.

424 '[Targeting determinations] must be based on conduct: either that the suspect is "directly participating in hostilities" (DPH), or that he or she performs what the International Committee of the Red Cross (ICRC) calls a "continuous combat function" (CCF) in the armed conflict.' *Ibid.*

425 *See* part A.3. 'Specific aspects of IHL', above. This factual assessment to be made in all the circumstances is impeded by the lack of information concerning targets and the circumstances in which they have been killed. On the lack of transparency, or investigation, *see* below in this section on drones and part B.2.4 below.

426 Note 106 above.

427 DOJ leaked White Paper and National Defense University 23 May 2013 speech, note 106.

428 See e.g. S Knuckey and R.Goodman, What Obama's New Killing Rules Don't tell You, Esquire,http://www.esquire.com/blogs/politics/obama-counterterrorism-speech-questions-052413. The government's position appeared at odds with information that it accelerated drone killings to avoid politically costly detentions.

429 See also Chapter 7B3 for the influence of IHRL, and related developments in this area.

moment.[430] A UN report presented to the General Assembly notes questions arising from the "the extent to which an advance decision, ruling out the possibility of offering or accepting an opportunity to surrender, renders such operations unlawful."[431] This is one of a number of difficult issues of international law raised by drone attacks, deserving of further legal analysis, where the framework of international law may evolve in light of responses to international terrorism.

6B.2.2.5 Drones and Civilian Casualties

While originally touted for their accuracy, as noted above, drone attacks have given rise to serious concern as regards large numbers of reported civilian casualties.[432] Despite denials by the US administration, including stating in 2010 that there had been not a single collateral casualty,[433] civilian casualty numbers resulting from drone strikes have grown exponentially, and reliable reporting puts the fact of such casualties beyond plausible deniability.[434] Beyond troubling reports of thousands of civilians dead, are others that indicate devastating broader effects of drone campaign on civilians and civilian life.[435]

An assessment must be made whether drones can, and in practice in each situation do, meet the legal requirements of distinction and proportionality. Considerations of the strengths and inherent limitations of the weapons system – the surveillance capability of drones on the one hand, and suggestions by some that the remotely-operated nature of these weapons necessarily make

430 The killing of bin Laden, although ultimately resulting in his death, shows the feasibility of ground operations. *See* Chapter 9.

431 Note by the Secretary General, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, 30 August 2011, UN Doc. A/66/330, paras. 65-85; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns – Addendum – Follow-up to country recommendations – United States of America Human Rights Council, 20th Session, 29th March 2012, A/HRC/20/22/Add.3, para. 77.

432 Numerous reports document this e.g. 'Living under Drones' (Stanford), 'Will I be Next' (Amnesty) and 'Between Drones and al Qaeda' (HRW). See also Smith, 'Sleepwalking into the Drone Age'.

433 President Obama's top counterterrorism adviser, John O. Brennan, and other officials claimed there were no' collateral death[s] because of the exceptional proficiency, precision of the capabilities we've been able to develop." S. Shane, 'C.I.A. Is Disputed on Civilian Toll in Drone Strikes', *The New York Times*, 11 August 2011, available at: http://www.nytimes.com/2011/08/12/world/asia/12drones.html *ibid*. Obama, 'Your Interview with the President – 2012', 30 January 2012, available at: http://www.youtube.com/watch?v=eeTj5qMGTAI. Obama Defense University speech, 23 May 2013, note 106.

434 'Oxford Research Group', supra note 416, p. 12; 'Alston Study on Targeted Killings', p. 25; 'Living Under Drones'.

435 Eg Living Under Drones, p. 73 et seq.

on-the-spot assessments more difficult on the other,[436] will contribute to ongoing debate as the role of these weapons within an IHL responsive framework. In face of the mounting evidence of civilian casualties, the onus must lie with the state to demonstrate that distinction and proportionality were respected, and the obligations to protect civilians from the effects of conflict have been met, in each situation.[437] However, as noted below, rather than discharge this onus, the US has shrouded the programme, including their own casualty figures and possible explanations that would assist assessments of lawfulness, in secrecy. Whether due to the nature of the weapon system, the poor intelligence on which attacks are based or other reason, the fact is that drone attacks have cost thousands of civilian lives, strained relations between the US and Pakistani and Afghan governments, and given rise to growing international concern.[438]

In addition to incidental civilian deaths, particular controversy attends 'follow-up strikes', which have been criticized as leading to the death of rescuers, and as having no justification under IHL.[439]

Civilian casualties through drone killings have been described as having 'replaced Guantánamo as the recruiting tool of choice for militants,'[440] with necessary implications for the effectiveness of the use of drone in combating terrorism.[441] As noted in the COIN manual, 'an operation that kills five in-

436 For a discussion on the 'video-game control' aspect of drone use and intelligence failings, *see* J. Mayer, 'The Predator War: What are the risks of the C.I.A.'s covert drone program?', *The New Yorker*, 26 October 2009, available at: http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

437 Eg. the TBIJ found that between 2,429-3,097 individuals were killed in Pakistan drone attacks, of which between 479-811 were civilians. C. Woods and C. Lambs, 'Obama terror drones: CIA tactics in Pakistan include targeting rescuers and funerals', at http://www.thebureauinvestigates.com /category/projects/drone-data/.

438 J. Boone, 'Pakistani MPs say US drone strikes must end before relations improve', *The Guardian*, 20 March 2012, available at: http://www.guardian.co.uk/world/2012/mar/20/pakistani-us-drone-strikes-relations; T. Wright, 'Pakistan Seeks End to Drones', *The Wall Street Journal*, 20 March 2012, available at: http://online.wsj.com/article/ SB10001424052702304636404577292792576081400.html; M. Zenko, 'What Happens if Afghanistan Shuts Down the U.S. Drone Program There?', *The Atlantic*, 9 December 2012, available at: http://www.theatlantic.com/international/archive/2012/04/what-happens-if-afghanistan-shuts-down-the-us-drone-program-there/255602/. 'Alston Study on Targeted Killings', p. 25; 'Living Under Drones'.

439 *See* statement by Christof Heyns, the United Nations special rapporteur on extrajudicial killings, in June 2012 criticising 'double tap' drone strikes, in which a second missile is fired at people coming to aid the wounded. Heyns suggested that this could constitute a war crime. See also D. Akande, 'US Drone Strikes in Pakistan: Can it be Legal to Target Rescuers & Funeralgoers?', *EJIL Talk*, 12 February 2012, available at: http://www.ejiltalk.org/us-drone-strikes-in-pakistan-can-it-be-legal-to-target-rescuers-funeralgoers.

440 'Drones have replaced Guantánamo as the recruiting tool of choice for militants; in his 2010 guilty plea, Faisal Shahzad, who had tried to set off a car bomb in Times Square, justified targeting civilians by telling the judge, "When the drones hit, they don't *see* children."' *Ibid*.

441 See e.g. 'Between Drones and al Qaeda', HRW,'AQAP surge and backlash,' p.24 et seq.

surgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents'.[442]

6B.2.2.6 Transparency, Accountability and Drones

While transparency around targets and the use of force in allegedly conflict situations will always be necessarily curtailed, the lack of transparency and accountability for IHL violations in the war on terror generally has been particularly controversial, and all the more so in relation to drone killings.[443]

The US administration has been sharply criticised, by people on different sides of the debate on the lawfulness of the targeted killings of al-Qaeda operatives[444] and by successive Special Rapporteurs,[445] for secrecy around that programme that extended to refusing to acknowledge its existence until 2010, and continuing resistance to clarifying its legal basis. In response perhaps to growing international and domestic pressure, it has presented greater information on its broad legal justification, representing an important move towards transparency, though not the details of legal advice on which the programme is purportedly based.[446]

Concerns regarding weak positive identification procedures, and the lack of independent post-strike reviews and where appropriate investigations conducted afterwards, remain.[447] Reports that, instead, journalists have been

442 Headquarters, Department of the Army & Headquarters, Marine Corps Combat Development Command, FM 3-24/MCWP 3-33.5, Counterinsurgency, (2006), available at: http://www.usgcoin.org/library/doctrine/COIN-FM3-24.pdf (hereinafter COIN Manual), cited in Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, pp. 309-310; Hampson, 'Afghanistan 2001-2010', supra note 8, p. 259.

443 On the lack of transparency, or investigation, *see* below in this section on drones and B.2.4 below; *see also* Chapter 7B.14 on 'Justice and Accountability'.

444 Anderson Written Testimony, supra note 322, p. 2; *Al-Aulaqi v. Obama*, supra note 322. *See* C. Savage, 'Secret U.S. Memo Made Legal Case to Kill a Citizen', *The New York Times*, 8 October 2011, available at: http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-acitizen.html.

445 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston – Addendum – Mission to the United States of America [Human Rights Council] 11th Session, 28th May 2009. Interim report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Philip Alston, UN GA, 65th Session, 23rd August 2010, A/65/321 at para 87. C. Heyns, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, supra note 439, para. 76; Emmerson, Interim Report, 18 September 2013 emphasises the need for greater disclosure.

446 Knuckey and Goodman, What the Killing Rules Don't Tell, note 436

447 'Alston Study on Targeted Killings', note 109; Lewis, 'The Boundaries of the Battlefield', note 315.

punished for reporting on drone attacks puts a particularly dark face on the lack of transparency around drone killings.[448]

The fact that such strikes are carried out not only by the military, but also by civilian intelligence agencies, heightens concerns both as to the lawfulness of these attacks under IHL, the absence of the normal framework of command and control enshrined in IHL, and further undermines the prospect of oversight and accountability.[449] It remains to be seen whether the US decision to shift responsibility for such killings from the CIA to Department of Defense will alter the approach to transparency in practice.[450] Thus far, requests and legal measures in pursuit of a degree of information for those affected by the policy, and ultimately the opportunity to challenge, have been summarily dismissed.[451] While developments in relation to other terror lists have gone a long way to ensuring the rights of those whose movement, property or other rights are affected,[452] these death lists remain beyond the pale of legal or judicial oversight.

6B.2.3 'Wanted Dead or Alive:' Rewards and the Bounty Hunter in IHL

Speaking with reporters after a Pentagon briefing on 17 September 2001, then President George Bush stated of Osama bin Laden: 'I want justice. And there's an old poster out West I recall, that said, "Wanted, Dead or Alive."'[453] The same terminology has been used in respect of other high-level targets who, as noted above, appear on controversial 'kill or capture' CIA lists.[454]

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448 A Yemeni journalist was arrested for exposing U.S. military intervention in Yemen, including information regarding drone strikes. J. Scahill, 'Why Is President Obama Keeping a Journalist in Prison in Yemen?', *The Nation*, 13 March 2012, available at: http://www.thenation.com/article/166757/why-president-obama-keeping-journalist-prison-yemen

449 Actions by intelligence agencies have often been criticised as undermining transparency. *See* M. Scheinin, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', UN Doc. No. A/HRC/10/3, 4 February 2009, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/106/25/PDF/G0910625.pdf ; and 'Alston Study on Targeted Killings', supra note 109, p.26.

450 Obama, National Defense University speech, May 2013; on the implications of the CIA role, see B. Emmerson, Special Rapporteur on Terrorism's Interim Report, para 46.

451 *See, e.g.*, *Al-Aulaqi v. Obama*, supra note 322 where the family of al-Aulaqi sought information regarding the grounds for putting someone on a 'kill-list' and the lawful basis for the asserted authority to use lethal force; the case was dismissed on state's secrets grounds. See Chapter 11 on litigation.

452 *See* e.g. Chapter 7B.8 on terrorism sanctions lists, and Chapter 11.'on the 'Role of the Courts'.

453 'Bush: bin Laden "Wanted Dead or Alive"', *CNN*, 17 September 2001, available at: http://articles.cnn.com/2001-09-17/us/bush.powell.terrorism_1_bin-qaeda-terrorist.

454 'Secretary Napolitano Confirms Al-Awlaki Is Wanted Dead Or Alive', CNN, 21 July 2011, available at: http://www.youtube.com/watch?v=hSOFGlGOdCo.

The practice of offering financial rewards for those that assist the United States towards the killing or capturing of suspected members of al-Qaeda or associated groups has characterised the war on terror in Afghanistan and, on occasion, beyond. After 9/11, a pre-existing US scheme to solicit information on international terrorists known as 'Rewards for Justice' was revamped in the counter-terrorism context.[455] Often large sums of money have been awarded for individuals, information or contributions towards capture or killing of 'most-wanted' individuals.[456] Examples of the 'wanted dead or alive' mantra and US assisted bounties have arisen in relation to alleged terrorists in other states also.[457]

This practice raises a range of serious concerns in light of the framework of IHL. The scope for mistaken identities and abuse is obvious where individuals sell information for financial reward. In practice, the intelligence gathered in this way has been criticised for its unreliability, often leading to erroneous targeting or mistaken capture,[458] as revealed in the case of many early Guantanamo inmates detained on this basis.[459]

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455 "Washington initiated its bounty program in 1984...The program was enhanced significantly under the 2001 Patriot Act, which, among other things, increased the overall funding, and, in particular, boosted the total available in certain individual cases, such as bin Laden, to $25 million... In most cases, rewards are capped at $5 million and are often considerably smaller...' 'US Bounty Scheme Targets Terrorist', *Forbes*, 21 February 2008, available at: http://www.forbes.com/2008/02/20/terrorism-bounty-taliban-cx_0221oxford.html. The Rewards for Justice program is described as "one of the most valuable U.S. Government assets in the fight against international terrorism....Since the inception of the Rewards for Justice program in 1984, the United States Government has paid more than $100 million to over 70 people who provided actionable information that put terrorists behind bars or prevented acts of international terrorism worldwide.' 'Program Overview', Rewards for Justice, 12 December 2012, available at: http://www.rewardsforjustice.net notes that

456 'US/INTERNATIONAL: Counter-terror bounties', *The New York Times*, 5 December 2008, available at: http://www.nytimes.com/2008/02/25/news/25iht-20oxan-terrorbounties.10376135.html;US bounty Scheme, ibid, details amounts offered for various individuals.

457 *See, e.g.*, in the Philippines in February 2012, two individuals were killed who carried a $50,000 and a $5 million reward from the United States respectively; see F. Whaley, 'Philippine Officials Say Raid Killed Militants', *The New York Times*, 2 February 2012, available at: http://www.nytimes.com/2012/02/03/world/asia/philippines-says-raid-killed-senior-militants.html; *see also* 'Wanted, Zulkifli bin Hir, Up to $5 Million Reward', Rewards for Justice, available at: http://www.rewardsforjustice.net/index.cfm?page= zulkifli&language=English.

458 'Perhaps the most problematic aspect of the scheme is a tendency to attract false information, which has led to deleterious strategic effects in the past.' 'US/INTERNATIONAL: Counter-terror bounties', supra note 463; *see also* M. Samari, 'Bounties paid for terror suspects', *Amnesty International*, 16 January 2007, available at: http://www.amnesty.org.au/hrs/comments/2167. See also C Stafford Smith, Sleepwalking into Drones, supra 6B2.3.

459 'More than 85 percent of detainees at Guantanamo Bay were arrested, not on the Afghanistan battlefield by US forces, but by the Northern Alliance fighting the Taliban in Afghanistan, and in Pakistan at a time when rewards of up to US$5,000 were paid for every 'terrorist' turned over to the United States.'

To the extent that the policy directly or indirectly encourages individuals to themselves engage in unlawful activity, including ultimately killing or capturing listed individuals, it is antithetical to the basis of IHL, with its careful attention to rules on belligerency, status and the principle of distinction.[460] Private individuals do not have belligerents privilege, nor any right to engage either in combat under IHL or in law enforcement under that paradigm. The obligations, safeguards and oversight that would at least in principle arise for parties to conflict under IHL are absent.

Although it has perhaps had less attention than other issues, it is submitted that the public 'bounties' placed on the head of individuals, on uncertain legal basis and with no accountability or possibility of challenge, is a graphic reminder of the extent to which the WOT has become, in the language of George Bush, the Wild West of international practice. The 'wanted dead or alive' approach, so far as it incites or induces private actors to commit crimes, could constitute not only acts for which the state has responsibility under international law, but also crimes both under international and domestic law.[461]

6B.2.4 'War on Terror' Detentions and IHL

The widespread detention of individuals in relation to the war on terror is notorious, and has given rise to the historic anomaly of Guantanamo Bay addressed in Chapter 8, and the rule of law nadir of the Extraordinary Rendition programme, discussed in Chapter 10. Issues related to detention have also given rise to difficult issues concerning the interplay of legal regimes, notably the inter-relationship between IHL and IHRL and its bearing on safeguards in detention addressed in Chapter 7B.3. Myriad legal issues have therefore arisen in the course of what has been described as the 'legal and political disaster' of the US detention policy, which will not be developed here as they are addressed in those chapters.[462]

No chapter on IHL would be complete, however, without brief regard to three of the key questions that have arisen regarding the IHL framework. Notably, these issues go far beyond Guantanamo or the CIA secret prisons to affect the detainees (estimated at more than one hundred thousand)[463] who have been, and continue to be, detained without charge by the US since 2001, including in Afghanistan and Iraq, as well as beyond.

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460 The principles at stake are reflected in the rules governing mercenaries. 'ICRC Study on Customary IHL', supra note 78, Vol. I, Rule 108.

461 *See* Art. 25 ICC Statute and Chapter 4.

462 D. Cole, 'Out of the Shadows, Preventative Detention, Suspected Terrorist and War', 97 *Cal. L. Rev*. 693, 727 (2009).

463 R. Chesney, 'Who May Be Held? Military Detention Through the Habeas Lens', 52 *B.C. L. Rev*. 769, 770 (2011).

6B.2.4.1 Lawful Basis for Detention

On November 13, 2001, President Bush signed the Military Order 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism', providing the authorizing the detention of non-US citizens with respect to whom:

> '(1) there is reason, to believe that such individual, at the relevant times, (i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harboured one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and (2) it is in the interest of the United States that such individual be subject to this order.'[464]

Over time, and across administrations, the US has continued to assert and act upon a broad reaching right to detain 'enemy combatants' including those that 'were part of, or substantially supported Taliban or al-Qaida forces or associated forces'.[465] It has been suggested that 'more than one hundred thousand individuals have been detained without criminal charge' by the US in Afghanistan, Iraq and Guantanamo since 2001, giving rise to an immense amount of scholarship, advocacy, and litigation while 'the question of who lawfully may be detained remains unsettled in important respects'.[466] The lack of clarity or consensus as to who may be detained has been identified on several levels, notably on a group level – as to which groups could be detained and whether it covered only the Taleban and al-Qaeda or also others – and on an individual level, as to 'the mix of conditions that are necessary or sufficient to justify the detention of a particular person'.[467]

The US administration has persistently justified its detention policy as lawful under the regime applicable to 'law of war detentions'. IHL does provide a lawful basis for detention of certain categories of individuals in the context of, and for reasons associated with, an armed conflict. Afghanistan and Iraq were such conflicts, and many of the detainees held by the US were captured

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464 Bush, Military Order of November 13, 2001, 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism', Sec. 1.

465 'Substantial' has not been defined, although the brief states: 'It is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of "substantial support," or the precise characteristics of "associated forces," that are or would be sufficient to bring persons and organizations within the foregoing framework....' *See* Hamdan, 'Respondents' memorandum regarding the Government's detention authority relative to detainees held at Guantanamo Bay', supra note 249, p. 2.

466 Chesney, supra note 463, p. 770.

467 *Ibid*.

at least in those geographic areas, although numerous others were captured at various locations around the globe and with no apparent connections to those recognised armed conflicts. There is strong reason to doubt therefore whether many of the particular individuals were detained in relation to an armed conflict, as opposed to the broader fight against international terrorism, al-Qaeda or others.[468]

In an armed conflict, the power to detain for reasons associated with the conflict is explicit in IHL in relation to IAC and, while not uncontroversial, it may be considered implicit in case of NIAC.[469] As set out above, combatants and fighters may be detained until the end of the conflict – members of the armed forces, such as Taliban fighters referred to above, would thus appear detainable and entitled to POW status. Civilians may also be detained but so long as 'absolute necessity'[470] or 'imperative reasons of security'[471] so require, a standard which has been referred to as a 'minimum legal standard that should inform internment decisions in all situations of violence, including NIACS'.[472]

Available information concerning categories of detainees, such as those referred to in the Obama administration's Guantanamo Task Force Report, illustrate the range of individuals who have been subject to the emergency detention measures in practice, and suggest many that go beyond the IHL parameters.[473] They consist of: (a) 'Leaders, operatives, and facilitators involved in terrorist plots against US targets', (b) others who 'may not have been directly involved in terrorist plots against US targets' but who are believed to have had 'organizational roles within al-Qaida or associated terrorist organizations', including for example, persons who provide 'logistical support to al-Qaida's training operations' and 'facilitators who helped move money and personnel', (c) Taliban leaders and members of anti-Coalition militia groups, (d) 'low-level foreign fighters' who have 'varying degrees of connection to al-Qaida, the Taliban, or associated groups, but who lacked a significant

468 *See* 6B.1.1 'Armed conflict with al-Qaeda, associates and "terrorist groups of global reach"?' for a discussion on armed conflict with al-Qaeda.

469 NIAC does not provide an explicit power to detain, though it has been argued with some force that this power may be inherent in the nature of armed conflict – just as parties can use force, so must they be able to detain as an alternative: *see* Pejic, 'Conflict Classification', supra note 58, p. 10. See also US Supreme Court *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion); *see also* (Thomas, J.) (dissenting opinion).

470 GC Art. 42(1).

471 GC Art. 78(1).

472 Pejic, 'Conflict Classification', supra note 58, p. 15.

473 Executive Order 13492, 22 January 2009, called for an interagency review of the status of all Guantanamo detainees.

leadership or other specialized role',[474] and (e) 'miscellaneous others' who do not fit into any of the groups.[475]

Clearly those directly participating in hostilities could be detained in either type of conflict. However, it must be highly doubtful in relation to those rendering looser forms of 'support' to a broad range of groups, whether imperative reasons of security genuinely require their detention. While a very small number of the detainees could be considered 'fighters' in any sense the US acknowledged that most had not themselves engaged in hostile acts.[476] One can only speculate about the undefined 'miscellaneous' group that falls beyond any of these categories. Assessments of risk posed, and the necessity of detention, should be made in relation to the individual, based on his or her own conduct.[477] Yet it has been suggested that the detainee report indicates that more than half of the detainees were detained on grounds unrelated to their personal conduct.[478] Many were considered 'members' of a broad range of groups, going far beyond even the groups on US terrorism lists, while the vast majority were associated in some more remote way with international terrorism.[479]

The assessment of whether imperative reasons of security exist must be made on an on-going basis, and the person released once there is no longer a compelling need for detention. The fact that individuals may 'have been' members of prohibited groups in the past is insufficient, other than as relevant to a careful assessment of the real security imperative requiring the individual at the present time.

Notably, in light of the focus of much of the war on terror detentions,[480] IHL does not envisage detention under these provisions for interrogation or

474 The report notes that this majority group 'do[es] not appear to have been among those selected for more advanced training geared toward terrorist operations abroad'. Guantanamo Review Task Force Final Report, 22 January 2012, p. 14 available at: http://www.justice.gov/ag/guantanamo-review-final-report.pdf.

475 *Ibid.* 13-14.

476 Note the US administration maintains there is no need to be linked to a hostile act. *See al Bahini v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

477 Cf the position for members of the armed forces in IAC who may be detained as POWs.

478 Chapter 8. M. Denbeaux and J. Denbeaux, 'The Guantanamo Detainees: The Government's Story', Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data, p. 2, available at: http://law.shu.edu/publications/guantanamoReports/guantanamo_report_ final_2_08_06.pdf

479 *Ibid*. at p.2. 'The Government has detained numerous persons based on mere affiliations with a large number of groups that in fact, are not on the Department of Homeland Security terrorist watch list. Moreover, the nexus between such a detainee and such organizations varies considerably. Eight percent are detained because they are deemed "fighters for;" 30% considered "members of;" a large majority – 60% – are detained merely because they are "associated with" a group or groups the Government asserts are terrorist organizations. For 2% of the prisoners their nexus to any terrorist group is unidentified.'

480 Se e Chapter 10 on intelligence gathering by the CIA and Chapter 7B7 on torture in Iraq.

intelligence gathering purposes.[481] Nor does IHL allow detention as punishment.[482] IHL detention is not an alternative to criminal law, where it is considered not practicable or 'feasible' for whatever reason to prosecute. While the official US position has, at various stages, referred to 'security' alongside 'US interests' and 'foreign policy' considerations as justifying detentions,[483] the latter categories provide no apparent basis for detention under IHL.

In conclusion, IHL does provide a broad basis for detention of various categories of persons considered to pose a threat during armed conflict, notably fighting forces and in limited situations where imperative reasons of security so demand, civilians. The detention of many of those captured since 9/11 may well be justified under IHL. Uncertainties stem, however, from a refusal to operate within, and apply consistently, established categories of IHL. Concerns in this respect are closely linked to concerns regarding the absence of meaningful and rigorous individualised assessments and the importance of respect for the safeguards enshrined in IHL, addressed below.

6B.2.4.2 Procedural Safeguards

The detention of 'war on terror' detainees without legal safeguards has been a notorious feature of post-9/11 practice. Other chapters elaborate on this phenomenon in the context of the Guantanamo detentions and the Extraordinary Rendition programme (ERP), which together epitomize the consequences of procedural protection voids. The hard-won litigation that led to acknowledgement of the right of Guantanamo detainees to habeas corpus is discussed in relation to the role of courts in Chapter 11. Yet many detainees elsewhere continue to be held without due process or meaningful review of the lawfulness of their detention, including in Afghanistan where the right to challenge the lawfulness of that detention through habeas proceedings, was consistently denied by the administration, and by US courts.[484]

IHL does not provide explicit rules regarding the safeguards to which detainees are entitled in non-international conflicts, and as discussed in Chapter 7B3, there is an area where genuine uncertainties and significant disagreement arises as regards the applicable framework. On one view, as there are no rules – no 'lex specialis' – of IHL, human rights law continues to apply. On another,

481 'The indefinite detention of prisoners of war and civilian internees for purposes of continued interrogation is inconsistent with the provisions of the Geneva Conventions.' Commission on Human Rights, Joint Report 'Situation of detainees at Guantánamo Bay', 27 February 2006, UN Doc. E/CN.4/2006/120, para. 23.

482 Pejic, 'Conflict Classification', supra note 58.

483 Bush, Military Order of November 13, 2001, Sec. 1.13. Obama's Executive Order 13492 creates and charges the Task Force with finding 'lawful' means '... consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of the detainee'.

484 *See* Baghram litigation, Chapter 11.

the gap should be filled by principles of IHL, applied by analogy.[485] On any view, certain minimum standards common to both fields of law must surely apply. As the ICRC's 'Minimum Guidelines' suggest, this must include reasons, effective opportunity to challenge (which must include access to evidence against them), and periodic review as to the continued existence of the imperative reasons that made such detention necessary.[486] The facts and circumstances of detentions and the lack of meaningful review of all detentions fall significantly short of even these basic minimum requirements of international law.

6B.2.4.3 End of the Conflict and Detention

Finally, as noted in relation to the 'War without End' discussion above, when an armed conflict comes to an end the lawful basis for detention under IHL also ends, and detention must end with it, or another legal basis must be provided. If the conflict shifts in nature from international to non-international, as happened in both Afghanistan and Iraq for example, different legal considerations apply and the detention must be justified in accordance with the law that then applies. The ICRC suggests that the minimum standard of 'imperative reasons of security' may still justify detention, and the relevant minimum safeguards continue to apply, while others suggest a greater role for human rights law in non-international conflicts settings, where less prescriptive rules of IHL apply.[487] When armed conflict ceases, undoubtedly it is the provisions of human rights law that then apply, as the Parliamentary Assembly of the Council of Europe (PACE) has noted: 'since that IAC [in Afghanistan] ceased, however, IHRL standards have applied in the normal fashion'.[488] IHL provides for detention to come to an end and relocation of detainees.

Despite many detainees having been detained in relation to the conflict in Afghanistan in 2001 and 2002, the 'ending of combat in Afghanistan and

485 See discussion in Chapter 7B3.

486 *See generally*, Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed con?ict and other situations of violence', ICRC, Vol. 87 No. 858, June 2005 (hereinafter 'ICRC Minimum Guidelines').

487 *See* the ECtHR decision in *Al-Jedda* v. *United Kingdom*, Appl. No. 27021/08, Judgment, ECtHR, 7 July 2011, on detention in armed conflict situation in Iraq, and the critique thereof in J. Pejic, 'The European Court of Human Rights' Al-Jedda judgment: the oversight of international humanitarian law', 93(883) 2011 International Review of the Red Cross 837 (stressing the importance of having regard to the inherent right to detain under IHL); *see also* 7B.3 'The "war" and human rights'.

488 PACE, 'Lawfulness of detentions by the United States in Guantánamo Bay', Res.1433 (2005), para. 4.

Iraq appears to have no consequences for the ending of detention'.[489] The defence secretary, Leon E. Panetta, announced that the US hoped to end its combat mission in Afghanistan in 2013 as it did in Iraq in 2011, yet apparently maintained the right to continue to hold enemy detainees 'for the duration of hostilities'.[490] A media report recently encapsulated the situation in these terms: 'By asserting, for political purposes, that the nation's two wars are ending while planning behind the scenes for a longer-term war against al-Qaeda terrorists, the man who pledged to bring America's wars to an end has instead laid the basis for an endless battle.'[491]

6B.3 THE AFGHAN CONFLICT AND PARTICULAR ISSUES OF IHL COMPLIANCE

Many issues of compliance with IHL have arisen in the course of the 'war on terror', in relation to the genuine armed conflicts that followed 9/11, in Afghanistan and Iraq, some of which have been addressed above or in other chapters.[492] The US's assertions concerning the existence of a broad conflict with al Qaeda, rejected as a matter of law above, is often conflated with the conflict against the Taleban in Afghanistan. It may be assumed that the approaches it takes to, for example, target identification in relation to the conflict in Afghanistan, would hold true as part of its purported broader war on al Qaeda. This section highlights three groups of IHL issues to have arisen by reference to examples from the military action in Afghanistan that commenced on 7 October 2001. The first group raises questions of targeting and the principle of distinction. The second relates to the methods and means of warfare employed. The third concerns the humanitarian protection afforded to those who have fallen into the power of the Coalition and its Northern Alliance allies.

6B.3.1 Targeting

6B.3.1.1 Drug Lords, Financiers and other 'nexus targets': identifying the targets for legitimate lethal force in Afghanistan

Several questions have arisen in the Afghan conflict concerning the legitimacy of selected targets. Some relate to not uncommon controversies, such as the

489 M. L. Dudziak, 'This War Is Not Over Yet', *The International Herald Tribune*, 15 February 2012, available at: http://www.nytimes.com/2012/02/16/opinion/this-war-is-not-over-yet.html.
490 *Ibid.*
491 *Ibid.*
492 Eg Chapter 7B.7, 8 and 11.

bombardment on 11 October 2001 of the Afghan radio station,[493] which was reminiscent of the attack on the television station during the Kosovo conflict, provoking considerable controversy in this context as in others, as to the legitimacy of target selection.[494] US Defense Secretary Rumsfeld sought to justify the attack on the basis that the radio station was 'the propaganda machine of the opposing forces', while others question the legitimacy of targeting civilian radio and television stations, even where they are used for propaganda purposes.[495]

More novel, and more controversial, were other issues around target identification in Afghanistan. Reports indicate that, differences of view between the states engaged in conflict in Afghanistan as to who were the parties to the conflict, discussed above,[496] translated into differences of views as to who were legitimate targets.[497]

Particular controversies arose when the US purported to broaden the categories of persons considered legitimate targets for lethal force, including specifically the targeting of drug lords, financiers and other 'nexus targets' who provide support for insurgency. In August 2009, the United States Senate Committee on Foreign Relations confirmed that US forces in Afghanistan are now mandated to kill or capture drug traffickers in Afghanistan with links to the Taleban.[498] The Committee was informed of the considerable impact of drug trafficking on the financing of the insurgency,[499] and that the Rules of Engagement and IHL have therefore been 'interpreted' so as to include drug traffickers with proven links to the insurgency on the so-called joint inte-

493 *See* Amnesty International, 'Afghanistan: Accountability for Civilian Deaths', News Release, 26 October 2001, AI Index: ASA/11/022/2001.

494 *See e.g.* 'Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia', supra note 177; Report of the Prosecutor on the NATO Bombing Campaign, supra note 177; see also M. Cottier, 'Did NATO Forces Commit War Crimes during the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000' in H. Fischer, C. Kreâ and S.R. Lüder (eds.), International and National Prosecution of Crimes under International Law: Current Developments (Berlin, 2001), pp. 505, 516-30.

495 *See* Amnesty International, 'Afghanistan: Accountability for Civilian Deaths', supra note 493.

496 6B.1.2 'The Real Armed Conflicts: The nature of the Afghan conflict'.

497 *See* Cole, 'Legal Issues in Forming the Coalition', supra note 344, p. 146; Hampson, 'Afghanistan 2001-2010', supra note 334, p. 260

498 'Afghanistan's Narco-War: Breaking the Link Between Drug Traffickers and Insurgents', A Report to the US Senate Committee on Foreign Relations, 10 August 2009, available at: http://www.gpoaccess.gov/congress/index.html (hereinafter 'Afghanistan's Narco-War'); *see also* D. Akande, 'US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?', *EJIL Talk*, 13 September 2009, available at: http://www.ejiltalk.org/usnato-targeting-of-afghan-drug-traffickers-an-illegal-and-dangerous-precedent/.

499 The Taleban is estimated to receive between $70 and $500 million annually from the drug trade, which clearly has a critical role in financing the insurgency. 'Afghanistan's Narco-War', supra note 498, p. 10.

grated prioritised target list.[500] The result was 'a list of 367 "kill or capture" targets, including 50 nexus targets who link drugs and insurgency'.[501]

Media reports indicate that guidance originally provided by NATO's Supreme Allied Commander in Europe, General Craddock, stated that drug traffickers and narcotics facilities could be treated as legitimate targets,[502] and that it was 'no longer necessary to produce intelligence or other evidence that each particular drug trafficker or narcotics facility in Afghanistan meets the criteria of being a military objective'.[503] In an interesting example of the transatlantic legal tussle, however, this approach was reportedly challenged, *inter alia* on grounds of inconsistency with IHL, by at least some NATO members.[504] Various solutions were reported, one of which was for certain member states to 'opt-out' of certain operations,[505] Though there also appears to have been a shift in position as a result, with the policy ultimately being limited to targeting drug lords and financiers 'on the battlefield',[506] while the NATO website had indicated targeting of those 'with a link' to the insurgency.[507]

These changes may reflect at least some passing regard to the legal framework that governs target identification, but do they amount to consistency with it? The framework requires that in a non-international conflict such as Afghanistan, only those fighters (in a 'continuous combat function'), or civilians directly participating in hostilities at the time, can be deemed to have lost their immunity from attack.[508] One requirement of 'direct participation,' that it adversely affects the military operations or capabilities of the adversary, may well be satisfied by financing, but far less clear is whether it might be said to amount to a 'direct causal link between the act and the harm'. This is particularly clear in light of the ICRC guidance which states that this causation

500 *Ibid.* pp. 15-16.

501 *Ibid*.

502 Eg. M. Gebauer and S. Koelbl, 'Battling Drugs in Afghanistan: Order to Kill Angers German Politicians', *Der Spiegel*, 29 January 2009, available at: http://www.spiegel.de/international/world/0,1518,604430,00.html.

503 *Ibid*; *see also* Akande, supra note 498.

504 S. Koelbl, 'NATO High Commander Issues Illegitimate Order to Kill', *Der Spiegel*, 29 January 2009, available at: http://www.spiegel.de/international/world/0,1518,604183,00.html. On the internal political repudiation of this approach in the German parliamentary debate, *see, e.g.*, M. Gebauer and S. Koelbl, 'Battling Drugs in Afghanistan: Order to Kill Angers German Politicians', supra.

505 'P. Finn, 'NATO to Target Afghan Drug Lords Who Aid Taliban', The Washington Post, 11 October 2008, available at: http://www.washingtonpost.com/wp-dyn/content/article/2008/10/10/AR2008101001818.html. The report notes that the agreement was for some states to opt out of operations, adding that the US and UK supported striking drug traffickers, while 'some European countries, including Germany and Spain' questioned this on mandate and policy grounds.

506 This is how the policy was expressed to the Foreign Affairs Select Committee.

507 Akande, 'US/NATO Targeting of Afghan Drug Traffickers', supra note 506.

508 See Chapter 6A.2.1.2

arises 'in one causal step', and that 'an act must be specifically designed to directly cause the required threshold of harm'.[509]

More fundamentally perhaps, while there are undoubtedly areas of uncertainty and scope for interpretation as to the meaning of 'direct participation', it is generally understood that the individual should be engaged in some way in 'hostilities', not in the many other forms of support on which any insurgency or conflict may depend. Indeed, the ICRC Guidance specifically excludes 'war sustaining' efforts or 'economic support' or 'financial' transactions from the scope of its definition of 'direct participation in hostilities'.[510] Likewise, the Israeli Supreme Court has rejected, the notion that financing insurgency can amount to direct participation that displaces the immunity from attack.[511] While some argue that those who finance attacks can be subject to attack, this has been described as 'definitely a rare minority viewpoint that has not been accepted by the international community.'[512]

The references to targeting the drug lords 'on the battlefield' or 'with links' to the insurgency may seek to draw the targeting practice closer to the legal framework. Absent evidence of a more direct role in hostilities,[513] the targeting practice appears out of sync with current IHL and a potentially dangerous attempt to broaden the circumstances in which the lethal use of force can be invoked: 'To permit anyone who is involved in the war sustaining effort to be a direct target is to allow for unrestricted warfare – practically everyone could be a target.'[514]

Criminal activity often sustains armed conflict, and the criminal law framework set out in Chapter 4, as well as the broader law enforcement and prevention framework reflected in human rights law, continue to operate alongside that of IHL. The lack of authority to target these individuals under IHL does not therefore mean that the legal framework does not contemplate action to be taken against drug lords and others that fund the unlawful use of force, and where appropriate and effective, the destruction or seizure of factories and fields.

509 'ICRC DPH Guidance', supra note 124, p. 59.
510 *See* Chapter 6A.2.1.2; 'ICRC DPH Guidance', supra note 124, p. 51.
511 Decision on Targeted Killings, supra note 7, para 35.
512 J. Paust, 'The United States' Use of Drones in Pakistan', *EJIL Talk*, 29 September 2009, available at: http://www.ejiltalk.org/the-united-states-use-of-drones-in-pakistan/.
513 The question, which remains unanswered, is whether these references envisage a factual scenario in which drug lords do in fact directly participate in hostilities.
514 Akande, 'US/NATO Targeting of Afghan Drug Traffickers', supra note 498.

6B.3.1.2 Civilian casualties and targeting in Afghanistan

Reports appear to indicate that thousands of civilians were killed (and many civilian objects destroyed) during the early stages of the military campaign[515] by the United States and its allies, originally referred to 'Operation Infinite Justice' and later as 'Operation Enduring Freedom'.[516] The heavy reliance on airstrikes has been criticized as responsible for large numbers of civilian casualties and a consistent matter of concern by observers.[517]

Numbers of civilian deaths do not themselves add up to violations of IHL. The key question to be addressed in relation to any particular incident is whether the underlying conduct of hostility rules were fully respected. In relation to the majority of controversial aerial bombardment incidents, where persons or property attacked were clearly not *per se* legitimate targets, the question is not target selection as such, but whether there is an IHL justification for hitting what is, on its face, an unlawful target. Such justification may be based, for example, on mistaken identity or proportionality.[518] Among the reported incidents of aerial bombardment that raise such questions are several attacks on wedding parties, where reportedly traditional celebrations with gunfire have been misinterpreted and led to multiple deaths.[519] The purported justification in such cases may be mistaken identity as to the nature of targets. Like the proportionality of any anticipated civilian losses, the assessment of targets must be made in light of information available at the time, taking into account the conditions of the conflict, though particularly

515 Professor M. Herold's independent study on civilian casualties in Afghanistan, for example, which was widely cited by the media, states that at least 3,767 civilians were killed by US bombs between 7 October and 10 December, a figure which has recently been revised to nearing 4,000. *See* 'A Dossier on Civilian Victims of United States' Aerial Bombing of Afghanistan: A Comprehensive Accounting', most recent edition of study available at: http://pubpages.unh.edu/%7Emwherold last visited 12 December 2012. A more conservative report places the number of civilian deaths due to aerial bombardment between 1,000 and 1,300. *See* C. Conetta, 'Strange Victory: A critical appraisal of Operation Enduring Freedom and the Afghanistan war', Project on Defense Alternatives, 30 January 2002, available at: http://www.comw.org/pda/0201strangevic.pdf.

516 Following protests, principally by the Muslim community in the US, 'Operation Infinite Justice' was renamed 'Operation Enduring Freedom' on 25 September 2001.

517 According to the United Nations Assistance Mission in Afghanistan (UNAMA), airstrikes were responsible for 25% of all civilian casualties in 2008, and 63% of PGF-caused civilian casualties; see 'From Hope to Fear: An Afghan Perspective on Operations of Pro-Government Forces in Afghanistan', Afghanistan Independent Human Rights Commission (AIHRC), December 2008, p. 2, available at: http://www.unhcr.org/refworld/pdfid/ 4a03f60e2.pdf.

518 At no time has it been the official policy of the Coalition to target civilians, and few commentators would contend that attacks on civilians were intentional; the emphasis in the following is thus on the more pertinent questions regarding the obligations in place to safeguard the principle of distinction.

519 *See* Amnesty International, 'Afghanistan: Accountability for Civilian Deaths'; *see also* 'From Hope to Fear', p. 12.

over time a certain degree of local knowledge might reasonably be assumed.[520]

In a number of cases, there were reportedly legitimate military targets in the vicinity,[521] and the question is whether there were sufficient attempts to distinguish the two, the proportionality of foreseeable civilian losses as against the military advantage anticipated, and whether all feasible steps were taken to minimise such losses,[522] including the use of methods and means of warfare which are not inherently unreliable or indiscriminate but as precise as possible, and which limit as much as possible collateral losses.[523] While the proportionality assessment is not a numbers game, involving simple balancing of military casualties against numbers of civilians, in the presence of heavy civilian casualties, a weighty onus rests with the party responsible for ensuring compliance with IHL, and in possession of the relevant information, to account for the lawfulness of the action. Contrary to suggestions that have on occasion been made in the war on terror context, civilian losses might be judged as excessive in relation to the concrete military advantage in the particular situation (not the conflict as a whole).

Other types of targeting issues have arisen in the course of the Afghan conflict, which involve conduct that is on its face plainly unlawful, apparently caused by individual soldiers or groups acting without and beyond the scope of their orders. Examples include egregious accounts in early 2012 of a rampage leading to the massacre of an Afghan family,[524] or the burning of Korans by soldiers,[525] provoking tensions between the authorities and intervening forces. Other examples include the incident in which a suicide attack blowing up a US marine's vehicle prompted indiscriminate shooting at vehicles and pedestrians at the site of the attack and along the next 16 kilometres of road,

520 See 'Afghanistan Civilian Casualties' the Guardian, 12 April 2013. http://www.guardian.co.uk/news/datablog/2010/aug/10/afghanistan-civilian-casualties-statistics. For egs see 'Afghanistan: New Civilian Deaths Due to U.S. Bombing', 30 October 2001'Afghanistan: U.S. Bombs Kill Twenty-three Civilians: Rights Group Urges Immediate Investigation', 26 October 2001, available at: http://www.hrw.org/press/2001/10/afghan1026.htm.

521 Where the military target was not hit, the question becomes accuracy and the considerations are those in relation to error, set out below.

522 As noted above, the situation must be appraised from the point of view of the reasonable commander at the time of the attack, taking into account conditions of conflict.

523 *See* this chapter, 6A.3.2. This may involve choosing to employ precision-guided weapons. *See* HRW, 'International Humanitarian Law Issues', supra note 175.

524 T. Shah and G. Bowley, 'An Afghan Comes Home to a Massacre', *International Herald Tribune*, 12 March 2012, available at: http://www.nytimes.com/2012/03/13/world/asia/us-army-sergeant-suspected-in-afghanistan-shooting.html.

525 A. Rubin, 'Afghan Protests Over the Burning of Korans at a U.S. Base Escalate', *International Herald Tribune*, 22 February 2012, available at: http://www.nytimes.com/2012/02/23/world/asia/koran-burning-in-afghanistan-prompts-second-day-of-protests.html.

resulting in multiple deaths and injuries.[526] For these issues, the questions that arise may be less legal questions regarding targeting and proportionality, but rather how much is being done within the forces to prevent such incidents and, most significantly, whether a thorough investigation and accountability ensues.[527]

A final issue of continuing concern that emerged several years into the military campaign in Afghanistan is the widespread resort to – and the handling of – night raids, which in many documented cases has lead to deaths of civilian adults and children, and allegations of lack of cultural sensitivity on one level and serious ill treatment on another. While the US has on occasion admitted causing civilian deaths – including in one case of six children – through night raids, it also engenders a particularly extreme lack of transparency and accountability. It is reportedly often difficult to ascertain – at the time, or after the fact – who the raiders are (some of whom are reportedly private contractors) and under which authority they act, still less to obtain investigation, redress or accountability.[528] On the contrary, disclosed documents suggest that allegations of civilian deaths in Afghanistan have been met with cover up from within the armed forces.[529]

6B.3.2 Methods and means: cluster bombs in Afghanistan

As noted in Part A, the use of weapons that are indiscriminate, or which cause cruel and unnecessary suffering or superfluous injury, is a violation of IHL. The use of drones, and particular issues arising in the context of Afghanistan, were addressed above.[530]

In the Afghan conflict, as in the Iraqi conflict that followed, particular controversy has also surrounded the use of cluster bombs. It has been reported that in the early part of Operation Enduring Freedom, between October and the end of 2001, 1,210 cluster bombs were employed by allied forces in

526 *See* Afghanistan Independent Human Rights Commission – Investigation, 'Use of indiscriminate and excessive force against civilians by US forces following a VBIED attack in Nangahar province on 4 March 2007, p. 1. The AIHRC investigation of the incident found that the large majority, if not all of the victims were civilians. 12 people were killed and 35 injured, including several women and children.

527 *See* discussion on accountability, above.

528 A. Rubin, 'U.S. Transfers Control of Night Raids to Afghanistan', *International Herald Tribune*, 8 December 2012, available at: www.nytimes.com/2012/04/09/world/asia/deal-reached-on-controversial-afghan-night-raids.html. *See, e.g.*, 'Alston Study on Targeted Killings', supra note 109.

529 D. Walsh, 'Afghanistan war logs: How US marines sanitised record of bloodbath', *The Guardian*, 4 March 2007, available at: http://www.guardian.co.uk/world/2010/jul/26/afghanistan-war-logs-us-marines.

530 B2.2, above.

Afghanistan.[531] Each aerial cluster bomb contains a significant amount of smaller 'bomblets' which, when deployed, cover an extensive area.[532] As the framework section of this chapter indicates, cluster bombs are controversial as they disperse submunitions over a wide area and cannot therefore be directed with precision or confined within the parameters of a military target.[533] In Afghanistan UN reports give examples of US cluster bombs targeting a military compound near the city of Herat, but striking only a mosque used by the military but also a village some 500 to 1,000 metres away.[534] Cluster bombs are also controversial for their initial failure rate; unsurprisingly then, reports record bomblets lying dormant in Afghanistan long after military attacks, until disturbed at some future point causing random civilian deaths.[535]

Indications of shifting policy towards cluster bombs by the US in other contexts[536] did not lead to the avoidance of the use of these controversial weapons in Afghanistan. As noted above, cluster bombs are of increasingly doubtful legality.[537] In respect of incidents where these controversial weapons have been employed and heavy civilian casualties have resulted, the party should bear the burden of justifying their use and demonstrating that the duty of care to protect civilians from the effects of these weapons was satisfied.

Finally, other circumstances attending the use of such weapons compound concerns as to unlawfulness. These are given dramatic illustration by the statement issued by US 'Psychological Operations' to the people of Afghanistan in 2001:

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531 *See* Human Rights Watch Report, 'Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan', December 2002, available at: http://hrw.org/reports/2002/us-afghanistan; HRW, 'Cluster Bomblets' supra note 173. The former notes that 1,228 cluster bombs containing 248,056 bomblets were dropped during the aerial bombardment campaign and the latter notes that in the first few weeks of November 2001, the US had deployed 350 cluster bombs. Human Rights Watch notes that the use of such weapons was more restricted than in the past, and that their accuracy was improved by new technology, but to an insufficient degree to alleviate concerns. *See*, however, Conetta, 'Strange Victory', supra note 522.

532 For the controversy around the use of cluster bombs by the US military, *see also* 'US Deploys Controversial Weapon', *The Guardian*, 12 October 2001, available at: http://www.guardian.co.uk/world/2001/oct/12/afghanistan.terrorism7. The 1,210 cluster bomb units reportedly deployed between October to December 2001 gave rise to the dispersal of a total of 244,420 bomblets. *See* further Conetta, 'Strange Victory', supra note 522.

533 *See* 6A.3.2 above.

534 *See* R. Norton-Taylor and R. Carroll, 'US Cluster Bombing Provokes Anger', *The Guardian*, 25 October 2001, available at: http://www.guardian.co.uk/world/2001/oct/25/afghanistan.terrorism1.

535 *See* S. Goldenberg, 'Long After the Air Raids, Bomblets Bring More Death', *The Guardian*, 28 January 2002, available at: http://www.guardian.co.uk/world/2002/jan/28/ afghanistan.suzannegoldenberg. S*ee also* Amnesty International, 'Afghanistan: Accountability for Civilian Deaths'.

536 *See* statement regarding US policy in Bosnia, mentioned in Chapter 6A above.

537 *See* 6A.3.2 above.

> Noble Afghan people: as you know, the coalition countries have been air-dropping daily humanitarian rations for you. The food ration is enclosed in yellow plastic bags. They come in the shape of rectangular or long squares. The food inside the bags is Halal and very nutritional ... In areas away from where food has been dropped, cluster bombs will also be dropped. The colour of these bombs is also yellow ... Do not confuse the cylinder-shaped bomb with the rectangular food bag.[538]

In these circumstances it may be doubtful that the duty of care owed to the civilian population has been discharged in respect of the facts and circumstances surrounding resort to the use of cluster bombs in Afghanistan.

6B.3.3 Humanitarian protection of prisoners

It is perhaps surprising that many of the most controversial aspects of the application of the IHL framework post 9/11 have arisen in relation to humanitarian protection, designed to protect basic human dignity with which few would take open exception.[539] Yet questionable compliance with these norms has arisen in many contexts post 9/11 including in relation to the detentions in Guantanamo Bay, 'enhanced interrogation techniques' and torture by proxy in multiple contexts worldwide, discussed elsewhere,[540] as well as repeatedly in the conflicts in Iraq and Afghanistan.

Many examples of the ill-treatment treatment of prisoners, disregarding international humanitarian law, arise in the form of allegations of, *inter alia*, summary executions, torture, sexual abuse and other forms of ill-treatment. These issues have captured international attention most sharply – and graphically – in relation to the widely reported torture and mistreatment of prisoners by US troops at Abu Ghraib prison in Iraq.[541] Evidence has also emerged

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538 US Psychological Operations Radio, 28 October 2001, quoted in *BBC News*, 'Radio Warns Afghans over Food Parcels', 28 October 2001, available at http://news.bbc.co.uk/hi/english/world/monitoring/media_reports/newsid_1624000/1624787.stm.

539 While the focus is on treatment of prisoners, many other humanitarian issues arise, such as the obligations to allow humanitarian relief to affected civilians that has been criticised by UN agencies and others which has been described as perhaps the most serious issue of IHL compliance in relation to Afghanistan: S. Kapferer, 'Ends and Means in Politics: International Law as Framework for Political Decision-making', in P. Eden and T. O'Donnell (eds.), *September 11, 2001: a Turning Point in International and Domestic Law* (2005), pp. 25-84.

540 See Chapters 7B7, 8 and 10.

541 *See, e.g.*, 'America's shame', *The Guardian*, 1 May 2004, available at: http://www.guardian.co.uk/world/2004/may/01/usa.iraq; S. Chan and M. Amon, 'Prisoner Abuse Probe Widened. Military Intelligence at Center of Investigation', *Washington Post*, 2 May 2004, available at: http://www.washingtonpost.com/wp-dyn/articles/A59750-2004May1_2.html and Chapter 7B7.

recurrently of serious violations by or with the collusion of UK troops in Iraq.[542]

In Afghanistan, reports of torture and ill treatment by the US relate to interrogation techniques ranging from the issuance of death threats against prisoners to the imposition of other forms of gross physical and psychological duress. One early such case involved the widely reported allegations of ill treatment of detainees in United States custody at the Baghram Air Base north of Kabul.[543] In December 2002, two men being held for questioning died in circumstances where official autopsies concluded that they had suffered 'blunt force injuries' and that their deaths were homicides;[544] despite an official undertaking to investigate the matter, no information was made public.[545] As information on extraordinary renditions emerged, the involvement of this and other Afghan detentions centres as one of the stations for torture and ill-treatment has also became clear.[546]

Other examples of mistreatment relate to abysmal conditions of detention and transfer, resulting in death and serious injuries at the hand of the Northern Alliance.[547] Numerous allegations have emerged of the extra-judicial execution of prisoners by Northern Alliance fighters.[548] These allegations highlight particular issues that arise in respect of irregular forces, such as the Northern Alliance, and the legal relationship between those acts and the US

542 See e.g. 'British personnel reveal horrors of secret US base in Baghdad', Guardian 1 April 2013 accessed at http://www.guardian.co.uk/world/2013/apr/01/camp-nama-iraq-human-rights-abuses last viewed 27 April 2013 on torturous interrogation techniques in a camp run by the US but with the involvement of the UK. On allegations concerning UK troops see e.g.. 'High Court Challenge over Iraqi Civilian Deaths', *The Guardian*, 28 July 2004, available at http://www.guardian.co.uk/Iraq/Story/0,2763,1270930,00.html; *see also* Baha Mousa Public Inquiry Report, available at: www.bahamousainquiry.com and Chapter 7B7.

543 See S. Goldenberg, 'CIA Accused of Torture at Baghram Base', *The Guardian*, 27 December 2002, available at: http://www.guardian.co.uk/world/2002/dec/27/usa.afghanistan;T. Wagner, 'Amnesty Criticizes U.S. for Afghan Deaths', *Associated Press*, 30 November 2003.

544 D. Campbell, 'Afghan Prisoners Beaten to Death at US Military Interrogation Base. "Blunt Force Injuries" Cited In Murder Ruling', *The Guardian*, 7 March 2003, available at: http://www.guardian.co.uk/world/2003/mar/07/usa.afghanistan. *See also* J. Turley, 'Rights on the Rack. Alleged Torture in Terror War Imperils U.S. Standards of Humanity', *Los Angeles Times*, 6 March 2003 and C. Gall, 'U.S. Military Investigating Death of Afghan in Custody', *New York Times*, 4 March 2003, available at: http://articles.latimes.com/2003/mar/06/opinion/oe-turley6.

545 *See* Chapter 7.B.14.

546 *See* Chapter 10.

547 *See* 'Slow Death on the Jail Convoy of Misery,' *Daily Telegraph*, 19 March 2002, available at:http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/1388204/Slow-death-on-the-jail-convoy-of-misery.html, on hundreds of deaths due to transporting Taleban prisoners for days in crammed freight containers, without sufficient air.

548 See e.g. R. McCarthy and N. Watt, 'Alliance accused of brutality in capture of Kunduz', *The Guardian*, 27 November 2001, available at: http://www.guardian.co.uk/world/2001/nov/27/afghanistan.rorymccarthy; L. Harding and R. McCarthy, 'Hundreds of Pakistanis Believed Massacred', *The Guardian*, 13 November 2001, available at: http://www.guardian.co.uk/world/2001/nov/13/pakistan.afghanistan.

and its allies in Afghanistan. The US Defense Secretary Donald Rumsfeld has stated that US policy has been to 'have the forces on the ground that have been opposing the Taliban and Al-Qaida take prisoners themselves and then allow us to do whatever interrogating might be appropriate'.[549]

Executions, torture and ill-treatment do not raise complex legal questions regarding the application of the IHL framework. If established, they are straightforwardly violations of IHL. In light of parallel allegations arising from Guantanamo Bay, Iraq, Afghanistan and elsewhere, others have emerged as to these practices revealing a systematic policy of encouraging, justifying and/or turning a blind eye to, such abuse.[550] Questions arise regarding criminal responsibility of those that ordered or, under the doctrine of superior responsibility, failed to prevent such practices may also arise, though with little effect on accountability thus far.[551] At an absolute minimum, questions arose as to whether those in positions of responsibility are doing sufficient to discharge their duty to ensure that their troops respect IHL, and the extent of 'institutional and personal responsibility' at 'high levels'.[552] Likewise, the 'message' sent to those on the ground, including through memoranda of legal advice advocating the lawfulness of measures amounting to torture or ill-treatment, provide a veneer of legitimacy to plainly unlawful behaviour.[553] Similar questions arise with renewed intensity in relation to those one step removed, whether irregulars such as the Northern Alliance or private foreign contractors and security companies active in Afghanistan,[554] who lack much of the training and preparation enjoyed by regular troops, but who nonetheless are invited to act in consort with coalition forces in Afghanistan.

Finally, questions relate to respect for the broader responsibility incumbent on other states party to the Geneva Conventions, as a result of the positive duties to ensure respect for IHL.[555] This implies a duty to refrain from collaborating and cooperating with those that flout IHL standards, and a duty to

549 Department of Defence, News Briefing, Secretary Rumsfeld and General Myers, 26 November 2001, available at http://www.defenselink.mil/news/Nov2001/g011126-D-6570C.html.

550 See Chapter 7B7.

551 On individual responsibility for ordering, aiding and abetting or for failure of superiors to take reasonable measures to prevent serious violations of IHL, s*ee* Chapter 4A1.2. See Chapter 7B14.

552 *See, e.g.*, the Final Report of the Independent Panel to Review DoD Detention Operations, the 'Shlessinger report', available at: http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf, on 'both institutional and personal responsibility at higher levels' for Abu Ghraib. The ICC prosecutor's office annual report of 2012 notes allegations in relation to the situation in Afghanistan.

553 *See, e.g.*, M. Mazzetti and S. Shane, 'Interrogation Memos Detail Harsh Tactics by the C.I.A.', *The New York Times*, 17 April 2009, available at: http://www.nytimes.com/2009/04/17/us/politics/17detain.html.

554 Swisspeace Report, infra 565, on the US military working with an estimated 2-3,000 former Afghan militia fighters as auxiliaries and the influx of private security companies in a range of non-combat roles, including intelligence, interrogation and surveillance; s*ee* Chapter 33.2.

555 Common Article 1 of the Geneva Conventions, *see* Chapter 3.31.

make reasonable inquiries into the activities of potential allies before forging alliances; the duty plainly cannot be reconciled with the formation of alliances with notorious leaders, renowned for past violations, as in Afghanistan.[556]

6B.3.4 Transparency, inquiry and accountability?

Assessing the lawfulness of many of these controversial measures highlighted above depends on information, including of an intelligence nature, to which the public does not, generally, have access. This was particularly so during a military campaign that was characterised by a relative lack of transparency, both in terms of information briefings from the states involved and the absence of media on the territory of the conflict.[557] In such circumstances, and in the face of widespread casualties, the onus shifts to the responsible armed forces to demonstrate that the prerequisites of IHL were satisfied in the particular case.

It has been noted that in the putative war on terror "one of the greatest challenges in the analysis of this conflict stems from the lack of available information about virtually every aspect under examination."[558] Calls for explanations and, as appropriate, independent inquiries into apparent violations have often gone unheeded, or met with responses that have been criticised as tardy and inadequate.[559] In one exceptional case, following the deaths of prisoners in US custody at the Baghram Air Base in Afghanistan, the US authorities stated that an inquiry would be conducted,[560] but the progress or findings of the investigation were then never made public, despite repeated requests for a full and public criminal investigation and explana-

556 *See, e.g.*, 'Slow Death on the Jail Convoy of Misery', supra note 547 reporting that 'the captors owe allegiance to Gen Abdul Rashid Dostum, the northern warlord whose men committed similar atrocities in 1997'.

557 The Afghan conflict contrasts unfavourably in this respect with the Kosovo campaign of 1999, wherein NATO held daily briefings, and the Iraq conflict where media presence was considerable. *See* Amnesty International, 'Afghanistan: Accountability for Civilian Deaths', supra note 501 (describing as 'disturbing' the lack of public information, and noting the lack of access given to impartial observers).

558 Lubell, 'The War (?) against al Qaeda', in Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6, p. 451.

559 *See* 'From Hope to Fear', supra note 517, emphasizing the lack of transparency and importance of accountability. On threats against journalists who sought to investigate indiscriminate civilian deaths, *see* Targeting Civilians, above.

560 Chapter 7B.14.

tion.[561] Reports also suggest cover-up operations including threats to journalists in an attempt to suppress information.[562]

In turn, as discussed in other chapters, the Obama administrations consistently oppose judicial oversight of its conduct in Afghanistan, through habeas corpus review, on the basis that 'federal courts should not thrust themselves into the extraordinary role of reviewing the military's conduct of active hostilities.'[563] It has employed this rationale in relation to persons not detained in Afghanistan in relation to that conflict at all (but captured elsewhere and transferred in to a situation of unlawful detention), a fact which the government in its pleadings describes as 'immaterial'.[564]

The responsibility of states, parties to the conflict and individuals should be given effect in respect of crimes and violations in Afghanistan. The landscape for responsibility and accountability was complicated – whether deliberately or not – by the multiple actors, including non-state armed groups, private security companies[565] and intelligence agencies of various states[566] engaged in detention and alleged ill-treatment in Afghanistan.

Accountability has been identified as a key concern in Afghanistan,[567] yet this area remains much neglected in Afghanistan as in the putative 'war with al Qaeda' more broadly.[568] The Special Rapporteur on Extra-Judicial Summary or Arbitrary Executions has reiterated obligations to respect, and ensure respect of, IHL, which entail an obligation effectively to investigate suspected violations, using impartial and independent procedures, and to prosecute and punish violations:

> ... the support of both the people in Afghanistan and the international community is dependent upon a sense that the international forces are doing what they think the people of Afghanistan should be doing – being held to account.[569]

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561 *See e.g. also* Wagner, 'Amnesty Criticizes U.S.'

562 The AIHRP condemned the refusal to provide information or access to the site in the aftermaths of the attack by US marines following the suicide attack, and journalists being threatened and forced to delete all pictures and videos they had taken; s*ee* Afghanistan Independent Human Rights Commission, supra note 534.

563 US Justice Department response to the habeas motion of al Bakri, 8 September 2008, cited in Hampson, 'Afghanistan 2001-2010', supra note 334, p. 268. See more detail on the case in Chapter 11.

564 *Ibid*.

565 *See generally*, 'Private Security Companies and Local Populations: An exploratory study of Afghanistan and Angola', Swisspeace, Ulrike Joras and Adrian Schuster (eds.), 2008 and Chapter 3.3.2.

566 Philip Alston noted that '[t]hese issues of accountability are exacerbated by the operation of forces within this country that are not accountable to any military but appear to be controlled by foreign intelligence services'. *See* P. Alston, 'Press Statement'.

567 *See* Alston, 'Press Statement'; *see also* 'From Hope to Fear'.

568 On measures of accountability thus far see Ch. 7.14.

569 *See* Alston, 'Press Statement'.

6B.4 CONCLUSION

By suggesting that the 'war on terror' is an armed conflict of global reach, of which Afghanistan was but a part, the implication is that the rules of IHL applicable in armed conflict govern all aspects of the counter-terrorist measures taken post September 11. This chapter has addressed how the 'war on terror' may include the military action taken in Afghanistan, but it certainly goes far beyond armed conflict in any legal sense. While the Afghan and Iraq interventions led to armed conflicts between identifiable parties, with identifiable end points, neither the September 11 attacks nor the subsequent multi-faceted fight against terrorism meets the legal criteria of armed conflict.

The proposition that there is an armed conflict between states and al-Qaeda has been as tenaciously defended by the US since 9/11 as it has been increasingly robustly rejected by other international actors. The result is a regrettable transatlantic rift of significant proportions and import, on the fundamental question of whether and when the armed conflict paradigm applies. The question of the existence and scope of armed conflicts post-9/11 is critical and defining. It underpins the proper identification of the legal framework, an essential precursor to its observance. IHL has been relied upon to apply to situations beyond genuine armed conflicts, with an impact on other areas of law, notably human rights law addressed in the following chapter. Its content has been overstretched to purportedly justify exceptional powers, then underapplied by ignoring the responsibilities that IHL imports.

Despite occasional and surprising assertions by the US of a new conflict paradigm garnering international acceptance, it is highly doubtful in light of the schism in practice and approaches to the law, that the international legal framework has been transformed as regards the definition of conflict or the emergence of new categories of conflict.[570] The practice explored in this chapter has undoubtedly fostered acute international attention to the legal framework, and development on certain aspects may well unfold over time. Areas of intense debate and potential future development that have been highlighted include certain issues around classification of conflicts,[571] whether persons can be targeted on the basis of their membership of an armed group that does constitute a party to a non-international conflict, the scope of 'direct participation in hostilities,' novel issues emerging from the specific nature of drone technology,[572] as well as some issues concerning the inter-relationship between IHL and human rights law in the next chapter.[573]

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570 *See* Part A 'The Legal Framework' for a discussion on how the legal framework changes. E. Wilmshurt, 'Conclusions', in Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6, pp. 499-501.

571 Chapter 6A1.1.2.

572 Chapter 6B.2.2 on drones, above.

573 Chapter 7B.3 on the Interplay between IHL and IHRL.

There can be little doubt that IHL has been shaken and undermined post 9/11, including by assertions that the legal framework is quaint and outmoded, ill-equipped to address the 'new challenges' and the 'new kind of war'. The examination of the legal framework set out in this chapter casts doubt on that proposition.

IHL allows for the use of force against non-state actors when they engage in an armed conflict, but a high threshold is deliberately placed on when such a conflict arises, given the profound implications on international norms and human peace and security. Where an armed group, whether using the name of al-Qaeda or another, meets the criteria of party to conflict and engages in hostilities in any particular part of the world, IHL may well govern. On the facts available, however, the legal criteria is simply not met for an armed conflict, still less one of global reach, with 'al Qaeda and associates.' Likewise, the manufacture of the enemy combatant criteria with its broad reaching implications is not the result of a gap in the law: IHL envisages and provides for unprivileged belligerents, for example, and provides rules consistent with the principles of IHL.[574] If individual members of terrorist groups take up arms in an armed conflict, IHL provides rules on their status, the scope of the right to target them, the possibility of prosecuting them, and their treatment upon detention.[575] The persistence of torture and ill-treatment contrasts to uncontroversial clarity as regards the legal framework governing humanitarian protections.

The challenge that emerges appears to be less related to the adequacy of the legal framework as to the refusal to be constrained by its terms, or to apply it consistently – and not only (in the words of then US president Bush) to the extent deemed 'appropriate' or 'consistent with military necessity' by the state itself.[576] While there are areas of legitimate dispute as regards the legal framework, and areas where it will continue to develop in the future, in part in response to the practice of the war on terror, there is an abundance of violations of the letter and the spirit of IHL the war on terror. The full impact of novel approaches to the use of IHL as justifications for conduct – such as its approach to detention or treatment of 'enemy combatants', drone killing of alleged terrorists anywhere in the world or targeting so called 'nexus targets' – remains to be seen. The potential for war on terror practices to be replicated elsewhere is already clear.[577]

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574 Pejic, '"Unlawful/Enemy Combatants": Interpretations and Consequences', supra note 256, p. 341.

575 Chapter B.2.1 'Enemy Combatants', above.

576 *See, e.g.*, Bush's order that the Geneva Conventions would be applied ' the extent appropriate'. 'Humane Treatment of al Qaeda and Taliban detainees', supra note 117.

577 Eg. 'enemy combatant' nomenclature being used elsewhere, see e.g. calls for the Boston bomber in 2013 to be held as an enemy combatant, rejected by the US government; see debate at http://blogs.reuters.com/great-debate/2013/04/23/boston-bomber-acted-as-enemy-combatant, visited 30 April 2013. Eg drones and targeted killings by the US and

Allegations of violations have been coupled by the failure to conduct thorough investigations and, subject to genuine and compelling security concerns, to make the findings of such investigations public, to restore the national and international confidence in the lawfulness and hence legitimacy of military action. Critical questions moving forward will be the commitment of states parties – those directly responsible and others – to ensure that effective measures are taken to avoid repetition and to hold to account those individuals directly and indirectly responsible for IHL violations amounting to war crimes.

Several concluding distinctions may be worthy of emphasis as regards the unravelling of the relationship between IHL and terrorism. First, the terrorist label, always of doubtful relevance in international law given the ambiguity surrounding its meaning and scope, is not legally significant, still less decisive, to the application of IHL.[578] To assess the existence of an armed conflict and application of IHL, the question is not whether there can be a conflict with 'terrorist' organisations *in abstracto* but whether, in relation to a particular and defined set of facts, the requirements regarding use of force and nature of the parties are met.[579]

Second, organisations labelled terrorist may well constitute parties to a conflict, as the Lebanon conflict showed, but the assessment has to be case-by-case in light of the evolving facts concerning the nature of particular groups and particular situations of violence. Criminal networks, like any other groups of individuals, may become *involved* in an armed conflict by fighting alongside, or in connection with, a party that meets the criteria set out above.[580] Only very exceptionally will financial or political support by terrorist organisations render them participants in the armed conflict. The resort to armed force, even of a significant scale, does not constitute armed conflict despite the challenges that it poses, some of which may be comparable to armed conflict. IHL is not the legal framework governing organised criminal activity beyond armed conflict, which the human rights and criminal law frameworks were intended to address.

Third, where there is an armed conflict, state or non-state parties to it may be responsible for 'terrorism'[581] or conduct that may be considered to exploit

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Israel being relied upon in Russian, at 6B.2.2, above. Eg resort to military commissions being relied upon by President Mubarak of Egypt, Chapter 8.

578 See 6A.1: in conflict situations, one party may not infrequently refer to another as a terrorist or as resorting to terror tactics, while many deny the existence of NIACs within their state, preferring to label it terrorism. This does not preclude the application of IHL.

579 The question, as sometimes posed, whether there can be an armed conflict with a 'terrorist' organisation is not therefore the most helpful and cannot be answered in the abstract.

580 *See, e.g.*, the Afghan conflict in which components of al-Qaeda appear to have fought with the Taleban. *See* 'Active and Direct Participation' in Hostilities, Section A above

581 Article 33(1) GC IV on collective penalties and prohibits 'all measures ... of terrorism' against civilians, while the Additional Protocols I and II prohibit '[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population'; Article 51(2) AP I; Article 13(2) AP II; *Galić*, supra note 117.

'terrorist' tactics, under IHL, such as attacks against civilians or civilian objects[582] or perfidy.[583] However, the commission of 'terrorism' by parties to a conflict should not be confused with the key question whether particular groups meet the necessary criteria to constitute parties to a conflict in the first place.

In conclusion, great emphasis has been placed by some on the novel features of the international landscape post 9/11 with particular emphasis on the new kind of war raising new kinds of challenges. Implicitly and explicitly, the relevance of IHL and its capacity to meet the challenges of contemporary conflict has been attacked following 9/11. Debate around the need, or not, to revise IHL has consumed considerable attention. To the extent that this leads to clarifying the content of IHL content, it may yet prove of long-term benefit. However, considered reflection by international experts has tended to reject the idea that 9/11 or its aftermath reveal the need for radical revision of IHL.[584] Behind the smoke screen the real challenges continue to lurk, only reinforced by the putative 'wars' on terror or on al-Qaeda and associates, which relate not to the normative content of IHL but to the need to strengthen the effectiveness of its implementation.

582 AP I, Article 85.

583 Article 37 AP I. The ICRC Report on IHL and Contemporary Armed Conflicts, supra note 48, p. 7, notes that 'suicide actions' against civilians are prohibited. Attacks in which individuals engaging in hostilities pose as civilians, of which numerous examples emerge post 9/11, amount to perfidy, and the use of human shields, for example, is also prohibited.

584 *See* Schrijver and Herik, 'Leiden Policy Recommendations', supra note 74; 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48; Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6, p. 500 (discussing specifically classification of conflicts); ICJ Eminent Jurists panel 2009; Dutch Advisory Report on Drones, note 362; B Emmerson, Interim Report on Drones, September 2013.

7 International human rights law

> The epithet 'subversive' had such a vast and unpredictable reach, the struggle against the 'subversive' had turned into a demential generalized repression with the drift that characterizes the hunting of witches and the possessed.
>
> (National Commission on the Disappeared, Argentina, 1984)[1]

> Defending human rights ... is a prerequisite to every aspect of any effective counter-terrorism strategy. It is the bond that brings the different components together. That means the human rights of all – of the victims of terrorism, of those suspected of terrorism, of those affected by the consequences of terrorism.
>
> (UN Secretary General, Global Counter-Terrorism Strategy Launch 2006)[2]

The starting point for an analysis of international human rights law (IHRL) is the principle of universality: human rights stem from the intrinsic value or the inherent dignity of the human being, irrespective of nationality, status, or indeed alleged wrong-doing. In this vein, as the German Constitutional Court has noted, 'dignity is not therefore at the disposal of the individual,'[3] just as it is not at the disposal of the state. Rather, IHRL at its core seeks to ensure a basic standard of protection for all human beings at all times, in all places. It becomes more critical, not redundant, in the face of situations of crisis.

Much state practice post-9/11 has challenged this fundamental premise of the universality of human rights law, as will be seen in Part B. An exception-

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1 Argentine National Commission on the Disappeared (CONADEP), *Nunca Mas: The Report of the Argentine National Commission on the Disappeared* (1984).

2 UN Secretary General address on the launch of United Against Terrorism: Recommendations for a Global Counter-terrorism Strategy, 2 May 2006, available at: http://www.un.org/unitingagainstterrorism/sgstatement.html.

3 BVerfGE 45, 187, 229 (1977); *see* J. Eckert, 'Legal Roots of Human Dignity in German Law', in D. Kretzmer and E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (Leiden: Martinus Nijhoff, 2002), p. 148.

alist approach has emerged recurrently, questioning the 'applicability' of the human rights framework (*whether* it is applicable at all, rather than simply as to *how* it applies) to certain classes of individuals, offshore locations, in a 'war' on terror, or in security challenged situations more broadly. Likewise, the pitting of 'security' against 'human rights,' or resort to the war paradigm, has at times brought into question the very relevance of human rights in the face of international terrorism, and questioned how apt or well equipped the human rights framework is to adjust and respond to security challenges.

The legal framework of IHRL set out in Part A of this chapter will address various ways in which the security versus human rights dichotomy is a false one. It addresses the inherent flexibility of the human rights framework to adjust to and accommodate the exigencies of international terrorism. It will discuss how the effective prevention and punishment of terrorism is itself a human rights obligation, though the legitimacy, and ultimately effectiveness, of measures taken as part of a counter-terrorism policy depends on them being discharged within the human rights and rule of law framework set out in the remainder of this chapter. Most if not all human rights can be implicated in counter-terrorism, and the chapter will describe the legal framework in relation to a broad range of specific rights, in light of a detailed body of law developed through the application of human rights law in situations of terrorism over many years and across continents – from Chechnya to Colombia, Turkey to Egypt, Ireland to Sri Lanka, and far beyond.

Part B will consider the extent to which this framework has been applied in practice, and the implications for respect for human rights and the rule of law in the fight against terrorism since 9/11. It will focus on three overarching issues: challenges to the geographic scope of application of IHRL; the conflictive but evolving relationship between 'security' and human rights; and the impact of the 'war' rhetoric on human rights, including challenging issues of interplay between IHRL and IHL that arise in the few genuine armed conflict situations. Part B also highlights many of the specific issues that have arisen in counter-terrorism practice, from targeted killings, torture and terror blacklists to deportations, deprivations of liberty and data-retention. This chapter should be read alongside the case study chapters that analyse in more depth the human rights implications of Guantánamo Bay (Chapter 8), the killing of Osama bin Laden (Chapter 9), extraordinary rendition (Chapter 10), and the chapter on the role of the courts in responding to human rights claims in the war on terror (Chapter 11).

7A THE LEGAL FRAMEWORK

7A.1 LEGAL BASICS: SOURCES AND MECHANISMS OF INTERNATIONAL HUMAN RIGHTS LAW[4]

The basic rules of IHRL are, for the most part, straightforward. They are found first in international and regional treaties that bind those states parties to them. Ratification of or accession to human rights treaties is widespread; for example, at the time of writing there are 167 states parties to the International Covenant on Civil and Political Rights (ICCPR), including the US (the driving force behind the 'war on terror'), most of its major allies and the states on whose territories it has been carried out, while 160 states have ratified the sister International Covenant on Economic Social and Cultural Rights (ICESCR).[5] Regional human rights treaties also enjoy widespread ratifications, comprising the majority of states within Europe,[6] Africa[7] and the Americas.[8] In addition to these general human rights treaties are others on the international and regional levels that protect specific groups of persons,[9] such as the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW), or address specific viola-

4 *See* Chapter 1.2.1.

5 For the status of ratifications of the main UN human rights conventions, *see* Office of the UN High Commissioner for Human Rights and the UN Treaties Collection, available at: www.treaties.un.org. The US, UK, Afghanistan and Iraq are all parties for example, as are most states on whose territories rendition and targeted killings have occurred, including Pakistan, which ratified on 23 June 2010.

6 The European Convention on Human Rights and Fundamental Freedoms (ECHR) is binding on all 47 states of the Council of Europe (CoE). *See* Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14,* 4 November 1950, ETS 5 [hereinafter 'ECHR']. For other CoE treaties, *see* http://conventions.coe.int.

7 The African [Banjul] Charter on Human and Peoples' Rights (African Charter), adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, reprinted in 21 I.L.M. 58 (1982),, entered into force 21 October 1986, is binding on 53 African states. For other African human rights treaties, *see* http://www.achpr.org/instruments.

8 The American Convention on Human Rights (ACHR) is ratified by 24 states of the Americas. In addition, the American Declaration of the Rights and Duties of Man, approved by the Ninth International Conference of American States in 1948, although initially intended to be non-binding, has been found to be 'indirectly binding'; *see*, *e.g.*, *James Terry Roach and Jay Pinkerton* v. *United States*, Case 9647, Res. 3/87, 22 September 1987, Inter-American Commission on Human Rights (IACHR), *Annual Report 1986-87*, p. 147, at p. 165 and *Certain Attributes of the Inter-American Commission on Human Rights*, Advisory Opinion OC-13/93, 16 July 1993, Inter-american Court of Human Rights (IACtHR), *Series A*, No. 13, paras. 42-5, referring to the Declaration as a source of 'international obligations'.

9 These include the: Convention on the Elimination of All Forms of Discrimination Against Women, New York, 18 December 1979, 1249 UNTS 13 (hereinafter 'CEDAW'), ratified by 187 states; Convention on the Rights of the Child (CRC), 20 November 1989, 1577 UNTS 44, ratified by 193 states; Convention on the Rights of Persons with Disabilities (CRPD), 3 May 2008, 2512 UNTS 3, ratified by 137 states by Sept. 2013. For a current list of countries and ratification dates, *see* http://treaties.un.org.

tions, such as the International Convention for the Protection of All Persons from Enforced Disappearance.[10] States that have signed but not ratified a convention (for example the US with the ACHR or ICESCR) are not legally bound by it; however, they undertake to act in good faith, and not inconsistently with its spirit.[11] Moreover, binding treaty provisions are supplemented by the many so-called 'soft law' standards of relevance to terrorism and human rights, contained in, for example, resolutions of the UN General Assembly or standards elaborated by other international or regional bodies.[12] In addition, the UN Charter, binding on all 193 UN member states,[13] might itself be seen (albeit not exclusively) as 'a human rights instrument imposing human rights obliga-

10 International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, adopted by UN GA Res. 61/177 on 12 January 2007. 34 parties have ratified and 94 parties have signed this convention. For a list of all parties and signatories, *see* http://treaties.un.org.

11 *See* Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27, 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875 (1969), at Article 18 [hereinafter 'VCLT'].

12 While not binding *per se*, they give more detailed expression to some of the binding prescriptions and prohibitions of international law and may reflect customary law, *see* Chapter 1.2.1.3. The Universal Declaration on Human Rights is foremost among the non-treaty instruments. Others of relevance to human rights and the 'war on terror' include the: UN 'Code of Conduct For Law Enforcement Officials', UN GA Res. 34/169, 17 December 1979, UN Doc. A/RES/34/169 (1979); Turku Declaration on Minimum Humanitarian Standards, Helsinki, 2 December 1990, reprinted in the Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, UN Doc. E/CN.4/1995/116 (1995); Paris Minimum Standards of Human Rights Norms in a State of Emergency, International Law Association (1984), reprinted in 79 AJIL 1072 (1985); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN GA Res. 43/173, 9 December 1988, UN Doc. A/RES/43/173 (1988); Standard Minimum Rules for the Treatment of Prisoners, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders (1955), UN Doc. A/CONF/611 (1955), annex I; approved by the Economic and Social Council by its Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; Basic Principles on the Independence of the Judiciary, Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, 26 August to 6 September 1985, UN Doc. A/CONF121/22/Rev.1, 59 and UN GA Res. 40/146, 13 December 1985; UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, UN Doc. A/RES/40/34 (1985); Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, UN Doc. A/CONF32/41 (1968); The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, UN Doc. E/CN.4/1996/39 (1996) ('Johannesburg Principles'); Special Rapporteur's report on 'Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives', UN Doc. A/HRC/22/52 (1 March 2013); Global Principles on National Security and the Right to Information, 12 June 2013, (the 'Tshwane Principles'), endorsed by, *e.g.*, the European Parliamentary Assembly on 20 Oct 2013, and multiple reports of UN special rapporteurs, working groups and experts referred to in this study.

13 *See Member States of the United Nations*, available at: www.un.org/Overview/unmember.html.

tions'[14] in that it stipulates 'promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language or religion' as one of the underlying purposes of the United Nations.[15] Article 1 ensures that both human rights and security should be understood as purposes underpinning the UN system.[16]

Alongside treaty provisions is customary international law, which obliges all states, regardless of whether they have ratified a relevant international or regional treaty, to respect certain rights and freedoms[17] In the case of international human rights law, and humanitarian law, it has been suggested that the extent of consistent, 'extensive and virtually uniform' practice is not as important as in some other areas, and that *opinio juris* of states plays a much greater role.[18] The fact that in some countries there may be daily occurrences of torture, arbitrary detention and extra-judicial killings does not preclude the existence of customary international human rights norms as these acts, while practiced, are universally regarded as unlawful.[19]

The question whether particular rights are sufficiently supported by state practice and *opinio juris* to have passed into customary law is the subject of much debate.The Restatement (Third) of the Foreign Relations Law of the US, for example, includes prolonged arbitrary detention, systematic racial discrimination, torture or other cruel, inhuman or degrading treatment, extra-judicial executions and causing the disappearance of individuals as prohibited in customary law.[20] The significance of the debate is, however, diminished by the fact that so many states have ratified relevant treaties, and customary international law is therefore often referred to simply to underscore the universality of those obligations. But in certain instances it may arise that a state is not bound by the relevant treaty law or, as discussed below, seeks to 'de-

14 *See* B. Simma (ed.), *The Charter of the United Nations, A Commentary*, 2nd ed. (Oxford: Oxford University Press, 2002), pp. 92-3; I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003), p. 532.

15 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, at Article 1(3) and Articles 55 and 56.

16 The Charter makes provision for the role of the UN in the collective enforcement of international security however, that are not matched for human rights enforcement. *See* Chapter 5.

17 *North Sea Continental Shelf, ICJ Reports 1969*, p. 43; Chapter 1.2.

18 This may be expressed through statements, *e.g.*, in international organisations or by ratifying a treaty; *see generally*, T. Meron, *Human Rights and Humanitarian Law as International Customary Norms* (Oxford: Oxford University Press, 1989).

19 *See* the approach of the ICJ in *Military and Paramilitary Activities in and against Nicaragua, Merits, ICJ Reports 1986*, p. 14. *See also* R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), pp. 19-22.

20 Restatement (Third) of the Foreign Relations Law of the United States (1987), section 702.

rogate' from its terms or to question its applicability in certain situations,[21] and customary status must be assessed to determine which norms are binding nonetheless.[22] It may also be of particular significance in states where customary – as opposed to treaty – law forms part of domestic law.

Also relevant to our current enquiry is the fact that some of these customary norms are additionally accepted and recognised as having attained the status of *jus cogens*. As such, the obligation cannot be deviated from in any circumstances, and cannot be changed through shifting state practice as other customary norms can; instead it can only be overridden by the establishment of another *jus cogens* norm.[23] Any assessment of the impact of counter-terrorism practice on changing law must bear in mind the peremptory status of certain human rights. Some suggest that these rights largely reflect the core non-derogable rights in the ICCPR (discussed below),[24] and others the shorter list of non-derogable rights common to the 'three major human rights treaties'.[25] The US Restatement of Foreign Relations law includes, as a mini-

21 For example, the position of the US is that the ICCPR does not apply extra-territorially or in the context of an armed conflict, as discussed in Part 7B2 and 3. *See*, *e.g.*, Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, and Annex I: Territorial Application of the International Covenant on Civil and Political Rights, available at: http://www.state.gov/g/drl/rls/55504.htm; Fourth Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, available at: http://www.state.gov/j/drl/rls/179781.htm. The US submitted additional information: U.N. Human Rights Comm., Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee, UN Doc. CCPR/C/USA/CO/3/REV.1/ADD.1 (2 Feb. 2008). In its One Year Follow Up report, it provided limited information on issues arising extra-territorially as 'a courtesy to the Committee while maintaining that the ICCPR does not apply'. *See generally* UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html.

22 *See* 7A.3 in this chapter, noting that derogations from treaty provisions are allowed in situations of emergency, but states remain bound by custom; *see also* 7A.3.2.1 in this chapter.

23 *See* VCLT, *supra* note 9 at Article 53, which defines *jus cogens* as 'a peremptory norm of general international law ... a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

24 *See* Lillich, 'Civil Rights', p. 118, fn. 17. The Human Rights Committee, General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11, 11 August 2001, p. 186, para. 11 notes that '[t]he proclamation of certain provisions of the Covenant as being of a non-derogable nature ... is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., Articles 6 and 7). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., Arts. 11 and 18).'

25 J. Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (Washington, 1994), p. 67 suggests the minimal standard of non-derogable rights common to the specified conventions covers life, freedom from torture and inhuman and degrading treatment or punishment, slavery and the prohibition of retrospective

mum, extra-judicial killings, disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment and prolonged arbitrary detention.[26] The International Law Commission lists, *inter alia*, the prohibitions of aggression, crimes against humanity, torture, apartheid, the basic rules of humanitarian law in armed conflict and the right to self determination as being generally accepted as norms from which no derogation is permitted,[27] while the Human Rights Committee adds 'collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial.'[28] The Working Group on Arbitrary Detention and several special rapporteurs have added their support to the view that arbitrary deprivation of liberty violates *jus cogens* norms in light of abusive detention practices in recent years.[29]

These international norms are accompanied by what might loosely be termed mechanisms of enforcement. One group of mechanisms are the 'treaty bodies' charged with overseeing the application of their particular constituent treaty. There are a growing number of such courts or bodies, and examples of them (and the Conventions which they interpret and seek to give effect to) include the following: the Human Rights Committee (under the ICCPR), the UN Committee against Torture (under the CAT), the Committee on Economic Social and Cultural Rights (under the ICESCR),[30] the European Court of Human Rights (under the ECHR), the Inter-American Commission and Court (in relation to the ACHR, and the American Declaration of the Rights and Duties of Man) and the African Commission on Human and Peoples' Rights and nascent African Court of Justice and Human Rights (in relation to the ACHPR).[31] The functions of these bodies vary, but commonly they provide a forum (in respect of states that have accepted their jurisdiction) for individual cases to be brought alleging violations of human rights,[32] as well as often having a broader func-

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legislation.

26 Restatement (Third) of the Foreign Relations Law of the United States (1987), section 702.

27 *See* ILC Commentaries to Articles on State Responsibility, Introductory Commentary to Part Two, Ch. III. It also includes genocide, slavery and racial discrimination.

28 General Comment No. 29, *supra* note 24, para. 11.

29 Deliberation No. 9, Report of the Working Group on Arbitrary Detention, 24 Dec. 2012, UN Doc. A/HRC/22/44; Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism ('UN Joint Study'), 19 February 2010, UN Doc. A/HRC/13/42.

30 An Optional Protocol (UN GA Res, A/RES/63/117 (2008), HRC Resolution 8/2) of 18 June 2008 provides the Committee competence to receive and consider communications.

31 Articles 28 ff. ICCPR; Article 19 ECHR; Article 33 ACHR; Article 17 CEDAW and the Optional Protocol; and Article 43 CRC.

32 For example, in the Inter-American system individuals petition the Inter-American Commission on Human Rights, which may take the case before the Court. Article 5(3) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Burkina Faso, 8-10 June 1998), provides for individual petition where the State against which the complaint is lodged has made a declaration accepting the competence of the Court to hear individual claims. Since the introduction

tion in promoting legal standards and monitoring specific situations.[33] Some of them have the power to issue decisions that states are legally obliged to follow: the decisions of the European Court of Human Rights, Inter-American Court of Human Rights or African Court on Justice and Human Rights are binding on the parties to the ECHR or states which have accepted the jurisdiction of the Inter-American or African Courts, respectively. By contrast, the decisions of the Human Rights Committee, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples' Rights have traditionally been considered authoritative but not legally binding, although the approach to this question may be evolving through jurisprudence.[34] However, the critical importance of the determinations of each of the above mechanisms lies in the fact that they provide authoritative interpretations of the treaties in question, which clearly are binding on states parties to them.

Proposals for a treaty establishing an international human rights court have not borne fruit,[35] and a major challenge remains the patchy competence of – and victims' access to – these mechanisms, which are generally dependent on ratification of particular treaties and/or the state accepting the jurisdiction of the mechanism. For example, the ability of victims to challenge violations by the US is limited because it has not accepted the jurisdiction of the IACtHR[36] or the Human Rights Committee, as required for those bodies to receive individual petitions, though the Inter-American Commission on Human Rights (ACommHR) has found it has inherent jurisdiction to consider violations of the Inter-American Declaration of Human Rights. The absence of an Asian or Middle Eastern mechanism limits the effectiveness of human rights enforcement against many Asian and Middle Eastern states in respect of their activities

of Protocol 11, individuals can institute cases directly before the ECtHR.

33 *See*, *e.g.*, the General Comments of the Human Rights Committee, or its observations on country reports, referred to later in this chapter.

34 The Human Rights Committee has indicated that respect for interim measures is obligatory: *see*, *e.g.*, *M. Dante Piandiong*, *M. Jesus Morallos and M. Archie Bulan* v. *Philippines* (Comm. No. 869/1999), decision of 19 October 2000, UN Doc. CCPR/C/70/D/869/1999, paras. 5.1, 5.2 and 5.4; *Denzil Roberts* v. *Barbados* (Comm. No. 504/992), decision of 19 July 1994, UN Doc. CCPR/C/51/D/504/1992, para. 6.3; *Loayza Tamayo* v. *Peru,* Judgment of 17 September 1997, para. 80.

35 *See*, *e.g.*, M. Nowak, J. Kozma, and M. Scheinin, 'A World Court of Human Rights – Consolidated Draft Statute and Commentary', May 2012, available at: http://www.eui.eu/Documents/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf. There appears little international appetite for a world human rights court. On treaty-body reform, *see*, *e.g.*, http://www.ishr.ch/document-stuff/browse-documents/doc_download/1463-report-of-the-second-consultation-with-states-parties.

36 The US has not ratified the ACHR or accepted the jurisdiction of the IACtHR, which is the enforcing body of the ACHR. *See* http://www.oas.org/dil/treaties_B-32_American_Convention_on_ Human_Rights_sign.htm.

in the context of terrorism and counter-terrorism.[37] Just as challenging however are the limitations on – and the lack of political commitment to – the effective functioning of existing treaty bodies and implementation of their decisions.[38]

A second group of 'Charter-based' mechanisms includes the UN Human Rights Council for example, which provides a forum for a four-yearly 'universal periodic review' of conformity of states' laws and practice with human rights obligations, which regularly include issues regarding counter-terrorism practices.[39] The universality of its reach, and potential for peer review of all states' human rights practices, is undoubtedly its strongest feature, particularly in light of the patchy access to the human rights mechanism mentioned above, though as a politicised body its real effectiveness remains subject to question. Under its auspices, Working Groups and Special Rapporteurs dedicated to issues relevant to terrorism and counter-terrorism, such as the Working Group on Arbitrary Detention or Enforced Disappearance, or the Special Rapporteurs on Torture, Extra-judicial executions, and a dedicated Rapporteur on counter-terrorism and human rights, have had critical roles in exposing, monitoring and exploring in some detail human rights issues arising in the counter-terrorism context.[40]

As will be seen in relation to state practice post-9/11, despite their various limitations, these mechanisms can be significant on various levels. They seek to ensure compliance or at least oversight and accountability on the part of the state; where individual communications are possible, they provide a forum for victims of violations to present claims and seek a remedy; they provide normative content and clarity (through authoritative judicial and quasi-judicial interpretations of the law) to the sometimes relatively skeletal framework of human rights treaties.[41]

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37 Some have accepted the jurisdiction of the HR Committee, which has therefore addressed many individual petitions in cases involving terrorism and counter-terrorism in, *e.g.*, Sri Lanka, India and Nepal. North African Middle Eastern states are bound by the African Charter mechanisms. The mandate of a new ASEAN Intergovernmental Commission on Human Rights (AICHR) was approved in 2010 but with limited functions: *see*, *e.g.*, FIDH commentary, available at: http://www.fidh.org/ASEAN-Human-rights-body-weak.

38 *See*, *e.g.*, 'Increasing the Impact of Human Rights Litigation: Implementation of Judgments and Decisions', INTERIGHTS Bulletin, Vol. 16, No. 2, Winter 2010, available at: http://www.interights.org/files/39/Bulletin%2016.2.pdf.

39 The Council was created by the United Nations General Assembly on 15 March 2006, UN GA Res. 60/251 (3 April 2006).

40 There are both UN and/or regional special rapporteurs on a range of additional related issues, including, *e.g.*, the independence of lawyers and judges, freedom of expression, assembly and association and the right to health. *See* http://www.ohchr.org/EN /Issues.

41 By providing detailed analyses of particular situations or interpretations of states' legal obligations, they may both clarify legal obligations (*lex lata*) in the context of counter-terrorism and herald areas ripe for legal development (*lex ferenda*).

While the mechanisms mentioned above are specifically dedicated to human rights, it should be recalled that there are many other international, regional and sub-regional institutions or bodies ranging from those under the auspices of the General Assembly and Security Council of the UN which, increasingly, discharge mandates in relation to both security and human rights. Notably the Counter-Terrorism Committee of the Security Council, which initially shunned any human rights role, now has a 'proactive' human rights role,[42] 'routinely taking account of relevant human rights concerns in all their activities'..[43] The High Commissioner for Human Rights office's broad role includes liaising with other UN bodies active in the field of international terrorism.[44]

Other regional entities established to strengthen international security such as the Organisation for Security and Co-operation in Europe (OSCE),[45] or to improve international cooperation such as Eurojust,[46] which are not specifically human rights bodies, increasingly have a strong human rights dimension to their terrorism related work. Likewise, courts, such as the International Court of Justice (ICJ), the European Court of Justice (ECJ), or the African sub-regional courts, none of which are human rights courts as such, have addressed important ground-breaking cases related to the compatibility of counter-terrorist measures with IHRL.[47]

The detailed tapestry of international provisions and mechanisms are paralleled by the human rights guarantees manifest in the national laws and

42 With the establishment of the Counter-Terrorism Committee Executive Directorate (CTED) by Security Council Resolution 1535 (2004), the Committee 'began moving toward a more pro-active policy on human rights'. *See* http://www.un.org/en/sc/ctc/rights.html.

43 This includes 'the preparation of preliminary implementation assessments (PIAs) relating to resolution 1373 (2001), country visits and other interactions with Member States'. *See* SC Res. 1963 (2010).

44 *See* UN GA Res. 58/187 (2003) and Commission on Human Rights resolution 2003/68 ('Protection of human rights and fundamental freedoms while countering terrorism') on the role of the High Commissioner's office.

45 *See*, *e.g.*, 'Bucharest Plan of Action for Combating Terrorism', 2001, para. 9, Bucharest Ninth Ministerial Council Decision No. 1, and OSCE Consolidated Framework for the Fight against Terrorism (PC.DEC/1063).

46 The role of Eurojust within the European region is to 'reinforce the fight against serious organised crime including terrorism', available at: http://eurojust.europa.eu/about/background/Pages/history.aspx.

47 *See*, *e.g.*, the important 'Kadi' cases before the ECJ on the lawfulness of EU terrorism lists (in 7B8, below, and Chapter 11), which are the clearest examples. The ICJ is also increasingly active on human rights issues. *See*, *e.g.*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2004 (hereinafter '*The Wall*'). *See also* the work of the East African Court of Justice on extraordinary rendition, *e.g.*, *Omar Awadh Omar* v. *The Attorney General Republic of Kenya*, App. No. 4 of 2011, East African Court of Justice at Arusha, First Instance Division, 1 December 2011. On the evolving human rights jurisdictions of African sub-regional bodies, *see* H. Duffy, 'Human rights cases in sub-regional African courts: towards justice for victims or just more fragmentation?' in L. van den Herik and C. Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff Publishers, 2012). *See also* Chapter 11.

constitutions of most, if not all, domestic legal systems. Primary responsibility for the implementation of international human rights law falls to governments and parliaments on the national level, and to national courts to provide remedies and reparation.[48]

IHRL provides a flexible, rule of law framework within which national systems choose how to protect human rights. Subsidiary to national systems, it provides norms and mechanisms that essentially seek to protect the individual where these national legal regimes fail to do so, as is not infrequently the case in the context of terrorism and counter-terrorism.[49]

7A.2 Scope of application of human rights obligations

7A.2.1 Territorial scope of human rights obligations – 'the jurisdiction question'

Generally, a state is not considered responsible for human rights violations arising on another state's territory. This basic rule is subject to certain increasingly important qualifications of particular relevance to an appraisal of the 'war on terror.'[50] Human rights conventions must be interpreted in a manner which render rights 'practical and effective, not theoretical and illusory.'[51] As states' spheres of operation and influence grow in a globalised world, as perhaps epitomised by the 'global' nature of the fight against international terrorism, a rigid, territorially limited approach to human rights obligations becomes increasingly untenable and the double standards it would produce increasingly 'unconscionable.'[52]

The precise language delineating the scope of human rights obligations varies between treaties, with the ECHR and ACHR providing that states must secure the rights of 'everyone within their jurisdiction',[53] while the ICCPR refers to the state party's obligations to 'respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present convention'.[54] The jurisprudence of courts and treaty bodies makes clear, however, that both for the ICCPR, where 'territory' and 'jurisdiction' present

48 *See* Chapter 11 on the role of the Courts.

49 The 'exhaustion of domestic remedies' rule applied by almost all human rights mechanisms follows the subsidiarity of human rights law.

50 On specific issues raised post-September 11, *see* 7B.1 below.

51 *See*, *e.g.*, *Leyla Şahin* v. *Turkey* [GC], no. 44774/98, § 136, ECHR 2005.

52 In an early case, *Lopez Burgos* v. *Uruguay*, *supra* note 74, para. 12, the HRC described it as 'unconscionable' to 'interpret the responsibility under the ... Covenant as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory.'

53 ECHR, *supra* note 6 at Article 1.

54 ICCPR, *supra* note 21 at Article 2.

a disjunctive test,[55] and for regional treaties, which do not mention 'territory' at all,[56] a state has obligations towards persons within its borders and, exceptionally, beyond them.

There are many examples of human rights courts and bodies, international and regional, finding that where states exercise authority and control abroad, they must assume the obligation to respect the human rights of persons affected thereby. Thus, for example, the Human Rights Committee found Uruguay responsible for kidnapping and mistreatment by Uruguayan security forces on Argentinian soil,[57] Israel responsible for violations in occupied territory;[58] and Germany potentially responsibility for German companies committing violations abroad.[59] The European Court of Human Rights found Turkey responsible for violations by its military in Cyprus,[60] Russia for viola-

55 ICCPR, *supra* note 21 at Article 2 refers to the state party's obligations to 'respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present convention'.

56 ECHR, *supra* note 6 at Article 1 refers to 'secur[ing] to everyone within their jurisdiction' the rights protected therein, and Article 1, ACHR, similarly, refers to 'ensur[ing] to all persons subject to their jurisdiction' the ACHR rights. The African Charter makes no reference to jurisdiction or territory, simply emphasising the duty to protect the rights in the Charter.

57 *See Lopez Burgos* v. *Uruguay* (Comm. No. 52/1979), Views of 29 July 1981, UN Doc. CCPR/C/13/D/52/1979 and *Celiberti de Casariego* v. *Uruguay* (Comm. No. 56/1979), Views of 29 July 1981, UN Doc. CCPR/C/13/D/56/1979, in particular the individual opinion of Tomuschat (attached to both decisions); *Montero* v. *Uruguay* (Comm. No. 106/1981), Views of 31 March 1983, UN Doc. CCPR/C/18/D/106/1981, para. 5. *See also* Concluding Observations of the Human Rights Committee: United States of America, at Part B. *See generally* HRC, General Comment No. 31, 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13. *See also* Concluding Observations of the CESCR: Israel, UN Doc. E/C.12/1/Add.90 (2003), para. 15, and Concluding observations of the CESCR: Israel, UN Doc. E/C.12/1/Add.69 (2001), paras. 11-12.

58 Concluding observations of the HRC (HRC): Israel, UN Doc. CCPR/C/79/Add.93 (1998); Concluding observations of the HRC: Israel, CCPR/CO/78/ISR (2003).

59 Concluding observations of the Human Rights Committee; Germany, CCPR/C/DEU/CO/6; 31 October 2012, para. 16 which innovatively provides that the state: '… is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.'

60 *Loizidou* v. *Turkey*, Appl. No. 15318/89, Merits, 18 December 1996, 23 (1996) EHRR 513. *See also Cyprus* v. *Turkey*, Appl. No. 25781/94, Merits, Judgment of 10 May 2001, ECtHR, *Reports 2001-IV*. The ECtHR has considered numerous other cases where extra-territorial application of the Convention has been explicitly endorsed, or not raised as an issue in dispute. Note, however, the apparently more restrictive approach in *Banković and Others* v. *Belgium and 16 Other Contracting States*, Appl. No. 52207/99, Admissibility decision of 19 December 1999, *Reports 2001-XII* (concerning the bombardment of Belgrade by NATO forces).

tions in the Transnistrian region of Moldova,[61] and the UK for violations by troops in Iraq.[62] The Inter-American Commission on Human Rights in turn acknowledged that the human rights obligations of the United States continued to apply during the US invasion of Grenada[63] and, more recently, in respect of the detainees in Guantánamo Bay.[64] Finally, the African Commission had no difficulty finding massive violations by Burundi, Rwanda and Uganda in neighbouring DRC.[65]

Through this practice, several exceptions to the 'essentially territorial scope of human rights obligations' have come to be recognised.[66] The first is where the state exercises effective control of territory abroad,[67] in which case it would appear that the full range of its human rights obligations arise as they would on its own territory.[68] Such effective control of territory can arise directly through military occupation or indirectly, through control of a 'subordinate administration.'[69]

Second, extra-territorial jurisdiction may arise where the state itself acts outside its own territory, through the conduct of its organs or agents abroad. The Human Rights Committee for example has noted 'that a State party must respect and ensure the rights laid down in the Covenant to anyone within the *power or effective control* of that State Party, even if not situated within the territory of the State Party ... This principle also applies to those within the

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61 *Ilascu and Others* v. *Moldova and the Russian Federation*, Appl. No. 48797/99, Judgement of 8 July 2004 [Grand Chamber] (concerning Russian actions in Moldova), and *Catan & Others* v. *Moldova and Russia*, Nos. 4337/04, 8252/05, 8454/06, 19 October 2012.

62 *Case of al-Skeini* v. *The United Kingdom*, ECHR Grand Chamber, Judgment, 7 July 2011.

63 *See Coard et al.* v. *the United States*, IACHR (Case 10.951), Report No. 109/99, 29 September 1999, Annual Report of the IACHR (1999). The Inter-American Commission referred to similar previous cases involving the assassination of a Chilean diplomat in the US and attacks by Surinamese officials in the Netherlands. *See*, *e.g.*, IACHR, Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66, doc. 17, 1985 (referring to Letelier assassination in Washington, D.C.); Second Report on the Situation of Human Rights in Suriname, OEA/Ser.L/V/II.66, doc. 21, rev. 1, 1985.

64 *See* IACHR, *Precautionary Measures in Guantanamo Bay*, Cuba, 13 March 2002.

65 *D.R. Congo* v. *Burundi, Rwanda and Uganda*, ACHPR, Communication 227/99.

66 *See*, *e.g.*, *Ilascu* v. *Russia*, *supra* note 61; *Banković* v. *Belgium*, *supra* note 60; *al-Skeini* v. *UK*, *supra* note 62; *Catan & Others* v. *Moldova and Russia*, *supra* note 78.

67 *See*, *e.g.*, Turkish control of Northern Cyprus, which gave rise to a series of cases before the ECtHR. For example, *Loizidou* v. *Turkey*, *supra* note 60.

68 This includes obligations of restraint and positive obligations to secure the rights under the convention: 'The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.' ECHR Grand Chamber in *al-Skeini* v. *UK*, *supra* note 79, at para. 138. *See also Catan & Others* v. *Moldova and Russia*, *supra* note 78, regarding Russia's responsibility for all violations by the local administration in Transnistria).

69 *Cyprus* v. *Turkey*, *supra* note 60. An example of control through occupation may arise in *DRC* v. *Burundi et al.*, *supra* note 65. For an example of control through the subordinate administrations, *see Catan & Ors*, *supra* note 61.

power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.'[70] This accords with the approach of the ICJ,[71] or the Inter-American Commission, which has referred to obligations arising extra-territorially 'where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad'.[72]

The jurisprudence of the European Court of Human Rights for its part has developed in a more erratic fashion, which has been euphemistically described as not always 'speaking with one voice'.[73] Early decisions of the ECtHR's predecessor, the European Commission of Human Rights, found states' obligations to apply to 'all persons under their actual responsibility, whether that authority is exercised within their own territory or abroad.'[74] In the admissibility decision in *Banković* v. *Belgium,* however, the Court adopted an apparently more restrictive approach, finding that the aerial bombardment by NATO troops of the TV station in Belgrade fell outside the human rights jurisdiction of the states on the basis of their lack of control of the territory on which the alleged violations took place.[75] The Grand Chamber thus controversially appeared to require an 'effective control of territory' nexus in all cases, rejecting as insufficient control over the *individuals* directly affected by the state's acts. In justifying its reasoning, the *Banković* judgment invoked the regional scope of the Convention which was said to apply to the '*espace juridique*' or 'legal space of the contracting parties' of the ECHR, of which the former Yugoslavia was not then part.[76]

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70 HRC, General Comment No. 31, *supra* note 57 (emphasis added); *see also*, *e.g.*, Concluding Observations of the Human Rights Committee: Belgium, UN Doc. CPR/CO/81/BEL, 12 August 2004, para. 6.

71 *'The Wall'*, Advisory Opinion, *supra* note 47, paras. 109 and 111. The ICJ described it as 'natural' that 'while the jurisdiction of states is primarily territorial, it may sometimes be exercised outside the national territory ...' It noted that the ICCPR 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.'

72 *Coard et al.* v. *the United States*, *supra* note 63, para. 37, and IACommHR *Precautionary Measures in Guantanamo Bay*, discussed in part B3.

73 J. Bonello, concurring opinion, *al-Skeini* v. *UK*, *supra* note 62.

74 *Cyprus* v. *Turkey*, *supra* note 60, p. 282 where the Commission indicated that the critical question was whether the state's acts or omissions 'affect' individuals abroad; *see also Drodz and Janousek* v. *France and Spain*, Appl. No. 12747/87, Judgment of 26 June 1992, ECtHR, *Series A*, No. 240; *Hess* v. *United Kingdom*, Appl. No. 6231/73, Commission Decision on Admissibility, 28 May 1975, 2 DR 72 (on UK responsibility for the administration of the Allied Military Prison in Berlin); *Reinette* v. *France*, Appl. No. 14009/88, Commission Decision on Admissibility, 2 October 1989, 63 DR 189 (on French responsibility for detaining persons on St Vincent).

75 The case concerned allegations of human rights violations resulting from the bombardment of the Belgrade television station *Radio Televizije Srbije* by NATO forces on 26 April 1999. *See Banković* v. *Belgium*, *supra* note 60, para. 70, referring to *Loizidou* v. *Turkey*, *supra* note 60.

76 *Banković*, *ibid.* at para. 80.

Considerable debate, confusion and inconsistency of approach followed. Numerous subsequent cases of the Court continued to find extra-territorial acts by state agents to fall within the jurisdiction of the state under the Convention, even outside the European 'sphere', and often without any reference to *Banković*.[77] On the other hand some national courts clearly felt bound by the shadow of the *Banković* Grand Chamber decision.[78]

A subsequent Grand Chamber of the European Court of Human Rights (ECtHR) decision on the extra-territoriality question, the *al-Skeini* v. UK judgment, clarified the Court's position in various respects. The Court determined that the Convention applies extra-territorially where a state controls territory abroad, or where its agents violate rights abroad, noting that '*what is decisive in such cases is the exercise of physical power and control over the person in question*'.[79] The Court re-emphasised the importance of an interpretation of the Convention that avoids 'a "vacuum" of protection,' at odds with the purposive interpretation of the Convention.[80] By making clear that a state's Convention obligations may arise extra-territorially where it exercises effective control of territory *or* of persons, the *al-Skeini* judgment brings ECtHR jurisprudence broadly into line with the long established view of other courts and human rights treaty bodies.[81] However, Grand Chamber decisions do not overturn previous decisions, leaving some lingering uncertainty around the significance,

77 In, *e.g.*, *Andreou* v. *Turkey*, Appl. No. 45653/99, Eur. Ct. H.R. (2008), the violations were a 'direct and immediate cause' of the Turkish troops' actions and the victims within Turkish jurisdiction; in Medvedyev v. *France*, Appl no. 3394/03, 2010, law enforcement operations on the high seas came within the state's jurisdiction; in *Issa and Others* v. *Turkey*, *supra* note 77, Iraqi shepherds killed by Turkish forces during a military operation in Iraq were covered by the ECHR; as were detainees in *Ilascu* v. *Russia*, *supra* note 61; and *Öcalan* v. *Turkey*, Appl. No. 46221/99, ECtHR, Admissibility Decision of 14 December 2000; or school children denied education rights in *Catan* v. *Moldova and Russia*, *supra* note 61.

78 Some cases, such as *Issa and Others* v. *Turkey*, Appl. No. 31821/96, Admissibility decision of 20 May 2000, where Iraqi shepherds killed by Turkish forces during a military operation in Iraq were within Turkish jurisdiction; in Andreou v. Turkey, Appl. No. 45653/99 Eur. Ct. H.R. (2008), a woman killed by Turkish troops at the UN buffer zone was not within territory controlled by Turkey but as she was shot as a 'direct and immediate cause' of the Turksih troops' actions, she was therefore within Turkish jurisdiction. However in, *e.g.*, the forerunner of *al-Skeini* v. *UK*, the English national courts felt bound by the Grand Chamber's decision in *Banković* v. *Belgium*, *supra* note 60.

79 *al-Skeini* v. *UK*, *supra* note 62 at para. 136.

80 *See* part B.2.2 'Extra-territorial Lethal use of force', below; *see also al-Skeini* v. *UK*, *supra* note 62 at para. 142. *See also Cyprus* v. *Turkey*, *supra* note 60 at para 78; *Loizidou* v. *Turkey*, *supra* note 60, § 78; *Banković* v. *Belgium*, *supra* note 60, § 80.

81 This Court has considered the principles of control of terrirory and state agent authority jurisdiction side by side in a number of cases. *Banković* v. *Belgium*, *supra* note 60 at paras. 69-73; *Issa* v. *Turkey*, *supra* note 77.

if any, of the *Banković* legacy for the debate on the lawfulness of states' counter-terrorism operations abroad.[82]

While the jurisprudence of human rights bodies now indicates that individuals may come within the extra-territorial jurisdiction of a state through the control of territory abroad, or the conduct of state officials or agents abroad, this does not prevent the issue from remaining controversial. Notable dissenters are the United States and Israel which reject the extra-territorial scope of the ICCPR altogether, as discussed further in relation to post-9/11 practice in Part B.[83] Particular controversies regarding the use of force abroad are addressed in Part B below.

Two other qualifications regarding the extra-territorial scope or effect of states' human rights obligations are worthy of brief note. First, where a State acts towards an individual on its territory in a manner that leads to a violation of that individual's rights, the State is responsible, even if the violations ultimately arise outside its territory. The rule of 'non-refoulement' discussed in detail later,[84] prohibits transfer of persons, through expulsion, deportation or extradition, to another state where there is a substantial risk of their rights being violated.[85] In some ways, however, this is not the extra-territorial application of human rights at all as the state's wrong arises while the individual is within its territory.

Second, a state's 'primary' obligations under IHRL to guarantee the rights of those within its jurisdiction sit alongside its 'secondary' obligations not to contribute to wrongs by other states. These obligations do not depend on the existence of any territorial or jurisdictional link. Thus, for example, a state may be responsible for aiding and assisting violations by other states irrespective of whether the state's contribution and/or the ultimate violation arose on the state's territory or were otherwise within its jurisdiction.[86] Moreover, certain egregious human rights violations, which occur entirely at the hand of other states, on other territories, may nonetheless engage the collective interest of all states. States may indeed have a duty to cooperate to end serious breaches

82 *See*, *e.g.*, 'Pilotless drones and the extraterritorial application of international human rights treaties', Bryan S. Hance, comparing drone killings to the geographically limited aerial bombardments that arose in *Banković*. Available at: http://www.aabri.com/OC2013 Manuscripts/OC13066.pdf. There is little in the *Banković* judgment to support the aerial bombardment as the relevant distinguishing criteria however.

83 The positions of the US and Israel are reflected in their submissions to human rights bodies; s*ee*, *e.g.*, Second to the Fourth Periodic Report of the United States of America and Israel to the UNHRC on the ICCPR addressing counter-terrorism abroad, in Part B.2.

84 Chapter 7A.5.10.

85 *See*, *e.g.*, cases referred to in 7A.4.3.8 of this chapter.

86 *See* Chapter 3.

of *jus cogens* norms, even where no other link exists between the state and the violation in question.[87]

7A.2.2 Personal scope of human rights obligations: irrelevance of nationality or wrongdoing to applicable law

Human rights obligations apply, in principle, to nationals and aliens alike.[88] Provided the person comes within the 'jurisdiction' of the state, it is irrelevant to the application of the human rights framework whether that person is a national of the state. As noted by the Inter-American Commission, '[t]he determination of a state's responsibility for violations of the international human rights of a particular individual turns not on the individual's nationality'.[89] Human rights law thus protects nationals and non-nationals alike, although in limited circumstances certain rights – notably relating to political life – are enjoyed only by a state's own citizens.[90] Conversely, persons are not generally considered subject to a state's jurisdiction, for the purposes of invoking the application of human rights treaties, on the sole basis of nationality.[91]

States in practice offer protection to their own nationals against violations by other states, and stateless individuals are particularly vulnerable without such protection, as will be seen from examples of victims of extraordinary rendition or of arbitrary detention at Guantánamo Bay, discussed in subsequent chapters.[92] However, human rights obligations apply to all persons on the

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87 *See* B.3.4.2, below in this chapter, and Chapter 3.1.3. Note that whether a state has 'responsibility' is not however the same question as whether the 'jurisdictional' threshold of treaties is met, or whether human rights courts and bodies acting under them would have competence over claims in respect of such broader responsibility.

88 '[T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, … in the territory or subject to the jurisdiction of the State Party.' HRC, General Comment No. 31, *supra* note 57 at para. 10.

89 It turns instead on whether 'that person fell within the state's authority and control'. Inter-American Commission on Human Rights, *Precautionary Measures in Guantanamo Bay*, *supra* note 64.

90 General Comment No. 15: The position of aliens under the Covenant [1986], in UN Doc. HRI/GEN/1/Rev.6 (2003), at 140.

91 *See*, *e.g.*, *R (Abbasi and another)* v. *Secretary of State for Foreign and Commonwealth Affairs*, (2002) EWCA Civ. 159, para. 49 where the argument that a plaintiff was within the jurisdiction of the United Kingdom for ECHR purposes on grounds of his nationality was found to 'come nowhere near rendering Mr. Abbasi within the jurisdiction of the United Kingdom for the purposes of Article 1 on the simple ground that every state enjoys a degree of authority over its own nationals'.

92 *See* Chapters 8 and 10 on the practical relevance of nationality to the protection of the rights as the cases that first came to prominence, and to be released from Guatánamo, were nationals of Western states while those that languish there are from less influential states or in some cases stateless persons.

state's territory or subject to its jurisdiction as discussed above. Distinctions in the application of human rights law based on a person's nationality, which often come to the fore in counter-terrorism measures,[93] far from justifying differential treatment, may bring the state into conflict with one of the human rights obligations – the duty not to discriminate on grounds such as race, sex, religion, sexual orientation or *national origin*.[94]

As stated in the introduction to this chapter, the essence of human rights law is that it is applicable to all persons by virtue of their humanity. Clearly the way in which the framework applies, and how individuals can be treated, may shift in accord with their behaviour, most obviously through the imposition of criminal law. As discussed in the following section, certain restrictions on rights may also be justified in the interests of public safety, protection of others or national security for example, and the behaviour of the individual may be relevant to this assessment. But as human rights courts and bodies have consistently affirmed, the human rights framework remains applicable to all persons irrespective of their alleged conduct. No one is beyond the protection of international human rights law.[95]

7A.3 THE FLEXIBLE FRAMEWORK OF HUMAN RIGHTS LAW IN CRISIS OR EMERGENCY: ACCOMMODATING SECURITY IMPERATIVES

No circumstances, however extreme, render the framework of human rights law redundant: on the contrary, human rights protections are most important in times of national and international strain. The framework of human rights law thus applies at all times, including in time of emergency or indeed armed conflict (at which point this body of law intersects with the body of IHL).

However, while the law is omnipresent, it is also responsive to exceptional situations, including terrorist threats and the existence of armed conflict. It accommodates exceptional circumstances in several ways discussed below.[96] First, certain specified rights may be restricted where necessary, for example to protect public order or the fundamental rights of others, subject to certain limits. Second, in times of 'public emergency' certain rights may be suspended (or 'derogated' from), such that a more restrictive body of 'core' human rights

93 Nationality distinctions have been a feature of state justifications in relation to the practices of targeted killings, broad surveillance and detentions policy at Part B below.

94 Article 26 ICCPR; Article 14 ECHR; Article 18 ACHPR and Article 24 ACHP. *A &Others (Derogation) case* ('The Belmarsh case'), Judgement of House of Lords, December 2004, para 132. *A & Ors.* v. *UK.*, Appl. No. 3455/05, ECHR (Grand Chamber) 2009; The United Nations Committee on the Elimination of All Forms of Racial Discrimination, Concluding Observations on the United Kingdom, 10 December 2003, paragraph 17.

95 *See, inter alia, Ahmed* v. *Austria* (1996); and CAT *Tapia Paez* v. *Sweden* (1997, § 14.5); *M. B. B.* v. *Sweden*, § 6.4.

96 *See generally* HRC, General Comment No. 29, *supra* note 29.

law applies, though this is again subject to conditions and limitations. Third, the interplay between IHRL and IHL – such that in armed conflict many of the provisions of one branch of law must be interpreted in light of the other – means that human rights law can respond to the special exigencies of armed conflict, which IHL is often specifically designed to address. Finally, there is an inherent flexibility in the law, by virtue of which the question whether rights have been violated will generally depend on the totality of the circumstances of the particular situation or case.[97]

7A.3.1 Flexibility I: Lawful limitations and 'claw back' clauses

Some treaty provisions expressly recognise that certain rights are not absolute and may be restricted in certain circumstances, for example where necessary to protect national security, public safety or order, health or morals, or the fundamental rights and freedoms of others. This is one of the ways in which the human rights framework accommodates security concerns falling short of a situation of 'emergency,' by reflecting the inherent balance between the protection of an individual's rights and the rights and interests of others.[98] However, these restrictions – or 'claw back' clauses[99] – attach only to a limited number of rights.[100] Under the ICCPR for example these clauses relate to freedom of movement (Article 12), freedom of conscience and religion (Article 18) and freedom of expression (Article 19). They do not therefore permit restrictions on rights relating to liberty and security (Article 9) or the right to a fair trial (Article 14).[101]

Lawful restrictions on these rights under claw back clauses must satisfy certain conditions. They must (a) be subject to the principle of legality, that is be provided for in clear and accessible law; (b) serve one of the legitimate aims set out in the particular convention (for example national security, public order); (c) be no more than strictly necessary to meet that aim and the

97 *See*, *e.g.*, the jurisprudence on the interpretation of the rights to liberty and fair trial, including the role of other safeguards in determining overall fairness at Chapter 8, or the positive obligations to take feasible and appropriate measures at A4 below.

98 Certain (but not all) aspects of the rights affected by claw back clauses may also be limited through derogation in the event of emergency and the 'inherent limits' approach, discussed below.

99 R. Higgins, 'Derogations under Human Rights Treaties', 48 (1976-77), BYIL 281.

100 These restrictions do not affect, *e.g.*, the rights to life, humane treatment, liberty or the majority of judicial guarantees. With the exception of religious freedom (*see* ICCPR, *supra* note 21 at Article 18), they tend not to apply to non-derogable rights, discussed below.

101 As regards fair trial rights under Article 14, the claw back clause applies only as an exception to the general rule that the press and public should be allowed access to criminal trials. *See* further 7A.5.

measures must be proportionate to it. As exceptions, these clauses must be strictly construed.[102]

7A.3.2 Flexibility II: Temporary suspension through derogation

Generally, international and regional human rights treaties, notably the ICCPR, ECHR and ACHR,[103] allow states in certain situations, and subject to specific safeguards, to renounce parts of their obligations in respect of certain rights.[104] The six conditions that must be satisfied for states parties to human rights treaties to lawfully derogate from their human rights obligations are set out below.[105]

i) Public emergency threatening the life of the nation

Not every national disturbance or catastrophe justifies derogation. Both the ICCPR and ECHR require the existence of a 'public emergency threatening the life of a nation,' while the ACHR refers to an 'emergency that threatens the independence or security of a State Party'.[106] The emergency has been described as serious enough to threaten 'the organised life of the community of which the state is composed,'[107] though it is clear that it need not affect the whole population,[108] nor must it 'imperil the institutions of the state'

102 Commentators warn of the dangers entailed in a broad interpretation of these clauses. *See* Lillich, 'Civil Rights', *supra* note 24, p. 119.

103 ICCPR at Article 4, Article 27 ACHR and ECHR at Article 15.

104 The African Charter does not contain a derogation clause. *In Media Rights Agenda and Constitutional Rights Project* case (Comm. Nos. 105/93, 128/94, 130/94, 152/96), 12th Annual Activity Report 1998-99, paras. 67-70, the African Commission concludes: 'limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27(2), that is that the rights of the Charter "shall be exercised with due regard to the rights of others, collective security, morality and common interest."'

105 The derogation clauses govern the conditions and procedure for derogation and the 'core' of human rights that is non-derogable – ICCPR at Article 4, ECHR at Article 15 and Article 27(1) ACHR. *See*, *e.g.*, General Comment No. 29; 'Study on the Principles Governing the Application of the European Convention on Human Rights during Armed Conflict and Internal Disturbances and Tensions', prepared by Jeremy McBride, consultant to the Steering Committee for the Development of Human Rights of the Council of Europe, Doc. DH-DEV(2003)001, 19 September 2003.

106 *Ibid*.; ICCPR, at Article 4, ECHR, at Article 15 and ACHR Article 27(1).

107 *See Lawless* v. *Ireland*, Appl. No. 332/57, Judgment of 1 July 1961, ECtHR, *Series A*, No. 3, para. 28.

108 *See Ireland* v. *United Kingdom*, Appl. No. 5310/71, 18 January 1978, ECtHR, *Series A*, No. 25, para. 207.

as such.[109] A situation of 'armed conflict' on the territory of a state would most likely amount to such an emergency,[110] as may other intense security situations arising from internal disturbances short of armed conflict under IHL.[111]

The need to derogate must however be based on an accurate examination of the actual situation in the country, not mere predictions of future attack.[112] The threat that justifies derogation must of course relate to the state seeking to derogate, as opposed to any other state.[113]

Particular measures of derogation must be 'strictly required by the exigencies of the situation'[114] – a standard which is intentionally high, given the important implications of suspending certain human rights protections. It follows that the measures of derogation should be no more, and for no longer, than strictly necessary. The importance of this is highlighted by the fact that, in practice, states have not infrequently invoked 'quasi-permanent' states of emergency under national law to justify otherwise impermissible restrictions on human rights.[115] As with any exception, derogation must be strictly construed and the legal measures that allow for derogation must therefore be precise.[116]

ii) Procedural requirements for derogation and supervision

Derogation clauses contain procedural safeguards. Commonly, they require a state availing itself of derogation to proclaim the emergency in the state, inform other states party to the particular instrument of the provisions which

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109 *A & Others* v. *UK*, Appl. No. 3455/0, 19 February 2009, ECtHR, [2009] ECHR 301, para.179 (noting that a broad range of factors that might contribute to determining the nature and degree of the actual or imminent threat to the 'nation').

110 Only the regional instruments expressly refer to 'war' as a ground for derogation perhaps as 'express reference to war was struck out in 1952 in order to prevent giving the impression that the United Nations accepted war'. M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rheim, 1993), p. 79.

111 *See* Chapter 6; Nowak states that 'in addition to armed conflict and internal unrest, serious natural or environmental catastrophes may also lead to an emergency'. *Ibid.*

112 *See* Human Rights Committee, *Landinelli Silva et al.* v. *Uruguay* (Comm. No. 34/1978), 8 April 1981, UN Doc. CCPR/C/12/D/34/1978; *see also*, the decision of the European Commission of Human Rights in the *Greek case*, 12 (1969) *Yearbook of the European Convention on Human Rights* 170.

113 In cases involving derogation due to 'terrorist threats', the threat must have arisen in the state itself. *See, e.g.*, *Aksoy* v. *Turkey*, Appl. No. 21987/93, Judgment, 18 December 1996, ECtHR, *Reports 1996-VI*, para. 68; *see also* 7B.3 below on derogation in practice post-9/11.

114 *See*, *e.g.*, ICCPR at Article 4.

115 *See*, *e.g.*, Concluding observations of the HRC: Syrian Arab Republic, UN Doc. CCPR/CO/71/SYR (2001), para. 6, where the Committee expresses concern about the 'quasi permanent emergency' declared in Syria since 1963. *See also* observations of the Human Rights Committee: Egypt, UN Doc. CCPR/CO/76/EGY (2002), para. 6.

116 On 'the lack of clarity of the legal provisions governing …emergency,' *see* Comment of the Human Rights Committee: Nepal (10/11/1994), UN Doc. CCPR/C/79/Add.42, para. 9.

it intends to suspend and provide notification to the relevant overseeing treaty body.[117] The notification must clearly detail the rights from which the state is seeking to derogate (as it cannot be a blanket derogation), the reasons and the nature of the measures taken.[118] The decision whether such an emergency has arisen is not a unilateral decision of a state, but ultimately rests with the treaty bodies that supervise the implementation of the treaty in question.[119]

In addition to international procedural requirements, intended to ensure appropriate international oversight, the Human Rights Committee has noted the need for domestic judicial oversight of derogation. It has noted that 'constitutional and legal provisions should ensure that compliance with Article 4 of the Covenant can be monitored by the Courts'.[120]

iii) Inalienable 'non-derogable' rights applicable in all situations

The universal and inalienable nature of certain human rights is well established, as reflected in the derogation clauses themselves. As such, there is a core of rights that must be protected at all times. As this includes situations of armed conflict, the core of IHRL complements the often more specific applicable rules of IHL, which together provide the standard for treatment of persons in conflict.[121]

The list of 'non-derogable' rights varies between treaties. However, common to all these provisions are the rights not to be arbitrarily deprived of life, freedom from torture or inhuman or degrading treatment or punishment, freedom from slavery, rights relating to legality and non-retroactivity in criminal matters.[122] In any event, reference to these lists is somewhat mis-

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117 A second notification must be completed as soon as the state of emergency has ended and the measures are no longer necessary. The common failure to observe these duties under Article 4(3) has been 'deplored'by the HRC: Concluding observations of the Human Rights Committee: Lebanon, CCPR/C/79/Add.78 (1997), para. 10.

118 N. Questiaux, UN Special Rapporteur on states of emergency, 'Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency', UN Doc. E/CN.4/Sub.2/1982/15.

119 'Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, *inter alia*, the states have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation.' *See*, *e.g.*, *Aksoy* v. *Turkey*, *supra* note 113, para. 68.

120 Concluding observations of the Human Rights Committee: Colombia, UN Doc. CCPR/C/79/Add 76 (1997), para. 38.

121 *See* 73A4 and 7B.3 below.

122 The ICCPR, as a binding widely ratified international convention deserves specific attention. Among the rights that Article 4 of the ICCPR explicitly provides as non-derogable are the right to life (Article 6), the prohibition on torture or cruel treatment (Article 7), slavery (Article 8(1) and (2)), imprisonment due to contractual obligations (Article 11), legality in the field of criminal law, including the requirement of 'clear and precise provisions' and prohibition on retroactive penalties (Article 15), recognition before the law (Article 16) and

leading, as international courts and bodies interpreting human rights treaties have consistently noted that, in addition, certain aspects of other rights (which are not non-derogable *per se*), are also applicable in all situations. Notably, the right to *habeas corpus*, core fair trial guarantees or access to a remedy[123] constitute core procedural guarantees which have been deemed to be non-derogable, and to provide safeguards essential for the protection of other non-derogable rights, such as freedom from torture and inhuman treatment.[124] In addition, discrimination in respect of these rights is also generally considered non-derogable.[125]

iv) Consistency with other obligations

Any derogation from human rights treaties must not affect other international obligations, whether treaty or customary. Derogation from one human rights treaty does not signify derogation from another.[126] As such, although a European state may derogate from the ECHR for example, it remains bound by the ICCPR (with its longer list of non-derogable rights), unless it similarly derogates from that treaty.[127]

Likewise, derogation from treaty responsibilities does not affect customary law obligations (discussed below). In practice, customary law is not likely to be broader in scope than the non-derogable core of treaty rights, so an issue is unlikely to arise. Critically, derogation from human rights treaties cannot justify violations of the obligations enshrined in IHL, which do not permit of any derogation.[128] As such, the provisions of IHL relating to fair trial rights,

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freedom of thought, conscience and religion (Article 18). The ACHR (Article 27) has a longer list than the ICCPR, while Article 15 of the ECHR lists specifically as non-derogable norms only Article 2 (right to life), 3 (prohibition of torture and inhuman/degrading treatment), 4(1) (prohibition of slavery) and 7 (non-retroactivity in criminal law), but note below on key aspects of liberty and fair trial and the right to a remedy.

123 The right to a remedy (Article 2(3)) has been described by the Human Rights Committee as a right that remains effective in time of emergency. *See* HRC, General Comment No. 29 on States of Emergency, *supra* note 24, para. 14; *see also* General Comment No. 32, on the Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007).

124 These and other specific rights are discussed below. *See* 8B.4.3, in this chapter, and 8B.4, in Chapter 8 relation to the detainees held at Guantánamo Bay.

125 Although non-discrimination is not listed among the non-derogable rights, aspects of the right cannot be derogated from in any circumstances. HRC, General Comment No. 29, *supra* note 24 and HRC General Comment 32.

126 Thus, *e.g.*, the UK as party to both the ECHR and the ICCPR but which derogated first derogated from the ECHR, remained bound at that time by the ICCPR. [For UK derogations, *see* the Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644), available at: www.hmso.gov.uk/si/si2001/20013644.htm]

127 The list of non-derogable rights in the ICCPR covers, for example, religious freedom and discrimination.

128 *See* HRC, General Comment No. 29, *supra* note 24, para. 3.

or the rights of detainees, will remain applicable, irrespective of derogation from certain fair trial or liberty provisions of human rights treaties.[129]

v) Measures strictly necessary and proportionate

Where circumstances do justify derogation in principle, and where the rights in question are not non-derogable, the question is whether each measure taken pursuant to the emergency situation is 'strictly required by the exigencies of the situation.'[130] Measures taken pursuant to derogation must be both strictly necessary and proportionate to the emergency in question.[131] As the Inter-American Commission has noted, this requirement covers 'the prohibition on the unnecessary suspension of certain rights, imposing restrictions more severe than necessary, and unnecessarily extending the suspension to areas not affected by the emergency'.[132]

All prevalent circumstances are relevant to an assessment of necessity and proportionality, but the nature of the right in question is a critical factor; the European Court has noted for example that while liberty is a derogable right, the fact that it is a 'fundamental human right [involving] the protection of the individual against arbitrary interference by the State' is relevant to assessing the lawfulness of measures taken.[133] Where, for example, liberty is restricted in a way not normally permitted, the question whether other safeguards are in place, including *habeas corpus* and legal representation, will also be relevant to an assessment of the lawfulness of measures taken.[134]

vi) Non-discrimination in application of derogation

Moreover, any derogation must not be applied discriminatorily.[135] As reflected in the wording of the ICCPR derogation clause, measures that would otherwise be justifiable will be impermissible where they are applied solely on the ground of race, colour, sex, language, religion or social origin.

Finally, this section has focused on human rights treaty law obligations, given the widespread nature of ratification of human rights treaties. Customary international law[136] also provides for exceptional rules to accommodate

129 *See* Chapter 8 and section B below.

130 ICCPR, *supra* note 27 at Article 4 and ECHR, *supra* note 7 at Article 15. *See*, *e.g.*, A & Ors, 2009, *supra* note 109; *Aksoy*, *supra* note 113.

131 *See* HRC, General Comment No. 29, *supra* note 30, para. 4.

132 *The Civilian Jurisdiction: The Anti-Terrorist Legislation*, OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, para. 70 ff.

133 *Aksoy* v. *Turkey*, *supra* note 113 at para. 76.

134 *Ibid*. at para. 81; *Brannigan and McBride* v. *the United Kingdom*, Appl. Nos. 1453/89 and 1454/89, Judgment, 26 May 1993, ECtHR, *Series A*, No. 258-B, paras. 49-50.

135 *See*, *e.g.*, ICCPR, at Article 4. *See also* HRC, General Comment No. 29, *supra* note 24, para. 8; *Civilian Jurisdiction*, *supra* note 132 at para. 70. Note also that the anti-discrimination provisions of CEDAW and CERD are non-derogable.

136 Customary international law is not usually critical, given the scope and ratification of treaty obligations in this field; *see* 7A.1, this chapter.

emergency situations, with doctrines of 'state of necessity' and '*force majeure*' providing that, in very exceptional circumstances, a state's failure to comply with its obligations is not unlawful.[137] A 'state of necessity' may arise where an act is 'the only means of safeguarding an essential interest of the State against a grave and imminent peril',[138] and '*force majeure*' is 'the occurrence of an irresistible force or of an unforeseen external event beyond the control of the State, making it materially impossible in the circumstances to perform the obligation'.[139] However, the relevance of these doctrines in the human rights context is limited, not least as certain key rights have *jus cogens* status and must be respected at all times, without exception.[140]

7A.3.3 Flexibility III: Adjusting to Armed Conflict – the relationship between IHL and IHRL

International humanitarian law (IHL) and international human rights law intertwine and together form the body of law governing situations of armed conflict.[141] The interrelationship between these strands of international law marks one of the ways in which the legal framework adjusts to the peculiarities of the situation at hand, ensuring its universal relevance and effectiveness.

IHL comes into operation in times of armed conflict and applies beyond the termination of hostilities to a general close of military operations. It is designed specifically to regulate the conduct of armed conflict, and the particular issues that arise therefrom. By contrast, international human rights law applies at all times. It is not directed specifically at the peculiarities of war, but it enshrines minimum standards relevant to all situations, including armed conflict. The genesis of modern international human rights law can be traced to the egregious human rights violations of the Second World War and it is

137 Note that these 'circumstances precluding wrongfulness' apply also with respect to obligations deriving from treaty law, but may not be invoked in respect of *jus cogens* norms. *See* ILC's Articles on State Responsibility, Article 25(2)(b).

138 *See* ILC's Articles on State Responsibility, Article 25. Necessity may not be invoked as a circumstance precluding wrongfulness where the act of the state 'seriously impair[s] an essential interest of the State or States towards which the obligations exists, or of the international community as a whole'. Article 25(1)(b).

139 ILC's Articles on State Responsibility, Article 23. These customary rules do not, however, affect the treaty obligations discussed above.

140 On the definition of *jus cogens*, *see* Chapter 1, para. 1.2; *see also* differences between commentators and bodies on which rights have attained such status. *See also*, Lillich, 'Civil Rights', *supra* note 24 at pp. 117; Fitzpatrick, *Human Rights in Crisis*, *supra* note 25 at p. 67; and HRC, General Comment No. 29, *supra* note 24 at para. 11.

141 On post-9/11 'armed conflicts', *see* Chapter 6B.

therefore unsurprising that international legal authority makes clear that the two strands of law apply concurrently during armed conflict.[142]

In many respects, IHRL and IHL drive in the same direction. There is substantial overlap between them,[143] most obvious in respect of torture or inhumane treatment or fair trial, where provisions are very similar. Basic principles of humanity and legality or non-arbitrariness may be seen to underpin either framework.[144]

Caution is however due in overstating the convergence of these areas of law. Fundamentally, whereas human rights are guaranteed to all persons, without distinction, much of IHL depends upon the status of the individual. Thus for example, rules of targeting are based on the cornerstone principle of distinction, that protects civilians from the lethal use of force but not combatants, while certain detailed rights correspond to certain categories of person, such as prisoners of war or civilians. In areas such as the right to life during hostilities or the lawful grounds for detention in conflict, major substantive differences remain as to starting points, processes and at least in some cases outcomes.[145] In certain circumstances, what amounts to prolonged arbitrary detention may be seen as lawful detention of prisoners of war for the duration

142 This is now supported by the overwhelming weight of international legal opinion and practice – *e.g.*, international courts, UN treaty bodies and special procedures, the International Committee of the Red Cross (ICRC), most states, regional political bodies and the United Nations Security Council and General Assembly. *See*, *e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ Rep. 226 (Adv. Op.), para. 25 [hereinafter 'Nuclear Weapons']; *The Wall*, *supra* note 47 at paras. 105-6; *Armed Activities on the Territory of the Congo (Democratic Rep. of Congo* v. *Uganda)*, 2005 ICJ Rep. (2005), para. 216; *Bámaca-Velásquez* v. *Guatemala*, Case No. 11/129 (Merits), IACtHR, (Ser. C) No. 70 (2000), para. 207. For more authorities and discussion of interplay in more detail, *see* H. Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight Against Terrorism', in L. van den Herik and N. Schrijver (eds.), *Counterterrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge: Cambridge University Press, 2013).

143 *'The Wall'*, *supra* note 47, para. 106 and fn. 123; *see also* J. Pejic and C. Droege, in L. van den Herik and N. Schrijver (eds.), *Counterterrorism Strategies*, *supra* 142. In these areas the development of IHL standards has drawn directly on human rights law, while even in respect of classically different issues such as the application of the right to life in conflict situations, human rights standards may have some bearing, as discussed in 7B3 below; *see also*, *e.g.*, L. Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers?', 88(64) (2006) *International Review of the Red Cross*, pp. 881-904, 897.

144 Pejic and Droege, 'The Legal Regime', *supra* note 142. *See also* part B.2.3 '"Wanted Dead or Alive": Kill vs Capturing', below. Even in traditionally different areas there may be more overlap and approximation of one area to another than is often acknowledged.

145 *See* 'Interplay' discussion of specific issues below, part B.3. The application of the two areas in some scenarios may not lead to different results, while in others (notably genuine 'battlefield' scenarios) they will.

of hostilities[146] or internment of civilians for 'imperative reasons of security',[147] while extra-judicial execution may be seen as lawful acts of targeting if considered through the prism of IHL rather than IHRL.

The co-application of IHL and IHRL raises sometimes complex issues regarding the interplay of norms,[148] the implications of which are explored in Part B. As a starting point, all applicable law should be identified and read together, so far as possible 'harmoniously'.[149] Norms that appear on their face to diverge may, with some 'adjustment' (but without distortion), be capable of being interpreted consistently, thus minimising normative conflict.[150] It is only in the event of irreconcilable conflict that the question of *lex specialis* arises,[151] whereby the more specific provision or the provisions more directly focused on the particular situation will prevail. Notably, whether there is such a conflict has to be determined norm-by-norm in the context of particular situations, rather than on a legal regime-wide basis.[152] The question is not then whether IHL clashes with IHRL as a body of law, but whether particular applicable norms, *e.g.*, the rules governing lawful targeting or detention, create irreconcilable conflict in the particular situation.

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146 Combatants and fighters may be detained until the end of the conflict – members of the armed forces, such as Taleban fighters in Afghanistan – would thus appear detainable and entitled to POW status. Article 21, GC III.

147 GC IV Article 78(1); 'absolutely necessary' under GC IV Article 42(1).

148 ILC, Report of the Study Group on the Fragmentation of International Law, finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682 (2006), paras. 88-89 (hereinafter, 'ILC Report 2006'), para. 152, stating that '[n]o general, context-independent answers can be given to questions.' Among the commentary *see* Duffy, 'Harmony or Conflict?', *supra* note 141; F. Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body', 90 (871) (2008) *International Review of the Red Cross*, p. 549-72, pp. 560-61; Sassóli and Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts', 90 (2008) *International Review of the Red Cross*, 599-627, p. 615; Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' (2005) 74 *Nordic J. Int'l. L.* 27.'

149 On harmonious interpretation, *see* Duffy, 'Harmony or Conflict?', *supra* note 141.

150 As the ILC has noted: 'Of course in such case, it is still possible to reach the conclusion that although the two norms seemed to point in diverging directions, after some adjustment, it is still possible to apply or understand them in such way that no overlap or conflict will remain. … [This] it may [] take place through an attempt to reach a resolution that integrates the conflicting obligations in some optimal way in the general context of international law.' ILC Report 2006, *supra* note 148, para. 43.

151 ILC Report 2006, *supra* note 148; *see also* Article 55 of the ILC's Articles on State Responsibility. The ILC Commentary explains: '(4) For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Some suggest that *lex specialis* can be understood either as applying where two rules operate but one provides more specific content than the other, while it is more commonly thought that it is applies only where two applicable norms conflict as set out above.'

152 See practice discussed at 7B.3.

In relation to targeting in the context of hostilities, for example, human rights law may refer to more specific provisions (the *lex specialis*) of humanitarian law.[153] In such circumstances it is not that human rights law ceases to apply, but that it must adjust to, and be interpreted in light of, the detailed rules of IHL. As such, the protection from 'arbitrary' deprivation of life and 'arbitrary' detention are non-derogable human rights that continue to apply in armed conflict; but targeting or detention is *not* arbitrary, and the rights are not violated, if permitted under the legal framework of IHL.[154]

Similarly, just as human rights law in armed conflict is informed by the standards of IHL,[155] many provisions of IHL are in turn interpreted in the light of the fuller jurisprudence available from human rights law.[156] Where IHL does provide a specific norm, there may yet be a continuing role for IHRL in informing the interpretation of applicable law, thereby minimising deviations from generally applicable rules.[157] Each strand therefore provides a tool in the interpretation of the other.

One important difference between the two areas is that while IHL principally binds parties to armed conflict (whether state or, for non-international armed conflicts, non-state), international human rights law essentially imposes obligations on states and confers rights on individuals. However, as discussed at Chapter 4, serious violations of human rights and IHL may amount to crimes under international law for which individuals may be held to account.

Another significant difference in practice is that while specific mechanisms exist under human rights treaties, enabling individuals or states parties to bring petitions alleging violations by states, no such judicial mechanisms exist under IHL treaties.[158] For states, there remains the option of bringing an inter-state

153 Derogation clauses in human rights treaties may explicitly reflect this (*e.g.*, Art 15(2) ECHR notes that the right to life is not violated where the deprivation is 'a lawful act of war') but where this is not specified (*e.g.*, Article 4 of the ICCPR does not so provide) it may be implied.

154 *See e.g.*, *Nuclear Weapons*, *supra* note 142 at para 25. The deliberate killing of a civilian, by contrast, is likely to violate both IHL and HRL.

155 *See*, *e.g.*, HRC General Comment No. 29, *supra* note 24, paras. 9 and 11; *The Wall*, *supra* note 47; *Nuclear Weapons*, *supra* note 142; *Bámaca-Velásquez* v. *Guatemala*, *supra* note 142; *Precautionary Measures in Guantanamo Bay*, IACommHR, *supra* note 64; *Özkan v. Turkey*, Appl. No. 21689/93, Eur. Ct. H.R, 6 Apr. 2004) para. 297 (*citing Ergi* v. *Turkey*), or *see*, *e.g.*, *Isayeva and Others* v. *Russia*, No. 1 and *Isayeva* v. *Russia*, no. 57950/00, 24 February 2005, para. 191. For more detail on human rights bodies' approaches to IHL, see Duffy, 'Harmony or Conflict?', *supra* note 141.

156 The due process guarantees in Common Article 3 are an example of IHL provisions interpreted in the light of human rights provisions and jurisprudence.

157 Duffy, 'Harmony or Conflict?', *supra* note 141. This corresponds with the rule of IHRL on measures that derogate in emergency, which must be no more than necessary.

158 While human rights are often enforceable by victims through national and international fora, IHL lacks comparable complaint mechanisms. Those mechanisms or procedures anticipated in IHL treaties, such as the (effectively redundant) role of the 'protecting power,' and that of the ICRC, are non-judicial in nature.

action to the International Court of Justice, but this is rarely invoked. The co-applicability of IHRL and IHL, and the role of human rights courts and bodies in adjudicating violations of IHRL in armed conflict (where appropriate by reference to IHL), is therefore essential to the provision of a remedy for violations that would otherwise not exist.[159]

7A.4 Terrorism, Positive Obligations, and Responsibility

7A.4.1 'Terrorism' as a Human Rights Violation?

Non-state armed groups are generally not considered to have obligations under international human rights law. The question therefore arises whether terrorism should properly be referred to as a human rights violation at all.

On the one hand, the classification of acts of individuals or armed groups as human rights violations as such sits uncomfortably with the international legal framework governing responsibility, discussed in more detail in Chapter 3, which essentially binds states (usually through their ratification of treaties) and confers rights on individuals. The mechanisms of human rights are also essentially geared towards state enforcement with these obligations.[160] On the other, from a victim perspective, the harm is of course the same irrespective of the state or non-state source. The direct and indirect *effect* of terrorism on human rights, including on the most basic right to life, is indisputable, as is the capacity and power of certain armed groups or networks which may indeed in some scenarios be on a par with that of certain states. This *de facto* 'diversification of the sources of violations of human rights' has been described as 'a new disturbing phenomenon for the (international) protection of human rights' giving rise to challenges for the human rights framework.[161]

The traditional response would be that, while only states may be bound by IHRL, there are different spheres of operation, with individuals and groups bound by national law, and criminal law, national or international.[162] This was expressed by a judge of the IACHR, in the context of a terrorism-related case against Peru, as follows:

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159 On the differing approaches of human rights bodies, *see* Duffy, 'Harmony or Conflict?', *supra* note 141. All bodies have some regard to IHL, though to varying degrees and effect. It has been suggested that the capacity of human rights bodies to address IHL should be enhanced.

160 M. Scheinin, 'Terrorism', in Moeckli, *International Human Rights Law*, *supra* note 191 at 583.

161 *Prison Castro Castro versus Peru*, Case No. 11.015, Judgment, Separate Opinion J. Trindade, 2008, para 23.

162 *See* Chapter 4 for crimes under international law that may be committed in the context of facts of international terrorism, principles of criminal law and fora of accountability.

> The victims of violations to human rights attributable to the State are protected by the regulations of International Human Rights Law (along with the rights enshrined in the constitution), which precisely determines the State's international responsibility, while the victims of terrorist acts attributable to non-state agents or groups are protected by the regulations of criminal law, which precisely determines the criminal responsibility of individuals, and whose application must be pursuant to the international human rights regulations binding to the State in question. Thus, nobody is removed from the protection of the Law, even when the applicable law may be different according to the circumstances of each specific case.[163]

Going a step further, one former UN Special Rapporteur has stated that: 'as a non-state actor the [group] does not have legal obligations under the ICCPR, but remains subject to the demand of the international community, first expressed in the UDHR, that every organ of society respect and promote human rights'.[164] Perhaps more significantly than the labels imposed is the increasing willingness to call on armed groups to respect human rights and to engage with them to this end.[165] In recent years there has been increasing engagement by human rights mechanisms with such groups, which is likely to contribute to further clarification and development with time.[166]

Whether or not terrorism by non-state groups should be understood as a violation, victims of terrorism nonetheless have certain rights reflected in IHRL.[167] These correspond to the obligations of the state to take all feasible steps to protect individuals on its territory from violations by private actors, as described further below. In addition, there is growing international recognition in recent years of a right of victims of serious crime, including where appropriate serious acts of terrorism, to seek compensation from the state (regardless of any legal responsibility of the state for that crime).[168] Victims

163 *Castro Castro, supra* note 161 at para. 83.

164 *Ibid*. at p. 506.

165 *See* A. Clapham, 'Non-state Actors', in D. Moeckli, S. Shah, et al. (eds.), *International Human Rights Law* (Oxford: Oxford University Press, 2010), p. 577; *see also*, examples and discussion in Chapter 3.

166 *See*, *e.g.*, Special Rapporteur on Extra-judicial Executions Mission to Afghanistan, 2009, on the importance of engaging with armed groups (cited in Clapham, 'Non-State Actors', *supra* note 165 at p. 579). Clapham notes that the distinction has been 'eroded' for armed groups as for corporations, p. 576.

167 On the nature of the states obligations *vis-à-vis* terrorism, *see* 7A.4.2 below.

168 *See*, *e.g.*, the European Convention on the Compensation of Victims of Violent Crimes; Recommendation N° R (85) 11 of the Committee of Ministers on the Position of the Victim in the Framework of Criminal Law and Procedure; UN Office of High Commissioner on HR, 'Human Rights, terrorism and Counter-terrorism', Fact Sheet No 32, p.10. The Basic Principles of Justice for Victims and Abuse of Crime, UN GA Res. 40/34, notes that a person may be a victim regardless of whether the perpetrator is identified. For the endorsement by the Special Rapporteurs on Terrorism and Human Rights as set out under recent practice, *see* section B.

may also have a right to take legal action themselves against individuals or groups under domestic law for damages, though the prospects of successful enforcement may be questionable. More commonly, it will be the criminal law framework discussed in Chapter 4 that will hold most promise as a forum for justice for victims of terrorism *vis-à-vis* those directly responsible.

7A.4.2 Protecting human security: positive human rights obligations

General human rights conventions – like the International Covenant on Civil and Political Rights, American Convention on Human Rights, African Charter on People and Human Rights and European Convention on Human Rights and Fundamental Freedoms – enshrine the duty of states bound by the conventions to 'respect' and 'ensure' or 'secure' the rights protected.[169] This comprises both the negative obligation not to infringe the rights, and the positive duty to guarantee their protection. These positive obligations have consistently been interpreted by human rights courts and bodies as involving the duty to prevent violations, to protect individuals from them, and, in the wake of serious violations, to respond, by investigating, bringing to justice those responsible where evidence supports prosecution, and providing reparation to victims.[170]

i) 'Due diligence' to Prevent and Protect

A state cannot be strictly responsible for all violations on its territory, but it has a sovereign duty to exercise 'due diligence' to protect individuals from infringements of their rights.[171] The state will fail in this duty where it knew or ought to have known that there was a real risk of violations and failed to take measures of prevention that were available to it.[172] Implicit in the posit-

169 *See* Article 1 ACHR and ICCPR, *supra* note 21 at Article 2. ECHR, *supra* note 7 at Article 1 refers similarly to the obligation to 'secure' the rights under the Convention. The African Charter reflects this by referring to the obligation to 'recognise' rights and to 'undertake to adopt legislative and other measures to give effect' to them.

170 The leading case was *Velásquez Rodríguez* v. *Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 162, 29 July 1988, which has been endorsed in many subsequent cases before the Inter-American Court, and a similar approach to positive obligations has now emerged from all major human rights bodies. *See*, *e.g.*, Committee against Torture (Annual Report to the General Assembly, 9 September 1996, UN Doc. A/51/44, para. 117), the Human Rights Committee (*e.g.*, General Comment No. 20: Prohibition of torture or cruel, inhuman and degrading treatment or punishment (Article 7) [1992], UN Doc. HRI/GEN/1/Rev.6 (2003) at 151; HRC, General Comment No. 31, *supra* note 57); *e.g.* the ECtHR (*e.g.*, *Osman* v. *United Kingdom*, Appl. No. 23452/94, 28 October 1998, ECtHR, Reports 1998-VIII); and ACommHPR cases *Purohit and Moore* v. *The Gambia*, Comm. 241/2001, and *Sabbah and Others* v. *Egypt*, Afr. Comm. 334/06 (2012).

171 *See*, *e.g.*, HRC, General Comment No. 31, *supra* note 57 at para. 8.

172 *Osman* v. *UK*, *supra* note 170 at para. 103.

ive nature of the obligations is that the state should take active measures to ensure that it *is* aware of risks and can act to prevent them; a state cannot hide behind lack of knowledge if it failed to make reasonable enquiries or to have in place effective systems, for example for monitoring situations of real potential risk. Notably, the state's preventive obligation applies in respect of acts of terrorism, and acts by foreign states or private actors against persons accused of terrorism.[173]

ii) Investigation and Accountability

Where information comes to a state's attention that may indicate violations of rights involving the commission of crimes, whether by state agents or private individuals, the state is obliged to investigate and where appropriate hold those responsible to account.[174] Human rights law provides some basic benchmarks that an investigation must meet: it must be prompt, thorough, effective, and be capable of leading to the identification of those responsible.[175] Those investigating '*should have access to any information, including sensitive information.*'[176]

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173 For an example, *see* Chapter 10 on rendition and the responsibility of a state for the acts of other states on its territory.

174 *See*, *e.g.*, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly on 21 March 2006, UN Doc. A/RES/60/147; UN Joint Study on Secret Detention, *supra* note 35. Jurisprudence across all human rights bodies indicates the duty to investigate. In the IACtHR, *see e.g.*, *Velásquez Rodríguez* v. *Honduras*, *supra* note 170; *Barrios Altos* v. *Peru*, Interpretation of the Judgment on the Merits, 3 September 2001; *Cepeda Vargas* v. *Colombia*, Judgement, Inter-Am. Ct. H. R., 26 May 2010, para. 116; *Dos Erres Massacre* v. *Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 211, 24 Nov. 2009, paras. 130-1, and *Gomes-Lund et al. (Guerrilha do Araguaia)* v. *Brazil*, Merits, Reparations and Costs, 24 November 2010, Inter-Am. Ct. H. R., Series C. No. 219. In the ECtHR, *see Musayeva et al.* v. *Russia*, Merits, 26 July 2007, 47 E.H.R.R. 25; *Aydin* v. *Turkey*, Merits, 25 September 1997, 25 E.H.R.R. 251; *Assen*ov. *et al*. v. *Bulgaria*, Merits, 28 October 1998, 28 E.H.R.R. 652. In the African system, *see e.g.*, *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe*, ACHPR No. 245/02; *Association of Victims of Post Electoral Violence & INTERIGHTS / Cameroon* ACHPR No. 272/03 and *EIPR and INTERIGHTS (on behalf of Sabbeh and Others)* v. *Egypt*, ACHPR, No. 334/06 (2012).

175 Benchmarks include promptness, independence, thoroughness and effectiveness: s*ee*, *e.g.*, UN Joint Study, *supra* note 29 at para. 292, and jurisprudence *ibid*. *See also* ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, 20 July 2012, available at: http://www.icj-cij.org/docket/files/144/17064.pdf.

176 *See* the UN Joint Study on secret detention on any credible mechanism for overseeing security and intelligence agencies having such access, *supra* note 29 at para. 292(d). *See also* Report of the Special Rapporteur on Terrorism and Human Rights, 'Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight', 17 May 2010, A/HRC/14/46, para. 15 which recommended that bodies investigating human rights abuses should have '*unhindered*' access to all confidential secret service materials.

Where investigations reveal serious violations of rights, States Parties must ensure that those responsible are brought to justice.[177] As the UN Human Rights Committee has noted: "As with a failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant.[178]

In addition to the interpretation of obligations in general human rights treaties, certain other treaties and instruments addressing specific human rights (and, as noted above, humanitarian law)[179] explicitly enshrine the duty to investigate and, in some cases, to prosecute and punish with proportionate penalties.[180] There is considerable support for the view that there is also such a duty under *customary* law, at a minimum in respect of violations that amount to crimes under international law.[181] The obligation to investigate or extradite (*aut dedere aut judicare*) has been reaffirmed by the ICJ in the case of *Belgium*

177 CCPR General Comment 31, 29 March 2004, CCPR/C/21/Rev.1/Add. 13.

178 CCPR, General Comment 31, *ibid*. at para. 18 on these obligations arising 'notably in respect of those violations recognized as criminal under either domestic or international law.' *See also Belgium* v. *Senegal*, *supra* note 175.

179 Within IHL there are obligations on states parties to seek out, prosecute and punish those who commit 'grave breaches' of the Conventions, which cover crimes such as unlawful killing, torture and inhumane acts; *see*, *e.g.*, Article 1 of the the four Geneva Conventions of 12 August 1949 and 'grave breaches' provisions, *e.g.*, Articles 147, 148 of GC IV and Article 85 AP I.

180 *See* UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85 [hereinafter 'CAT']. Other examples include: Convention Concerning Forced or Compulsory Labour (ILO No. 29), 39 U.N.T.S. 55, adopted on 28 June 1930, entered into force 1 May 1932; UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3, entered into force 30 April 1957.; International Convention on the Suppression and Punishment of the Crime of Apartheid, UN GA Res. 3068 (XXVIII)), 28 UN GAOR Supp. (No. 30) at 75, UN Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force 18 July 1976;, and the Convention on Forced Disappearance, *supra* note 11. As for non-binding instruments that reflect acceptance of this duty, *see* Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, ESC Res. 1989/65, Annex, 1989, UN ESCOR supp. (No. 1) at 52, UN Doc. E/1989/89 (1989).

181 For an early expression of this duty in respect of war crimes and crimes against humanity, *see*, *e.g.*, the 'Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity', adopted by UN GA Res. 3074 (XXVIII) of 3 December 1973, UN Doc. A/RES/3074 (XXVIII). *See*, *generally*, D. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 (1991) *Yale Law Journal* 2537, in particular at pp. 2592-3, 2600 for customary international law. According to Orentlicher, by 1991 the Restatement of Foreign Relations Law of the United States considered customary law violated by impunity for 'torture, extra-legal executions and disappearances'. pp. 2582-3. *See also* international standards set out in the expert opinion to the *Garzon* v. *Spain* case before the ECtHR, available at: interights.org/garzon.

v. *Senegal*.[182] Among the measures likely to be inconsistent with the obligations summarised above are the application of amnesty laws, which preclude any criminal process, prescription that bars prosecution after a limited amount of time, or immunities or defences, which provide impunity for serious violations.[183]

iii) Remedy and Reparation

Victims of rights violations have the right to a remedy and to reparation. This is inherent in the positive obligation to 'ensure' the rights in question,[184] and the right to a remedy is also specifically enshrined in human rights instruments.[185] The right to a remedy reflects a basic principle of international law that where there is a right there is a remedy (*ubi ius ibi remedium*),[186] and is recognised as an established principle of customary international law.[187] This was recognised for example by the UN General Assembly when it adopted, by consensus, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles).[188] More recently, important principles of reparation have been set down in ICC jurisprudence.[189]

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182 *Belgium* v. *Senegal*, *supra* note 175.

183 *See*, *e.g.*, *Barrios Altos* (*Chumbipuma Aguirre et al*. v. *Peru*), Merits, Judgment of 14 March 2001, IACtHR, *Series C*, No. 75 or *Dos Erres*, *supra* note 174, on the compatibility of amnesty laws with the state's duties in respect of justice and accountability. The HR Committee has consistently condemned amnesty statutes in countries including Argentina, Bolivia, Cambodia, Chile, Croatia, El Salvador, Haiti, Lebanon, Spain and Sudan; *see Garzon* expert opinion, *supra* note 181.

184 *See*, *e.g.*, *Velásquez Rodríguez* v. *Honduras*, *supra* note 170, §187.

185 *See*, *e.g.*, ICCPR, at Article 2(3) and ECHR, *supra* note 7 at Article 13. *See also* the analysis of international law on reparation in INTERIGHTS' third party intervention in *Mohamed* v. *Jeppesen Dataplan Inc.*, available at: http://www.interights.org/ document/127/index.html; *see also* HRC, General Comment No. 31, *supra* note 57 at para. 16.

186 *See*, *e.g.*, the 1928 holding of the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case: '[I]t is a principle of international law, and even a general conception of law, that *any breach of an engagement involves an obligation to make reparation*.' *Chorzów Factory* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (13 Sept.) (emphasis added).

187 *See generally* Ricardo Mazzeschi, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview', 1 Journal of International Criminal Justice 339, 347 (2003); M. Cherif Bassiouni, 'International Recognition of Victims' Rights', 6 Human Rights Law Review 203, 218 (2006); and Jean-Marie Henckaerts and Louise Doswald-Beck, ICRC Study of Customary International Humanitarian Law, Volume I: Rules, Rule 150, 537-550 (2005).

188 Basic Principles on the Right to a Remedy and Reparation, *supra* note 174.

189 Case of *Prosecutor* v. *Thomas Lubanga Dyilo*, *Decision Establishing the Principles and Procedures to be Applied to Reparations* (*Reparations*), ICC-01/04-01/06, 7 August 2012, available at: http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf. The ICC drew heavily on existing soft law on reparations (including the UN Basic Principles approved in 2005) as well as on the jurisprudence of the regional human rights courts, especially the Inter-American Court.

While the precise content of the remedy depends on the nature of the wrong and all the circumstances,[190] the right to a remedy includes the right to restitution, so far as possible, to the situation that existed prior to the wrong,[191] the investigation and prosecution of those responsible,[192] and compensation for damage flowing from the breach.[193] Recognition has emerged across international human rights of the 'right to truth.'[194] Victims have the right to information concerning the nature of the violations, their context, and those responsible,[195] though some sources suggest that the right to know corresponds to society more broadly, and relates to the need to learn from violations of the past.[196]

So far as they serve to protect and ensure the protection of non-derogable rights under treaty law, the obligations to take measures to prevent violations, to investigate and hold to account perpetrators of serious violations, or the right to a remedy and reparation are themselves non-derogable obligations applicable at all times.[197]

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190 *See*, *e.g.*, *Cordova* v. *Italy*, Judgment, App. No. 40877/98, ECtHR, 30 April 2003, para. 58.

191 Basic Principles on the Right to a Remedy and Reparation, *supra* note 174 at principle 19, which specifies that a state 'should, whenever possible, restore the victim to the original situation.' Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

192 *See* above on duty to investigate; Article 13 ECHR has been held to imply obligations to investigate, *e.g.*, *Kaya* v. *Turkey*, App. No. 22535/93, ECtHR, 28 March 2000), torture and inhuman and degrading treatment (*Aksoy* v. *Turkey*, *supra* note 113).

193 *E and Others* v. *UK*, App. No. 33218/96, ECtHR, 26 November 2002, para. 110; *Keenan* v. *UK*, *supra* note 192, para. 130

194 *See*, *e.g.*, Article 24(2), Convention on Enforced Disappearances; Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (1997) E/CN.4/Sub.2/1997/20/Rev.1; UN Commission on Human Rights Resolution 2005/66, 20 April 2005; Human Rights Council Resolution 9/11, 18 September 2008 and Resolution 12/12, 1 October 2009; UN Office of the High Commissioner for Human Rights, Study on the Right to Truth, 8 February 2006, E/CN.4/2006/91; Special Rapporteur's report on 'Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives', UN Doc. A/HRC/22/52, 1 March 2013. It is well recognised in the Interamerican system, *e.g.*, *Myrna Mack-Chang* v. *Guatemala*, Merits, Reparations and Costs, 25 November 2003, para. 274, Series C. No. 101. More recently the ECtHR reflected the right to truth in *el Masri* v. *Macedonia*, para 191..

195 Special Rapporteur's Report on Accountability, *ibid*. at para 24.

196 *See*, *e.g.*, Special Rapporteur 2013 report, *ibid*. at para 24-4; *Myrna Mack Chang*, *ibid.*, refers to the 'right of society' to know; and el Masri, para. 191: 'In this connection [the Court] underlines the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened.'

197 *See*, *e.g.*, *Barrios Altos*, *supra* note 183 at paras. 41-4; *Sabbeh* v. *Egypt*, *supra* note 170; *Osman* v. *UK*, *supra* note 170; HRC, General Comment No. 29 on States of Emergency, *supra* note 24 at para. 14.

iv) Inquiry and Onus of Proof

Linked to the positive nature of human rights obligations, is an onus that lies with the state to demonstrate that it has met its obligations of due diligence or response, as opposed to the onus resting solely with the individual to prove the failure to do so. This is particularly so where – as is not infrequently the situation in human rights cases, and all the more so in the shrouded world of counter-terrorism – the facts lie wholly, or in large part, within the exclusive knowledge of the authorities.

Human rights courts have therefore been willing to draw inferences where information that could prove or refute an applicant's allegations lies within the control of the respondent state.[198] Likewise, in the event that death or injury occurs in situations that might reasonably be thought to fall within the control of the state, presumptions of fact may arise with the burden on the state to demonstrate that it was *not* the result of a violation of its human rights obligations. These presumptions may arise for example where a counter-terrorist law enforcement operation results in death, particularly where the plans, orders and training are known only to the state,[199] or where prisoners suffer death or sustain injuries in a state's custody.[200] In such circumstances, as the European Court of Human Rights has noted, 'strong presumptions of fact will arise in respect of injuries and death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.'[201]

v) Positive obligations and the implications for Victims of Terrorism and Counter-terrorism

These obligations clearly have implications for states in the context of international terrorism. The state has a responsibility to establish an effective counter-terrorism strategy that couples 'preventive' measures to avoid terrorist attacks, with thorough investigation and accountability after the event. The duty to protect encompasses the obligation to provide timely information concerning dangers to human security arising from terrorist threats.[202] Seen through the prism of human rights law, invoking the criminal law paradigm

198 *Salman* v. *Turkey* [GC], Merits, Grand Chamber, 27 June 2000, 34 EHRR 17 111 § 100; *Varnava and Others* v. *Turkey*, 18 Sept 2009, § 184;. *See also Magomed Musayev and Others* v. *Russia*, no. 8979/02, §§ 85-86, 23 October 2008.

199 *See McCann, Farrell and Savage* v. *United Kingdom*, ECtHR, 27 September 1995, *Series A*, No. 324.

200 *See McKerr* v. *United Kingdom*, Judgment of 4 May 2001, ECtHR, *Reports 2001-III*. *Varnava and Others* v. *Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, §§ 182-184, 18 September 2009; *Salman* v. *Turkey*, *supra* note 198; *Toteva* v. *Bulgaria*, no. 42027/98, § 50, 19 May 2004; *Ireland* v. *the United Kingdom*, §§ 64-65, § 161 and *Mathew* v. *The Netherlands*, no. 24919/03, § 154, ECHR 2005-IX.

201 *Salman* v. *Turkey*, *supra* note 198 at para. 109.

202 *Öneryildiz* v. *Turkey*, Judgment, App. No. 48939/99, ECtHR, 18 June 2002; *see also Osman* v. *UK*, *supra* note 170.

to prevent serious terrorist attacks is not simply an option for a state, it is a matter of legal obligation. On this basis alone, such measures are plainly not interchangeable with others such as the use of military force.[203]

The same obligations of prevention, protection, investigation, accountability and reparation apply in respect of violations that arise from acts of terrorism or in the name of counter-terrorism.[204] States are obliged under IHRL to take all measures reasonably available to them to ensure that rights are not violated within their territories or under their jurisdiction, whether by the state's own agents or by private actors or foreign states, and to investigate and where appropriate hold to account. As practice in Part B indicates, recognition of 'victim' status and accountability are often more politically palatable in relation to terrorism rather than counter-terrorism, but the legal obligation is the same.[205] States, and indeed on occasion international courts and bodies, have often been reluctant to provide compensation to victims of counter-terrorism, apparently on the basis of their alleged or perceived association with 'terrorism.'[206] As a matter of law, the right to a remedy corresponds to the particular human rights violations under international law and there is no principled basis for a distinction between categories of victims as regards the right to recognition and reparation.

7A.4.3 State Responsibility and human rights violations

7A.4.3.1 Agents and private actors

Under general international law, a state will be responsible for the acts of organs of the state, whether or not they act within their authority, and for agents in respect of acts under the 'direction and control' of the state.[207] In addition, as noted above, under human rights law the state will be responsible for the conduct of private actors, or indeed foreign states, where the state fails

203 Those criminal law measures will themselves be subject to the constraints of the human rights framework, whether or not arising in the context of armed conflict.

204 *See*, *e.g.*, *Asencios Lindo et al.* (Case 11.182), Report No. 49/00, Annual Report of the IACHR 1999, para. 58; *Kiliç* v. *Turkey*, App. No. 22492/93, 28 March 2000, ECtHR, *Reports 2000-III*; Concluding observations of the Human Rights Committee: Russian Federation, UN Doc. CCPR/CO/79/RUS (2003).

205 Indeed arguably the state's obligations will be all the clearer where its own agents are responsible; in such cases, it must respond to distance itself from the violation and restore its credibility and the rule of law. *See* Terrorism as a Human Rights Violation? above.

206 *McCann* v. *UK*, *supra* note 199; *see also* discussion in *Castro Castro*, *supra* note 161 and the request for referral to the ECHR Grand Chamber for clarification in the case of *Maskhadovy* v. *Russia*, , *Application 18071/05,* 6 June 2013at: www.interights.org/maskhadov.

207 *See* the ILC Articles, and *Nicaragua* and *Genocide* Cases before the ICJ, discussed in Chapter 3.

in its positive obligations to exercise due diligence to prevent or respond to violations by them.[208]

A state may also, particularly where it is operating extra-territorially, act in consort with non-state groups or with other states and its responsibility may arise under international law, in accordance with the rules on state responsibility set out at Chapter 3, or under IHRL specific rules.[209] The European Court of Human Rights has noted for example that the state's responsibility may be engaged through the acts of it own armed forces, or through a 'subordinate local administration' over which it exercises 'decisive influence'.[210] The 'decisive influence' test appears to differ from the agency test under general international law which requires 'direction and control' of conduct to give rise to an agency relationship and state responsibility for the conduct of private entities. This may have implications for state responsibility for human rights violations arising in relation to terrorism and counter-terrorism, in circumstances where the state exercises decisive influence over entities active abroad, but which falls short of direction and control of their conduct.

It remains unclear whether such a standard could have a bearing on responsibility under IHRL for terrorism or non-state actor engagement in counter-terrorism. For example, where a state supports terrorist groups abroad, which are subject to its 'influence' but which are not necessarily agents of the state committing violations under the 'instruction or direction' of the state, can the state be responsible under IHRL?[211] Or, where private security companies are active in the counter-terrorism field abroad at the state's behest and commit violations that were not specifically directed or controlled by the state, can the state still be responsible under IHRL?[212] These issues and others require the legal framework of IHRL to be considered alongside the rules on responsibility discussed in Chapter 3.

208 *See* Chapter 3 on the law governing attribution to the state of responsibility for the conduct of private actors and the responsibility of non-state actors. *See also* 'positive obligations' above 7A.4.1.

209 For comment, *e.g.*, on the responsibility of the UK for acts of the US in the conduct of the Iraq war, *see* 'Report of the Inquiry into the Alleged Commission of War Crimes by Coalition Forces in the Iraq War During 2003', 8-9 November 2003, commissioned by Peacerights, pp. 14 and 15.

210 *See*, *e.g.*, *Loizidou* judgment (preliminary objections), *supra* note 60; and the subsequent *Cyprus* v. *Turkey* judgment, *supra* note 60, where 'the Court added that since Turkey had such "effective control", its responsibility could not be confined to the acts of its own agents therein but was engaged by the acts of the local administration which survived by virtue of Turkish support'. *Ilascu* v. *Russia*, *supra* note 61; *Catan & Others* v. *Moldova and Russia*, *supra* note 61. This test is distinct from that under general international law discussed in Chapter 3.

211 *See Catan & Others* v. *Moldova and Russia*, *2012*, *supra* note 61.

212 *See* Chapter 3 'International responsibility and terrorism'.

7A.4.3.2 Collective responsibility and violations by others?

Human rights violations by *other* states, while potentially matters of concern in policy terms, have traditionally not been considered matters of legal interest and still less to create legal obligations. However, the shared responsibility of several states may arise in various ways in the context of counter-terrorist measures, notably from inter-state cooperation that may violate human rights. States diverse contributions would have to be assessed to ascertain whether they amounted to one of the forms of responsibility in international law, such as aiding and assisting.[213] In this area too, it has also been questioned whether IHRL, with its underlying protective purpose, might embrace broader forms of responsibility, such as 'complicity' in torture for example. These issues, which are explored in more detailed in other chapters, may reveal areas where the legal framework is likely to develop and be further clarified as a result of developing practice in this field.[214]

Moreover, there is growing recognition of the community interest in the prevention of serious rights violations and accountability for them. Notably, the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, and judgments of the ICJ, recall that all states may have an interest in raising a complaint against another regarding human rights abuses, on the basis that the obligations to respect human rights are owed to the international community as a whole, as obligations *erga omnes*.[215] The ILC Articles go further, indicating that where the obligation breached derives from a peremptory norm of general international law, and the breach is 'serious'[216] all states have a *duty* to cooperate to end the wrong.[217] The

213 States may be responsible for aiding and assisting under Art. 11 ILC Articles on State Responsibility, among others, as noted in Chapter 3 and discussed in Chapter 10 on Extraordinary Rendition.

214 Chapters 3 and 10.

215 *See* Article 48, ILC's Articles on State Responsibility, on 'Invocation of responsibility by a State other than the injured State'. *See Barcelona Traction, Light and Power Company, Limited, Second Phase, ICJ Reports 1970*, p. 3, at p. 32, paras. 33-4, referring to obligations *erga omnes* as including 'the principles and rules concerning the basic rights of the human person.' *See also* J. Crawford, *Third Report on State Responsibility* (52nd session of the ILC (2000)), UN Doc. A/CN.4/507 and Add. 1-4, p. 44, para. 92

216 *See*, *generally*, ILC's Articles on State Responsibility, Part II, Chapter III 'Serious breach of obligations under peremptory norms of general international law.' Article 40 states that the chapter applies 'to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of international law' (para. 1) and that a breach is 'serious' if 'it involves a gross systematic failure by the responsible State to fulfil the obligation' (para. 2).

217 *See* Article 41, ILC Articles on State Responsibility: '(1) States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40. (2) No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.'.

Commentaries to the ILC Articles specify that the obligations under peremptory norms of general international law:

> arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and to their people and *the most basic human values*.[218]

This development may be seen as part of a trend towards collective responsibility, of which the shift from viewing human rights as internal matters of state sovereignty to matters of international concern, the 'responsibility to protect' doctrine,[219] universal jurisdiction[220] and, arguably, the movement towards recognising a limited right of humanitarian intervention,[221] also form part. These obligations are relevant to comments regarding responses to Guantánamo and Extraordinary Rendition in subsequent chapters.

7A.5 Specific rights protected and counter-terrorism

The following are some of the rights protected in human rights law, which may be implicated by acts carried out in the name of counter-terrorism. Their application to international terrorism is considered in Section B below.

7A.5.1 Life: arbitrary deprivation, lethal use of force and the death penalty

The duty to protect human life is at the heart of a state's obligations in relation to terrorism: the duty to take measures to protect from terrorist attacks, as well as the duty to protect life in responding to terrorism, are of paramount importance.[222] The right to life is a non-derogable right, and the prohibition

218 ILC Commentaries to Articles on State Responsibility, Commentary to Article 40(3) which lists among the examples of peremptory norms the prohibition of genocide, of slavery and slave trade, of apartheid and racial discrimination, of torture and cruel and inhuman treatment. *Ibid.* paras. 4-5.

219 *See* Outcome Document of the 2005 United Nations World Summit, UN Doc. A/RES/60/1, para. 138-140, and Secretary General's 2009 Report, UN Doc. A/63/677, on Implementing the Responsibility to Protect, both available at: http://www.un.org/en/preventgenocide/adviser/responsibility.shtml; note that while these developments are important they do not create legal obligations.

220 *See* Chapter 4 A.1.3 on universal jurisdiction. Where the violations are grave breaches, the *duty* to seek out criminals and ensure their accountability is explicit in IHL; for other war crimes or crimes against humanity, *see* the Preamble of the ICC Statute.

221 *See* Chapter 5, 'Humanitarian Intervention,' noting that a right to use force on this basis is not currently accepted in international law.

222 HRC, General Comment No. 6: Right to Life (Article 6) [1994], UN Doc. HRI/GEN/1/Rev.6 (2003) at 127, para. 3.

of extra-judicial executions is prohibited in customary law[223] and has attained the status of a fundamental norm of *jus cogens*.[224]

It was noted above in relation to positive obligations that the state may be responsible not only for unlawful killing by its own agents, but also by private parties where it failed to take effective action to prevent the deaths. The fact that a state possessed information as to terrorist threats and failed to act on it could conceivably be sufficient to render the state responsible if the threats are realised, although this would depend on there being clear information indicating a 'real and immediate risk' in circumstances where the state was in a position reasonably to prevent deaths and failed to do so.[225] As borne out by the findings of the enquiries in the US and UK in the aftermaths of the September 11 and 7 July attacks, respectively, states will often have lessons to learn *ex-post facto* regarding effective prevention, but this should be carefully distinguished from failing to exercise due diligence to prevent the loss of life.[226]

More commonly, the issue that arises is the nature of – and limits on – the duty of the state to protect the right to life in action taken against suspected 'terrorists'.[227] This may emerge in the context of criminal law enforcement operations that result in the lethal use of force,[228] in hostage taking situations,[229] or through practices of targeted killings which have developed exponentially in recent years.[230]

The right to life, which arises in these situations, belongs to the category of non-derogable rights that must be respected at all times, including in conflict.[231] Under IHRL, persons can never be arbitrarily deprived of their

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223 *See*, *e.g.*, Inter-American Commission on Human Rights, *Armando Alejandre, Jr. et al*. (Case 11.589), Report No. 86/99 (1999): 'The forbidding of extrajudicial executions thus raises to the level of imperative law a provision of international law that is so basic that it is binding on all members of the international community.'

224 *See*, *e.g.*, Restatement (Third) of the Foreign Relations Law of the United States (1987), para. 102(2).

225 *See*, *e.g.*, the case of *Osman* v. *UK*, *supra* note 170 at para. 121. In that case, the police did not have such information and hence the failure to act on death threats was deemed insufficient to render the UK responsible when the threats were carried out.

226 *See* 7.a.4.2. above. This implies that they state knew or had reason to know of a sufficiently identifiable risk and that it failed to take measures reasonably within its power.

227 *See* Chapter 7B.3.3 on drones and inteprlay IHL and IHRL, and Chapter 9 on the killing of Osama bin Laden.

228 *See e.g.*, *Guerrero* v. *Colombia*, HRC Views on Communication 45/1979, 1982

229 *See e.g.*, *Finogenov & Ors.* v. *Russia* (Appl. No. 18299/03 and 27311/03), 20 December 2011, ECtHR; *see also Tagayeva & Ors.* v. *Russia*, Appl. No. 26562/07, 4 October 2012.

230 The application of the legal framework in these situations is addressed in Part B and in Chapter 9 on the killing of Osama bin Laden. On the facts regarding drone killings and targeted killings, *see also* Chapter 6.

231 The paramount importance of the right to life is constantly stressed by the monitoring bodies of human rights treaties. *See*, *e.g.*, HRC, General Comment No. 6, *supra* note 220. Inter-American Commission on Human Rights, *Abella* v. *Argentina* (Case 11.137), Report No.

life. The Human Rights Committee has condemned the use of lethal force, even where the State faces 'terrorist violence, which shows no consideration for the most basic human rights'.[232]

Within the context of armed conflict, IHL applies alongside human rights law,[233] and what constitutes 'arbitrary deprivation of life' must be interpreted in the light of all applicable law, including IHL. Where IHL permits the killing of a legitimate military target, the deprivation of life has a legal basis and is not arbitrary.[234] In the context of hostilities, human rights courts have also accepted that killing of civilians by aerial bombardment, which was incidental and proportionate to lawful military operation, could be considered justifiable.[235] By contrast, the killing of persons in armed conflict in circumstances where there is no IHL justification would amount to arbitrary deprivations of the right to life.

Absent an armed conflict, the lethal use of force by a state is governed by IHRL and strictly curtailed. It must be absolutely necessary to achieve a legitimate aim, such as protecting life or, possibly, effecting a lawful arrest or detention.[236] Certain human rights treaty provisions specifically so provide[237] while the prohibition on 'arbitrary' (as opposed to lawful) deprivation of life in others has been interpreted by the authoritative bodies as comprising

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5/97, Annual Report of the IACHR 1997, para. 161.

232 *See* Concluding Observations of the Human Rights Committee: Peru, UN Doc. CCPR/C/79/Add.8 (1992), para. 8. *See also* E. Gross, 'Thwarting Terrorist Attacks by Attacking the Perpetrators or Their Commanders as an Act of Self Defence: Human Rights Versus the State's Duty to Protect its Citizens', 15 (2001) *Temple Int'l and Comparative Law Journal* 195.

233 *See* discussion of interplay in practice, including in relation to the right to life and targeted killings, in Chapter 7B.

234 *See* Nuclear Weapons, *supra* note 142 at para 25. The ICJ held, with regard to the application of the right to life during hostilities, 'the test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities'.

235 *See*, *e.g.*, *Isayeva* v. *Russia*, Appl. Nos. 57947/00, 57948/00 and 57949/00 of 24 February 2005. The Court did not specifically refer to IHL (the necessity test) but arguably interpreted the requirements of IHRL in line with IHL standards. *See also* D. Kretzmer, 'The Legal Regime Governing the Use of Lethal Force in the Fight against Terrorism', in L. van den Herik and N. Schrijver (eds.), *Counterterrorism Strategies in a Fragmented International Legal Order*, *supra* note 142.

236 Article 2(2) ECHR notes that where employed in defence against unlawful violence, to effect lawful arrest or detention or quell a riot or insurrection, lethal force will not constitute an unlawful deprivation of life, provided action taken is no more than 'absolutely necessary.'. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August-7 September 1990), UN Doc. A/CONF.144/28/Rev.1 at 112 (1990)) provides that 'intentional' lethal use of firearms may only be made when 'strictly unavoidable in order to protect life'. *See also* Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, *supra* note 180; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, 22 October 2002, OAS Doc. OEA/Ser.L/V/II.116, para. 87.

237 Article 2(2) ECHR; no similar provision appears in the ICCPR or ACHR.

a necessity and proportionality test.[238] As underlined by the Inter-American Commission of Human Rights, for example, IHRL tolerates the use of lethal force against suspected terrorists only 'where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury, or to otherwise maintain law and order where strictly necessary and proportionate'.[239] The defence of the state from the threat of terrorism does not then *per se* provide a justification for resort to lethal force. It is implicit in the necessity test that the use of lethal force must be a matter of last resort, and all non-lethal measures must have been exhausted. At least as regards situations other than armed conflict, it is clear that lethal force may not be used as an alternative to arrest and detention.[240]

The use of lethal force that may prove necessary in the course of a lawful law enforcement operation must be distinguished from the specific targeting and killing of an individual. Lawful targeting in the context of armed conflict, or death inflicted pursuant to the appropriate legal process resulting in the death penalty, are distinguishable from targeted killings or 'shoot to kill' policies[241] which have been held to be impermissible and amount to extra-judicial execution.[242] The UN Special Rapporteur on extra-judicial, summary, or arbitrary executions, has likewise defined the policy of 'targeted pre-emptive

238 The ICCPR and the ACHR refer to the prohibition on the 'arbitrary' deprivation of life (Articles 6 and 4, respectively). Article 1 of the American Declaration of the Rights and Duties of Man also provides for the right to life without any explicit qualification.

239 IACHR *Report on Terrorism and Human Rights*, para. 87. Other human rights courts and bodies follow suit. *See also* Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, *supra* note 236.

240 *See* Chapter 6 on the right under IHL to kill the adversary's combatants, and the rules governing targeting of those directly participating in hostilities. The ICRC Guidance suggests the latter group should be captured where feasible. It has been increasingly argued that even combatants should be captured rather than killed at least so far as capture causes no risk to troops and military disadvantage. *See* below 7B3 on the interplay between IHRL and IHL in this respect.

241 The Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 180, paras. 45 and 51, notes: 'The rhetoric of shoot-to-kill serves only to displace clear legal standards with a vaguely defined licence to kill, risking confusion among law enforcement officers, endangering innocent persons, and rationalizing mistakes, while avoiding the genuinely difficult challenges that are posed by the relevant threat.'

242 Such practices have often been condemned by international courts and bodies. *See*, *e.g.*, Concluding Observations of the Human Rights Committee: Peru, *supra* note 232; and *McCann* v. *UK*, *supra* note 199; Human Rights Committee Concluding Observations on Israel; Special Rapporteur on Extra-judicial executions, Report on Targeted Killings (2009), Chapter 6. For a detailed discussion of the legality of the Israeli practice of extra-judicial executions of terrorists under IHRL and IHL, *see* O. Ben-Naftali and K. R. Michaeli, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings', 36 (2003) *Cornell Int'l Law Journal* 233; and Kretzmer, 'The Legal Regime Governing the Use of Lethal Force', *supra* note 235.

killings' of suspected terrorists as a 'grave human rights violation'[243] and described arguments seeking to justify targeted killings and shoot to kill policies as 'suggest[ing] that it is futile to operate inside the law in face of terrorism'.[244]

A critical aspect of the 'necessity' test requires that an operation must be planned as well as carried out in a manner that strictly limits the danger of recourse to the use of force.[245] As the European Court of Human Rights has noted, if lethal force is used absent 'all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising incidental loss of civil life', it will be deemed unnecessary, and amount to the arbitrary deprivation of life.[246] Human rights bodies have therefore found that there should generally be an opportunity to surrender, unless doing so would itself present an imminent danger to life.[247] Moreover, extreme care is due when relying on intelligence suggesting that the lethal force is necessary to ensure that 'only such solid information, combined with the adoption of appropriate procedural safeguards, will lead to the use of lethal force.'[248]

It is part of states' obligations to ensure that there is a clear and effective legal framework in place providing guidance on the permissible use of force, including for example, for dealing with suicide bombers or the preservation of life in the context of counter-terrorism law enforcement operations.[249] Subsequent action, such as denial of medical care to those affected by use of force, may also give rise to a violation.[250] As noted above, where death does result from the lethal use of force, the obligation arises to ensure that 'a thorough, effective and independent investigation is automatically carried out'.[251]

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243 *See* 'Civil and Political Rights, Including questions of Disappearance and Summary Executions', 9 January 2002, UN Doc. E/CN.4/2002/74.

244 *Ibid.*

245 *See McCann* v. *UK*, *supra* note 199 (the use of lethal force against suspected members of the IRA amounted to a violation of Article 2(2) largely on what was found to be defective planning of the operation); *Finogenov & Ors.* v. *Russia*, *supra* note 229; C. Warbrick, 'The Principles of the European Convention on Human Rights and the Responses of States to Terrorism', (2002) EHRLR 287, 292.

246 *Ergi* v. *Turkey*, Appl. No. 23818/94, Judgment, 28 July 1998, 32 (2001) EHRR 388, para. 79.

247 *Ogur* v. *Turkey*, *supra* note 236; *Guerrero* v. *Colombia*, *supra* note 228; Basic Principles on Use of Force and Code of Conduct for Law Enforcement Personnel, *supra* note 236.

248 P. Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/2006/53, para. 51.

249 *Ibid.* at paras. 45 and 51.

250 *Finogenov & Ors.* v. *Russia*, *supra* note 229.

251 McBride, 'Study on Principles', *supra* note 105 at para. 18. *See Semsi Onen* v. *Turkey*, Appl. No. 22876/93, Judgment, 15 May 2002, ECtHR, para. 87.

Another right to life issue often arising in the counter-terrorism context involves the application of the death penalty to terrorism related crimes.[252] The death penalty is not *per se* prohibited by international law, although particular instruments abolish or restrict the application of the penalty, and the trend towards prohibition is gathering pace. For example, Protocol No. 6 and Protocol No. 13 to the ECHR,[253] the Second Protocol to the ICCPR[254] and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty[255] impose an obligation on States parties to abolish the death penalty.[256] In addition, general instruments such as the ICCPR and American Convention on Human Rights restrict the circumstances in which the penalty may be applied.[257]

The imposition of capital punishment following a judicial process that does not accord with the highest standards of justice will itself amount to an arbitrary deprivation of life.[258] As the Inter-American Court noted: 'Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result.'[259]

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252 *See* Chapter 4 on the practice of imposing more severe (including capital) penalties to terrorism.

253 Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty, Strasbourg, 28 April 1983, ETS No. 114, entered into force 1 March 1985 (hereinafter 'Protocol No. 6'); Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty, Vilnius, 3 May 2002, ETS No. 187, entered into force 1 July 2003 (hereinafter 'Protocol No. 13').

254 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty (UN GA Res. 44/128, UN Doc. A/44/49 (1989), entered into force 11 July 1991).

255 Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Asuncion, 8 June 1990, OAS Treaty Series No. 73.

256 Note, however, that only Protocol No. 13 to the ECHR provides for absolute abolition, whilst the other instruments allow for the retention of the death penalty as a criminal sanction in times of war.

257 The Concluding Observations of the Human Rights Committee: Egypt, *supra* note 137, para. 16, noted that an expansion of the penalty 'runs counter to the sense of Article 6, paragraph 2, of the Covenant'. Article 4(2) of ACHR specifically prohibits the reintroduction of the death penalty where abolished and its expansion to cover new crimes.

258 *See*, *e.g.*, Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83, September 8, 1983, Inter-Am. Ct. H.R. (Ser. A) No. 3 (1983); *Sabbah* v. *Egypt*, 2012, *supra* note 170.

259 The Right to Information on Consular Assistance, in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1 October 1999, IACtHR, *Series A*, No. 16, para. 136. *See also* Restrictions to the Death Penalty (Article 4.2 and 4.4 of the American Convention of Human Rights), Advisory Opinion OC-3/83, 8 September 1983, IACtHR, *Series A*, No. 3 and the decision of the ECtHR in *Öcalan* v. *Turkey*, *supra* note 74. In these circumstances, the death penalty may also amount to cruel or inhuman treatment. *See, e.g., Egyptian Initiative for Personal Rights and INTERIGHTS* v. *Arab Republic of Egypt*, Communication 334/06, Judgment, African Commission, 13 February 2012, (hereinafter

It has been affirmed that Council of Europe states could not transfer suspects where there is a risk of the death penalty being imposed.[260] Other states may be similarly prohibited if the trial would not meet the strictest fair trial standards referred to above.[261]

7A.5.2 Torture, cruel, inhuman and degrading treatment

The prohibition of torture and other ill treatment enshrines one of the fundamental values of a democratic society.[262] As such, the use of torture, cruel, inhuman and degrading treatment is prohibited both under conventional and customary international law.[263] In addition to the prohibition in general international and regional human rights instruments,[264] other conventions specifically address torture, inhuman and degrading treatment, including the widely ratified Convention against Torture.[265] International humanitarian law also contains this prohibition, which is applicable to all categories of persons under IHL.[266] The prohibition on torture constitutes a norm of *jus cogens*.[267] As an absolute norm, no exceptions or derogations from it are permissible even in the event of a public emergency threatening the life of the nation.[268]

'Taba case').

260 *See* Chapter 4 on well-established refusal of European states to cooperate with the penalty and long-established practice of judicial assurances that the death penalty would not be sought.

261 This relates to the right to life violation referred to above. It is in addition to other obligations such as not transferring to a flagrant denial of justice referred to further below. 7.A.5.10 below

262 *Saadi* v. *Italy*, Appl. No. 37201/06, ECHR, Judgment, 28 February 2008, § 127.

263 The Trial Chamber in *Prosecutor* v. *Delalic et al.*, Case IT-96-21-T, Judgment of 16 November 1998, para. 517 on ill-treatment as *jus cogens*; *Belgium* v. *Senegal*, ICJ, 20 July 2012, in which the International Court of Justice stated in para. 99 that 'the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens)'.

264 Article 5 Universal Declaration of Human Rights, Article 7 ICCPR, Article 3 ECHR, Article 5(2) ACHR and Article 5 African Charter on Human and Peoples' Rights.

265 *See also*, *e.g.*, the Inter-American Convention to Prevent and Punish Torture.

266 The prohibition against torture in humanitarian law is expressly found in Common Article 3, as well as the four Geneva Conventions including the grave breaches provisions, and the First and Second Additional Protocols of 1977. *See also* Articles 12 and 50 GC I; Articles 12 and 51 GC II; Articles 13, 14, 87 and 130 GC III; Articles 27, 32 and 147 GC IV; Article 75 of AP I and Article 4 of AP II.

267 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, Case No. IT-96-23-T, Judgment, 22 February 2001, para. 466, quoting the judgment of 16 November 1998 in *Prosecutor* v. *Delalic et al.*, para. 454. *See also R* v. *Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte* 2 WLR 827 (House of Lords 1999). The Lords unanimously found that the prohibition on torture had evolved into a prohibition 'with the character of *jus cogens* or a peremptory norm.'

268 *See Shamayev and Others* v. *Georgia and Russia*, Appl. No. 36378/02, § 335, ECHR 2005-III.

It has repeatedly been emphasised that the prohibition is unaffected even in the most difficult circumstances such as the fight against terrorism.[269] As the Human Rights Committee for example has recalled:

> The Committee is aware of the difficulties that the State Party faces in its prolonged fight against terrorism, but recalls that *no exceptional circumstances whatsoever can be invoked as a justification for torture*, and expresses concern at the possible restrictions of human rights, which may result from measures taken for that purpose.[270]

The prohibition likewise applies irrespective of a victim's alleged conduct or of the nature of any offence allegedly committed,[271] and even in circumstances where the life of an individual is at risk.[272] The purported reason for the mistreatment, whether serving the 'greater good', 'protecting communities from terrorist violence' or extracting information concerning future terrorist threats for example, do not affect the illegality of TCIDT.[273] While the sacrosanct nature of the prohibition on torture or ill treatment has been questioned in the context of international terrorism (as outlined at Part B), the judicial response constitutes a clear reaffirmation of the absolute nature of the torture prohibition in this context.[274] As one of the most basic human rights pro-

269 *Saadi* v. *Italy*, *supra* note 262, at § 137.

270 Concluding Observations of the Human Rights Committee: Egypt, *supra* note 115, para. 4 (emphasis added). *See also*, *e.g.*, HRC, General Comment No. 20, *supra* note 170. *See also* Committee against Torture, Summary account of the results of the proceedings concerning the inquiry on Egypt, UN Doc. A/51/44, paras. 180 ff., in particular para. 222, and the decision of the ECtHR in *Chahal* v. *United Kingdom* (Appl. No. 22414/93), Judgment, 15 November 1996, *Reports 1996-V*; *Al-Skeini and Ors.* v. *Secretary of State for Defence for the United Kingdom*, App No. 55721/07, ECHR 7 July 2011.

271 *See Chahal* v. *UK*, ibid, § 79; *Saadi* v. *Italy*, *supra* note 262, at § 127; al Skeini v. *UK*, *ibid*.

272 *See Gäfgen* v. *Germany* [GC], No. 22978/05, 2010 ECHR 759, § 107, 1 June 2010.

273 *Ibid.* at para. 79. *See also* paras. 73-4: 'Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and ... its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question'. The Human Rights Committee, in its Concluding observations on Israel, UN Doc. CCPR/C/79/Add. 93 (1998), para. 19, condemns guidelines authorising '"moderate physical pressure" to obtain information considered crucial to the protection of life'.

274 The Israeli Supreme Court has found that torture cannot be authorized under any circumstances. While court controversially open to defence of 'necessity' being available in a criminal case ex post facto, there is no 'necessity' justification for authorizing torture. 'The GSS does not have the authority to "shake" a man, hold him in the "Shabach" position (which includes the combination of various methods, as mentioned in paragraph 30), force him into a "frog crouch" position and deprive him of sleep in a manner other than that which is inherently required by the interrogation. Likewise, we declare that the "necessity defense," found in the Penal Law, cannot serve as a basis of authority for interrogation practices, or for directives to GSS investigators, allowing them to employ interrogation practices of this kind.' *The Public Committee Against Torture in Israel* v. *The State of Israel*, HCJ 5100/94, Israeli Supreme Court, 1999. *See also*, *Gäfgen* v. *Germany*, *supra* note 272.

tections, the application of the prohibition at all times, to all human beings, is, as a matter of law, uncontroversial.

Both torture and inhuman and degrading treatment involve the infliction of a certain threshold of serious physical or mental pain or suffering.[275] Torture is characterised by a particular level of severity[276] and by the additional requirements that it be imposed for a particular purpose[277] and, generally speaking, that it involve a state official, directly or indirectly.[278] Torture, inhuman and degrading treatment have as their distinguishing feature conduct that 'violate[s] the basic principle of humane treatment, particularly the respect for human dignity'.[279]

Whether the severity threshold is met will depend on the situation as a whole and the circumstances of the victim.[280] It is often the accumulation of forms of ill treatment or adverse circumstances that will give rise to a finding that the higher gravity threshold of torture has been met.[281] While there is no list of the treatment that may amount to torture or CIDT, human rights treaties and ample jurisprudence of human rights bodies (and increasingly domestic and international criminal tribunals), illustrate the sort of forms of humiliation, coercive interrogation, sensory deprivation or other extreme conditions of detention, for example, that are likely to fall foul of these obligations. For example, isolation and solitary confinement have at times been found to amount to a violation, notably if sustained for a prolonged period of time,[282] and it is clear that solitary confinement should be exceptional[283]

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275 On physical or mental suffering *see*, *e.g.*, *Loayza Tamayo Case*, IACtHR, Judgment, 17 September 1997.

276 *See*, *e.g.*, the ECHR torture case *Selmouni* v. *France* (Appl. No. 25803/94), Judgment, 28 July 1990, 29 (2000).

277 Article 1 of the CAT, for instance, defines '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*' (emphasis added).

278 Acquiescence would suffice for the state official link under the CAT. Differences between torture as a human rights norm and as a norm of humanitarian law, which does not contain such a requirement, were referred to in the *Kunarac* judgement before the ICTY, paras. 468 ff.

279 *Celibici Judgment*, para. 544; *Prosecutor* v. *Blaskic*, Case No. IT 95-14-T, Judgment, 3 March 2000, paras. 154-5.

280 *Opuz* v. *Turkey*, *supra* note 170, para. 158. '[I]ll-treatment must attain a minimum level of severity … The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.'

281 In *Ilascu* v. *Russia*, *supra* note 61, the ECtHR found that it was the combination of methods of treatment that amounted to torture under Article 3.

282 *See Ramirez Sanchez* v. *France* [GC], no. 59450/00, § 123 and § 136, ECHR 2006-IX. *See also*, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Report to the General Assembly of the UN, UN Doc. A/66/268, 5 August 2011, *generally* and at p. 19-20, available at: http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf. In *Castillo Petruzzi*, the Inter-American Court of Human Rights

and accompanied by procedural safeguards.[284] Prolonged incommunicado detention has itself been held to amount to torture or inhumane treatment by several courts and human rights bodies.[285] Secret detention and enforced disappearance of persons have been considered to themselves constitute torture irrespective of particular treatment of the individual in detention.[286] The application of certain penalties may, in certain circumstances, also give rise to a violation.[287]

International law and practice also gives guidance on the nature of states' positive obligations, and applicable safeguards, in respect of torture and ill-treatment specifically.[288] The state must ensure that through legislative, judicial and administrative action, the prohibition is provided for in law and effective in practice. Thus for example the TCIDT prohibition requires that detainees must not be held incommunicado, but have access to a lawyer, to courts,[289] to medical personnel and examinations,[290] and the right to contact

found that complete exclusion from the outside world for over a month and solitary confinement for one year were cruel and inhuman treatment. *Castillo Petruzzi and others* v. *Peru*, Merits, Judgment of 30 May 1999, IACtHR, *Series C*, No. 52.

283 The authorities must assess all relevant factors before placing an individual in solitary confinement*: A.B.* v. *Russia*, § 104, referring also to *Ramishvili and Kokhreidze* v. *Georgia*, no. 1704/06, § 83, 27 January 2009, and *Onoufriou* v. *Cyprus*, no. 24407/04, § 71, 7 January 2010.

284 These include monitoring and access to judicial review. *See A.B.* v. *Russia*, § 108 and § 110, 14 October 2010. *See* positive obligations and TCIDT below.

285 *Yussef El-Megreisi* v. *Libyan Arab Jamahiriya*, UN Human Rights Committee (HRC) Communication No. 440/1990; UN Doc. CCPR/C/50/D/440/1990, § 5.4, 23 March 1994, available at: http://www.worldcourts.com/hrc/eng/decisions/1994.03.23_El_Megreisi_v_Libya.htm. Ryabikin v. *Russia,* 19 June 2008, Appl. No. 8320/04, para 121; *El Masri* v. *the Former Yugoslav Republic of Macedonia,* [GC], No. 39630/09, 13 December 2012, para. 203; *see also Velásquez Rodríguez* v. *Honduras*, *supra* note 170, §187.

286 Defined in Art. 2 International Convention on Enforced Disappearance; *see* Chapter 10. UN Joint Study, *supra* note 29, §§ 31-35. *See María del Carmen Almeida de Quinteros et al.* v. *Uruguay*, HRC Communication No. 107/1981, UN Doc. CCPR/C/OP/2 at 138 (1990), §14, available at: http://www1.umn.edu/humanrts//undocs/newscans/107-1981.html; also *El-Megreisi* v. *Libya*, §§ 2.1-2.5; *Mojica* v. *Dominican Republic*, HRC Communication No. 449/1991, U.N. Doc. CCPR/C/51/D/449/1991 (1994), 10 August 1994, § 5.7; *Velásquez Rodríguez* v. *Honduras*, *supra* note 170, §187. The Working Group on Enforced or Involuntary Disappearances suggests every disappearance itself constitutes ipso facto torture or ill-treatment*:* UN Doc. E/CN.4/1983/14, § 131

287 *See*, *e.g.*, *Soering* v. *United Kingdom*, 11 Eur. Ct. H.R. 1989; and *Öcalan* v. *Turkey*. On life imprisonment without any possibility of early release raising an issue under Article 3 of the ECHR, *see* the Court's final decision as to admissibility in *Einhorn* v. *France*, Appl. No. 71555/01, Admissibility decision, 16 October 2001.

288 *See*, *e.g.*, CAT General Comment on the Implementation of Article 2 (prevention of acts of torture) by States parties 2007.

289 *See* Principles, *supra* note 338. IACtHR, *Habeas Corpus in Emergency situations; HRC GC 29 and 32*

290 *Akkoc* v. *Turkey*, Appl. No. 22947/93 and 22948/93, Judgment 10 October 2000, ECtHR, § 118; *Sabbeh v. Egypt* ACPHR 2012.

a third party.[291] In addition, officials should be properly trained,[292] and effective systems for monitoring compliance and accountability are required.[293] The duty to investigate effectively, prosecute and punish appropriately, and provide reparation for victims of TCIDT is a key integral aspect of the prohibition,[294] as is the obligation not to transfer persons to a state where there is a risk of ill-treatment ('non-refoulement').[295]

It is well established that the prohibition also includes the duty not to rely on evidence obtained through such prohibited practices in legal proceedings.[296] Numerous decisions in recent years on the national, regional and international levels have affirmed the prohibition on the admissibility of evidence obtained through torture.[297] The extent of any such prohibition of reliance on such information for other (for example operational) purposes is open to question and an area where the law may well be developing through practice.[298]

It is sometimes questioned to what extent different obligations arise in respect of torture as opposed to other forms of ill-treatment, in part as the Convention against Torture makes explicit certain positive obligations in respect of 'torture' specifically.[299] However, the practice of the Committee against Torture and other courts and bodies applying CAT and other human

291 *Carabulea* v. *Romania*, no. 45661/99, § 112, 13 July 2010. *See* Principles 15-19 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (GA Res.43/173, 9 December 1988); *see also* CPT, 12th General Report, the CPT Standards: Substantive sections of the CPT's General Reports, CPT/Inf/E (2002) – Rev. 2003, para. 40, which also refers to the right to have the fact of one's detention notified to a relative or another third party of choice as well as access to a lawyer and a doctor. *See also Sabbah and Ors. v. Egypt*.

292 Article 10 CAT.

293 Article 11 CAT.

294 Article 7 CAT.

295 'Non-refoulemnt' below and 7B.10.

296 CAT, Article 15 specifically so provides, though it is also part of the general positive obligations in respect of TCIDT; *Othman (Abu Qatada)* v. *United Kingdom*, Appl. No. 8139/09, Judgment, 17 January 2012, ECtHR.

297 These include Othman v. *UK, ibid. Sabbeh & Ors*. v. *Egypt*, ACHPR, or the Committee against Torture's *Yousri* Ktiti v. *Morocco*, 5 July 2011. CAT/C/46/D/419/2010; *El-Haski* v. *Belgium*, Appl. No. 649/08, Judgment, 25 September 2012, 35 (2005) 41 EHRR 494. *See also* B.6.2 below on practice in relation to this rule post-9/11.

298 *See* discussion in the context of Extraordinary Rendition in Chapter 10; *see* Special Rapporteur 2009 report on 'High Value Detainees'; Special Rapporteur on Torture, Juan Mendez, identified this as a key issue for further legal development in 2012. *See* discussion of practice in Part B and Chapter 11.

299 Under the CAT, that distinction affects the following duties: to exercise jurisdiction; not to admit torture evidence; to non-refoulement; and to provide redress and compensation. The UK argued this distinction before the ECHR but it was rejected in *Case of Babar Ahmed and Others* v. *The United Kingdom*, Appl. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Judgment, 10 April 2012, ECtHR.

rights provisions have held the same positive obligations to apply to other forms of ill-treatment.[300]

7A.5.3 Liberty and detention

The right to liberty is routinely implicated through counter-terrorism measures ranging from administrative, preventative or pre-trial detention, compulsory questioning of suspects or others, the denial of bail and remand, control orders or other measures.[301] The rights of persons in detention are discussed more fully in the context of the case study on Guantánamo in Chapter 8.[302]

In brief, as a basic starting point, any deprivation of liberty must be lawful. Human rights treaties reveal two distinct approaches to the permissible grounds for detention: the European Convention approach which lists permissible grounds of detention (those of relevance relate to detention pursuant to the criminal process or to deportation), and the broader ICCPR approach which simply prohibits 'arbitrary' detention. Relevant matters, of considerable controversy, include whether – and if so in what circumstances – administrative detention on 'security' grounds, or detention for the purposes of intelligence gathering, can be justified under each of these schemes.[303] Human rights courts and bodies considering the legality of detention often tend to focus on whether procedural safeguards in detention have been met, rather than tackling head on whether it is *per se* unlawful to detain people on 'security' grounds, but absent any intention to deport them or any suspicion of a crime having been or being about to be committed there is reason to doubt the lawfulness of such detention under IHRL.[304]

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300 The ICCPR explicitly extends the three duties not to admit torture evidence; to non-refoulement; and to provide redress and compensation to CIDT as well as to torture. *See*, *e.g.*, HRC General Comment 20. The only obligation that stands out as stemming exclusively from the torture prohibition is the establishment of jurisdiction, which corresponds with the prohibition of torture as a crime against humanity in international criminal law, discussed in Chapter 4A.1 'Crimes, principles of criminal law and jurisdiction'.

301 *See* discussion of practice post-9/11 in Part B.

302 *See, e.g.*, Article 9 ICCPR, Article 5 ECHR and Article 7 ACHR.

303 *See, e.g.*, N. Rodley, 'Detention as a Response to Terrorism', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), p. 472.

304 The Working group on arbitrary detention suggests that derogation would be necessary to avoid arbitrariness. The Human Rights Committee has tended to focus on critiquing the lack of safeguards than stating that administrative internment is inherently unlawful under art 9 ICCPR. In light of the ECHR's more restrictive approach, it would appear from the normal wording of that security detention would be inconsistent with Art 5, and therefore require derogation, though in practice the ECtHR has generally also focused on the illegality through lack of safeguards: *see, e.g.*, *A & Others*, *supra* note 131, paras. 140, 150, and 154. Cf Rodley above.

In respect of the detention of persons suspected of involvement in terrorism pursuant to a criminal law framework, there is a right to 'trial within a reasonable time or to release' pending trial.[305] While human rights bodies have shown themselves willing to afford states certain flexibility, for example to detain persons pre-trial for longer than would normally be permitted, in response to the challenges of combating terrorism, this is not unlimited; detention pending trial should not be the norm but the exception, where necessary for example to protect society and the investigation of the offence.[306] Automatic resort to pre-trial detention, absent such a determination of need on a case-a-case basis, may conflict with the right to liberty and jeopardise the underlying presumption of innocence.[307]

In line with the fundamental right to liberty, detention is an exception, which should be strictly construed. Even where there may be lawful grounds for detention (such as pursuant to lawful deportation for example), detention should only be used where necessary and less onerous alternatives are not available.[308]

For any type of detention, certain procedural safeguards must be met. While set out in more detail elsewhere, these include the prohibition on incommunicado detention, access to a lawyer, to judicial review of the lawfulness of detention and to have a meaningful opportunity to challenge such lawfulness (implying certain basic due process guarantees), as well as ensuring effective training of personnel and monitoring of places of detention.[309] Courts have often called states to account on the necessity of detaining without judicial oversight.[310]

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305 Article 9(3) ICCPR, Article 7(5) ACHR and 5(3) ECHR.

306 '[P]re-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.' Rule 6.1, United Nations Standard Minimum Rules for Non-Custodial Measures, G.A. Res. 45/110, annex, 45 U.N. GAOR Supp. (No. 49A), 14 December 1990.

307 Pre-trial detention – denial of bail or release pending trial – is common in terrorism cases and sometimes legislatively mandated, as noted in Chapter 4.

308 Office of the United Nations High Commissioner for Refugees, UNHCR's Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999; *Saadi v. the United Kingdom* [GC], no. 13229/03, ECHR 2008 at para. 74; Directive 2008/115 of the European Parliament and of the Council of 18 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, 2008 O.J. (L 348) 98See *A v. Australia*, Communication no. 560/1993 para 9.2, U.N. Doc. CCPR/C/59/D/560/1993 (1997); Report of the Special Rapporteur on the Human Rights of Migrants A/HRC/20/24, 2 April 2012, at para 9.

309 These safeguards are discussed in more detail in Chapter 8, 8B.4. *See, e.g.* UN Joint Study, *supra* note 29.

310 The ECHR showed the flexibility is not limitless and even in situations where the individual's activities were linked to a terrorist threat 20 days detention without judicial oversight was held unnecessary and a violation of Art. 5. *Sarikayaa* v. *Turkey*, Appl. No. 36115/97, Judgment, 22 April 2004, ECtHR. *See also Gaforov* v. *Russia*, Appl. No. 25404/09, Judgment, 21 October 2010, ECtHR.

Particular flexibility arises in the event of national emergency leading to derogation: the right to liberty is not a non-derogable right as such, and certain states have derogated from human rights obligations in order to detain persons perceived as posing a terrorist threat, other than pursuant to normal criminal procedure. In particular, derogation may foreshadow 'preventive' or 'administrative' detention, which may otherwise be inconsistent with the lawful bases for detention anticipated in human rights treaties.[311] Detention would, however, still need to be necessary and proportionate to the emergency as explained above.[312] Moreover, as again discussed in the following chapter, certain core aspects of the right to liberty remain protected at all times. Detention must not be arbitrary and to protect other non-derogable rights – judicial guarantees and the prohibition on 'unacknowledged detention' are themselves non-derogable.[313] Indeed the prohibition on prolonged arbitrary deprivation of liberty has been identified as a *jus cogens* norm.[314]

7A.5.4 Fair trial guarantees

Article 14 of the ICCPR, like its regional counterparts, sets out extensive fair trial guarantees that are often under strain in the context of alleged terrorist offences.[315] The right guarantees a fair and public hearing before an independent and impartial tribunal.[316] The law provides what might be described as parameters or benchmarks for determining fair trial, not rigid prescriptions on rules of procedure and evidence. Often a careful evaluation of all the facts and circumstances is required to assess whether in the particular circumstances the totality of the process met minimum standards of fairness.

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311 In the UK for example, various challenges arose from the procedure adopted for detaining persons in relation to the terrorist threat in Northern Ireland, which found their way to the European Court of Human Rights. *McVeigh, O'Neill and Evans* v. *United Kingdom*, Appl. Nos. 8022/77, 8025/77, 8027/77, Report of the Commission, 18 March 1981, 25 DR 15; *Murray* v. *United Kingdom*, Judgment of 28 October 1994, *Series A*, No. 300. Controversial measures post-9/11 are highlighted in section B.

312 *A & Others* v. *Secretary of State for the Home Department*, [2004] UKHL 56 (*A & Ors* (*Derogation*)). *See also* Chapter 8.

313 HRC, General Comment No. 29, *supra* note 30, paras. 13 and 15. *See also Judicial Guarantees in States of Emergency*, Inter-American Court of Human Rights Advisory Opinion (OC-9/87) and *Habeas Corpus in Emergency Situations, (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87 of 30 January 1987, IACtHR, *Series A*, No. 8 (1987).

314 HRC, General Comment No. 29, *supra* note 24, para. 11; Human Rights Council, 22d sess., Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/22/44, 24 December 2012, §§ 37-75, T. Meron, "On a Hierarchy of International Human Rights", 80 (1986) AJIL 1.

315 On the scope and application of these rights, like those relating to detention, *see also* Chapter 8.

316 *See*, *e.g.*, Article 14(1) ICCPR.

Special tribunals, such as military tribunals, have on numerous occasions been found by human rights bodies not to meet the 'independent and impartial tribunal' threshold.[317] In particular, they have often been criticised as inappropriate for the trial of criminal offences involving civilian suspects, and in certain circumstances for exercising jurisdiction over certain types of serious human rights violations, whether the suspects are military or civilian.[318] Commonly, resort to special courts also raises questions as to compatibility with specific fair trial guarantees, such as access to counsel of choice and to evidence;[319] indeed the Human Rights Committee recognised that often 'the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice'.[320]

317 *See Incal* v. *Turkey*, Appl. No. 22678/93, Judgment of 9 June 1998 (2000) 29 EHRR 449. *Polay Campos* v. *Peru* (Comm. No. 577/1994), Views of 9 January 1998, UN Doc. CCPR/C/61/D/577/1994, where the Committee criticised the use of 'faceless judges' to judge persons accused of terrorism, in part on the basis that '[i]n a system of trial by "faceless judges", neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established *ad hoc*, may comprise serving members of the armed forces. [S]uch a system also fails to safeguard the presumption of innocence'. For more examples, *see Grieves* v. *The United Kingdom*, Appl. No. 57067/00, Judgment, 16 December 2003, ECtHR; *Sadak et al*. v. *Turkey*, Appl. Nos. 29900/96, 29901/96, 29902/96 and 29903/96, Judgment 17 July 2001, ECtHR; and *Öcalan* v. *Turkey*, *supra* note 74. *See also* UN Commission of Human Rights Resolution 1989/32, which recommends against 'ad hoc tribunals ... to displace jurisdiction properly vested in the courts'.

318 Similar concerns appear across human rights systems. From the African system: *e.g. Sabbah* v. *Egypt*, *supra* note 170; Comm. No. 223/98 (2000) (Sierra Leone), and 'Resolution on the Right to Fair Trial and Legal Aid in Africa', ACHPR 15 November 1999, 60. From the European system: *Othman* v. *UK*, *supra* note 297; *Demirel* v. *Turkey*, Appl. No. 39324/98, Judgment of 28 January 2003, paras. 68-71; and *Cyprus* v. *Turkey*, *supra* note 60. For the Human Rights Committee: *e.g.*, Concluding observations: Slovakia, UN Doc. CCPR/C/79/Add.79 (1997), para. 20, recommending that law be changed to 'prohibit the trial of civilians by military tribunals in any circumstances'; Concluding observations: Lebanon, UN Doc. CCPR/C/79/Add.78 (1997), para. 14, recommending transfer of 'cases concerning civilians and all cases concerning the violation of human rights by members of the military, to the ordinary courts'. From the Inter-American system: *e.g.*, *First Report on the Situation of Human Rights in Chile*, OAS Doc. OEA/Ser.L/V/II.34, doc. 21 (1974)); Colombia (e.g., *Report on the Situation of Human Rights in the Republic of Colombia*, OAS Doc. OEA/Ser.L/V/II.53, doc. 22 (1981)); Argentina (e.g., *Report on the Situation of Human Rights in Argentina*, OAS Doc. OEA/Ser.L/V/II.49, doc. 19 (1980)); *Lino César Oviedo* v. *Paraguay* (Case No. 12.013), Report No. 88/99, 27 September 1999, para. 30. *See also* Inter-American Convention on Forced Disappearance of Persons, Article 9.The UN Working Group on Arbitrary Detention considered that military courts should not be used, *inter alia*, to try civilians, if the 'victims included civilians' or the crimes 'involved risk of jeopardising a democratic regime', UN Doc. E.CN/4/1999/63, 18 December 1998, para. 80. *See also* the Report on 'Administration of justice through military tribunals and other exceptional jurisdictions', prepared by the Special Rapporteur, Louis Joinet (UN Doc. E/CN.4/Sub.2/2002/4).

319 *See*, *e.g.*, *Sabbah* v. *Egypt*, *supra* note 170. *See generally*, D.A. Mundis, 'Agora: Military Commissions: The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts', 96 (2002) AJIL 320. *See* specific guarantees referred to below.

320 HRC, General Comment No. 13: Equality before the Law (Article 14) [1984], UN Doc. HRI/GEN/1/Rev.6 (2003) at 135, para. 4.

Moreover, it has been suggested that even where 'military justice' *is* appropriate, it should not impose the death penalty in any circumstances.[321]

The fair trial right involves a trial in 'public', although this is not absolute and may be limited in exceptional circumstances[322] where there is pressing need to do so, for example due to witness and victim protection.[323] As restrictions on public trials are an exception, and 'the publicity of hearings is an important safeguard in the interest of the individual and of society at large',[324] the need to hold criminal trials completely *in camera* would be difficult to justify.[325]

The accused has the absolute right to be presumed innocent until proven guilty,[326] and reversing burdens of proof, or public statements by state officials relating to suspected terrorists, may jeopardise this aspect of a fair trial.[327] International fair trial provisions also specifically provide for certain specific 'minimum' due process guarantees that are detailed in, for example, Article 14(3) of the ICCPR. The right to be informed in detail of the nature and cause of the charges, and the rights to prepare one's defence and to cross-examine witnesses, make the use of, for example, secret evidence and anonymous witnesses (where witness identity is withheld from the accused), highly controversial.[328] The rights to consult counsel of choice on a confidential basis,

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321 Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, 18 December 1998, para. 80.

322 That trials in public should be restricted only in 'exceptional circumstances' is specified in HRC, General Comment No. 13, para. 6. Article 14 ICCPR anticipates that exclusion of the press or public may be permissible 'for reason of morals, public order or national security in a democratic society, or when the interest of the private lives of parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

323 Article 14(1) specifies certain exceptional circumstances where the press and public may be excluded. On permissible restrictions under the ECHR, *see P.G. and J.H.* v. *United Kingdom*, Appl. No. 44787/98, Judgment of 25 September 2001, ECtHR, *Reports 2001-IX*, para. 29; *Lamanna* v. *Austria*, Appl. No. 28923/95, Judgment of 10 July 2001; *B. and P.* v. *United Kingdom*, Appl. Nos. 36337/97 and 35974/97, Judgment of 24 April 2001; *Fejde* v. *Sweden*, Appl. No. 12631/87, Judgment of 29 October 1991, ECtHR, *Series A*, No. 212 and, at the Human Rights Committee, *Kavanagh* v. *Ireland* (Comm. No. 819/98), Views of 4 April 2001, UN Doc. CCPR/C/71/D/819/1998.

324 HRC, General Comment No. 13, para. 6.

325 *See* Warbrick, 'Principles', *supra* note 246, p. 302.

326 Article 14(2) ICCPR.

327 *Allenet de Ribemont* v. *France*, Appl. No. 15175/89, Judgment of 7 August 1996, ECtHR, *Series A*, No. 308. Andrew Ashworth (*2006*), Four threats to the presumption of innocence. The International Journal of Evidence & Proof: July 2006, Vol. 10, No. 4, pp. 241-278.

328 *See* Part B. For standards in the context of the ICC Statute and Rules, *see* Article 68(5) of the Statute and Rule 81(4) suggesting that complete anonymity has been ruled out from ICC proceedings, while other measures to protect the safety and well-being of witnesses can and should be taken, and do not raise doubts as to incompatibility with the rights of the accused. *See* F. Guariglia, 'The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of Individual Criminal Responsibility', in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International*

to have time and facilities for the preparation of a defence, to an interpreter, not to be compelled to testify against oneself, and to lodge an appeal, are all further specifically provided for in these fair trial human rights provisions.[329] There is no international human right to trial by jury, although this may be provided for in national law, depending on the nature of the legal system.

The right to fair trial covers not only criminal processes but also the right to access a court, and to have basic due process rights, in the determination of one's civil rights and obligations. This includes the right to challenge the range of counter-terrorism measures – from administrative detention to listing of individuals or organisations to freezing of assets and beyond – that restrict liberty, private life, association, property or other rights on security grounds. The question is often whether the procedures for such challenge, taken as a whole, guarantee the requisite meaningful opportunity to confront the case against you and to challenge lawfulness.[330] In addition to practices, which offer no opportunity to challenge at all,[331] difficult issues often arise in relation to measures taken in the name of preserving security in such proceedings, such as withholding information or evidence from the affected person or limiting access to counsel, and their compatibility with the overall fairness test.[332]

The provisions relating to fair trial, like those rights relating to liberty and detention, permit derogation. However, the Human Rights Committee has noted that the right to an independent and impartial tribunal is 'an absolute right that is not subject to any exception'[333] and that no circumstances justify 'deviating from fundamental principles of fair trial, including the presumption of innocence'.[334] Even in emergency, 'only a court of law may try and convict a person for a criminal offence'.[335] Other fundamental aspects of the guaran-

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Criminal Court: A Commentary (Oxford: Oxford University Press, 2002), pp. 1111 ff., at pp. 1125-6. For a different view *see* C. Kreß, 'Witnesses in Proceedings Before the International Criminal Court', in H. Fischer, C. Kreß and S.R. Lüder (eds.), *International and National Prosecution of Crimes under International Law* (Berlin, 2001), pp. 375 ff.

329 *See* Chapter 8.

330 These matters have been subject to considerable litigation post-9/11 in relation to detention. *See* part B below and Chapter 10 'Exploring the Role of the Courts: Litigating the War on Terror'.

331 The lack of challenge to UN terrorism lists is discussed in Part B.

332 *See* discussion of issues related to disclosure of evidence, burden of proof and procedural safeguards at 7B73. Cases such as A&Ors, e.g. para 218, sought to ensure a balance between disclosure and overall fairness, ensuring the individual has enough information to make challenge effective, with the protection of security.

333 *Miguel González del Rio* v. *Peru* (Comm. No. 263/1987), Decision of 28 October 1992, UN Doc CCPR/C/46/263/1987.

334 HRC, General Comment No. 29, *supra* note 24, para. 16 and General Comment No. 32 paras. 6 and 19. Core fair trial issues are discussed more fully at Chapter 8, in particular 8B.4.5.

335 *See also*, para. 11 on link between basic fair trial rights which can never be dispensed with given link to torture and other explicitly non-derogable rights. *See* General Comment No. 32, *supra* note 123.

tees contained in the fair trial provisions are likely to be considered a *sine qua non* of fair trial that thus remain applicable at all times, such as the presumption of innocence or right of a person accused of serious offences to know the charges against him or her and to independent legal advice. In many cases however the appropriate assessment will not be the presence of particular safeguards in isolation but rather whether the totality of the proceedings amount, in the circumstances, to a fair trial.[336]

Finally, it should be noted that in determining international standards relating to the rights of suspects and accused persons, regard may also be had to the developing area of international criminal law, which generally reflects, and may at times exceed, the minimum guarantees in human rights treaties. Examples might be the right to remain silent without any adverse inference being drawn from the same, and the prohibition on the admissibility of evidence illegally obtained, which are both provided for unequivocally in the ICC Statute.[337] While it would go too far to assert that states are legally bound to meet ICC standards in domestic proceedings, the standards that were ultimately approved by 120 states for ICC purposes must lay some claim to being relevant to informing the interpretation of human rights treaties, and to themselves embodying accepted fair trial standards.[338]

7A.5.5 Certainty and non-retroactivity in criminal law

The requirement of legality and certainty in criminal law enshrined in Article 15 of the ICCPR[339] and other instruments[340] is often referred to as the funda-

336 *See McCallum* v. *United Kingdom*, Appl. No. 9511/81, Judgment of 30 August 1990, *Series A*, No. 183.

337 Articles 55(1)(a), (2)(b), 67(1)(g) and 69(7). The European Court of Human Rights by contrast has taken a more flexible approach, finding that there is no rule prohibiting the admissibility of, for example, interceptions in violation of Convention rules, and that inferences may be drawn from the decision of the accused to remain silent, provided the overall fairness of proceedings is maintained. On the right to remain silent *see Murray (John)* v. *United Kingdom*, Appl. No. 14310/88, Judgment of 7 April 1993, ECtHR, *Series A*, No. 300-A. On the admissibility of evidence, *see Austria* v. *Italy* Appl. No. 788/604, 11 January 1961, 4 *Yearbook of the European Convention of Human Rights* 116 at 140.

338 In total, 120 states voted in favour of the Statute, with only seven against. *See* www.un.org/icc/index.htm.

339 'No one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.' ICCPR, Article 15(1).

340 *See* Universal Declaration of Human Rights, Article 11(2): Article 7(1) ECHR, Article 7(2) African Charter and Article 9 ACHR; *see also* Articles 22 (*Nullum crimen sine lege*) and 23 (*Nulla poena sine lege*) of the ICC Statute.

mental principle *nullum crimen sine lege*. It is one of the rights in respect of which human rights treaties explicitly proscribe derogation.[341] The European Court of Human Rights has noted that the relevant provision 'occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency'.[342] Yet as will be seen they are among the rights most often violated in the name of counter-terrorism.

These provisions prohibit prosecution for conduct that was not criminal at the time carried out. Hence the Human Rights Committee has found violations of, *inter alia*, Article 15 in respect of convictions for terrorist offences under legislation which did not exist at the time of the alleged offences, even where the law in force at that time criminalised other relevant offences to which similar penalties applied.[343] The related provisions addressing the principle *nulla poene sine lege* seek to ensure also that, where the conduct was criminal, a heavier penalty cannot be imposed than the one in force at the time of the commission of the offence. The temptation to increase penalties retrospectively as policy imperatives shift, for example in the wake of a terrorist attack, must therefore be resisted.[344]

The provisions of Article 15 and comparable regional provisions are not however confined to prohibiting the retrospective application of the criminal law, but enshrine more generally the requirements of legal certainty in respect of criminal law. Specifically, offences must be clearly defined in law in a way that is both accessible and foreseeable; it follows that, as only the law can define a crime and prescribe a penalty, criminal law must not be extensively construed to an accused's detriment, for instance by analogy.[345] Terrorist legislation has not infrequently been subject to criticism as falling foul of the requirements of legality, enshrined in Article 15, as a result of ill-defined, overbroad definitions of terrorist offences in domestic law.[346]

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341 Article 4, ICCPR, Article 15, ECHR and Article 27, ACHR all expressly proscribe derogation from this right.

342 *See S.W.* v. *United Kingdom* and *C.R.* v. *United Kingdom*, Judgments of 22 November 1995, *Series A*, No 335-B and 335-C, cited in *Streletz, Kessler and Krenz* v. *Germany*, Judgment of 22 March 2001, 33 EHRR 31, para. 50. The passage continues: 'It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.'

343 *Gómez Casafranca* v. *Peru* (Comm. No. 981/2001), Views of 19 September 2003, UN Doc. CCPR/C/78/D/981/2001.

344 *See Welch* v. *United Kingdom*, Judgment of 9 February 1995, ECtHR, cited in McBride, 'Study on Principles', *supra* note 105, para. 49.

345 For a reasoned discussion of these requirements, which have been set down in jurisprudence for some time, *see Kokkinanis* v. *Greece*, Appl. No. 14307/88, Judgment of 25 May 1993, ECtHR, *Series A*, No 260-A.

346 *See*, *e.g.*, Concluding Observations of the Human Rights Committee: Egypt, *supra* note 115, para. 8; Concluding observations on the recent Israeli report (UN Doc. CCPR/CO/78/ISR (2003)) and 7B.4 of this chapter.

Notably, however, Article 15 expressly does not apply to preclude the prosecution of conduct that was an offence under international (but not national) law at the time committed.[347] Thus this rule does not prohibit the prosecution of, for example serious terrorist attacks that amount to crimes against humanity, or other crimes under international law.[348] As terrorism is not clearly defined in international law, the ability to prosecute for terrorism as such would depend on sufficient specificity and clarity in domestic law to meet the requirements of *nullum crimen sine lege*.[349]

7A.5.6 Freedom of expression, association and assembly

The human rights to free expression, association and assembly are often called into question in the presence of a perceived terrorist threat, whether by prohibiting expression of opinion or dissent, or proscribing certain organisations or forms of collective activity. Human rights law emphasises the importance of these rights, not only in themselves, but because they are essential to a functioning democratic system of government, which may itself be put under strain by terrorist and counter-terrorist measures.[350]

These rights fall within the limitation or 'claw back clauses' referred to above, which explicitly allow for their restriction, provided the three-fold criteria are met: the restriction is provided for in clear and accessible law, pursues a specified legitimate aim[351] and is strictly necessary and proportionate.[352] These criteria must be strictly applied: the choice is not 'between two

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347 Article 15(2) ICCPR provides that: 'Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations'; Article 7(2) of the ECHR provides in similar terms: 'This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.' Prosecution on the basis of offences enshrined in international criminal law has been found by the ICTY, e.g., not to breach the *nullum crimen* rules.

348 *See* Chapter 4 regarding crimes in international law committed on September 11.

349 *See* discussion on the contrary view of the Lebanon tribunal that terrorism is a crime under customary law in Chapter 2. *See also* B. Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', 24 *Leiden J. of Int'l L.* 2011. On the human rights implications of national anti-terrorism criminal laws, *see* Chapter 4.

350 *See*, *e.g.*, Draft General Comment 19, 2010, CCPR/C/GC/34/CRP.5

351 According to Article 19 ICCPR these are national security, public order, public health or morals.

352 The first requirement of being 'provided for in clear and accessible law' meets with the difficulty of ill-defined concepts of terrorism. The second – the legitimacy of the aim of combating terrorism – is less likely *per se* to give rise to controversy. The third – the necessity of the measures, covering the ability of the measures adopted to meet that aim and the reasonableness and proportionality of the measures taken in response – provides

conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted'.[353]

The freedoms of information and expression are described as 'cornerstones in any free and democratic society',[354] and political speech is broadly considered deserving of particular protection.[355] Yet human rights jurisprudence shows how the terrorism label has long been invoked against political opponents,[356] or to suppress a free press.[357] Freedom of expression applies to those ideas that offend, shock or disturb, but 'where such remarks incite to violence … the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression'.[358] Likewise, hate speech would not be protected under the Convention.[359] However, care is due in preserving the line between virulent (or even offensive) criticism

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the most common basis of successful challenge to a state's justification for restrictions.

353 *Sunday Times* v. *United Kingdom (No. 1)*, 29 March 1979, ECtHR, *Series A*, No. 30, para. 65.

354 *Ibid*. *See also*, *e.g.*, *Aduayom et al*. v. *Togo* (Comm. No. 422-24/1990), para. 7.4. *See also*, *Media Rights Agenda et al.* v. *Nigeria*, ACHPR, Communication Nos. 105/93, 128/94, 130/94, 152/96, para. 52 and *Lingens* v. *Austria*, Appl. No. 9815/82, Judgment of 8 July 1986, ECtHR, *Series A*, No. 103, para. 41: 'freedom of expression ... constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'.

355 *See* the decision of the ECtHR in *Castells* v. *Spain*, Appl. No. 11798/85, Judgment of 23 April 1992, *Series A*, No. 236. On political speech, *see also*: ECtHR, *Sener* v. *Turkey*, Appl. No. 26680/95, Judgment of 18 July 2000; Human Rights Committee, *Keun-Tae Kim* v. *Korea* (Comm. No. 574/1994), Views of 4 January 1999, UN Doc. CCPR/C/64/D/574/1994, para. 12.2; *Lingens* v. *Austria* and ACHPR, *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa* case, Comm. No. 48/90, 50/91, 52/91, 89/93, 13th Annual Activity Report 1999-2000.

356 *See*, *e.g.*, *Kenneth Good* v. *Botswana* cited in Chapter 11 as an example of the use of security language to justify violations against academic freedom in a context entirely unrelated to terrorism.

357 The Court held that the imposition of a prison sentence for a press offence would be compatible with journalists' freedom of expression only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence.

358 *Sürek v. Turkey (no. 1)* [GC] Appl. 26682/95, § 62, ECHR 1999-IV; also in *Halis Doğan* v. *Turkey (no. 2)*, Appl. No. 71984/01, 25 July 2006, the ECtHR considered that the reasons given by the Turkish courts could not be considered sufficient in themselves to justify the interference with the applicants' right to freedom of expression. Although some particularly acerbic passages in the articles painted an extremely negative picture of the Turkish State, they did not exhort the use of violence or incite armed resistance or rebellion, and they did not constitute hate-speech. It found the applicants' convictions to be disproportionate to the aims pursued. *See also Fatullayev* v. *Azerbaijan*, Appl. No. 40984/07, Judgment 22 April 2010; *Sener* v. *Turkey*, *supra* note 356; *see also Ozgur Gundem* v. *Turkey*, Appl. No. 23144/93, Judgment of 16 March 2000, ECtHR, *Reports 2000-III* and *Surek* v. *Turkey* (No. 2) (Appl. No. 24), Judgment of 8 July 1999, where there was no violation given direct incitement to violence.

359 *Ibid*. *Halis Doğan* v. *Turkey (no. 2)*, Appl. No. 71984/01, 25 July 2006; *Gündüz v. Turkey*, no. 35071/97, § 41, ECHR 2003-XI.

on the one hand and hate speech and incitement on the other.[360] The international expert report, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, suggests that expression may be punished as a threat to national security only where intended to incite imminent violence, likely to incite such violence and where there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.[361]

The right to association is closely linked with free expression, and plays an important role in the democratic, cultural and social life of a state, but is often under threat where the fear of terrorism prevails, and states seek for example to ban organisations believed to support terrorism or to prosecute certain forms of association of support. This right does not prevent organisations that promote violence from being dissolved, provided there is clear evidence[362] and judicial control.[363] Any limitation on this right must however be necessary to achieve a legitimate purpose and proportionate to those aims and as with other rights, this framework must be protected with appropriate safeguards against abuse. Restrictions on assembly, in turn, are clearly contemplated where there are genuine risks to life, health or safety, but efforts should be made to accommodate alternative arrangements that meet those concerns while respecting the essence of the right.[364]

In time of emergency, as these rights are derogable, the state may rely on a valid derogation, provided again it meets the conditions and constraints already discussed above, including, again, the requirement that the particular measures restricting rights be necessary in response to the emergency and proportionate to it.

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360 *See Incal* v. *Turkey*, *supra* note 318; *Aksoy* v. *Turkey*, *supra* note 113; *Thorgeirson* v. *Iceland*, Appl. No. 13778/88, Judgment of 25 June 1992, ECtHR, *Series A*, No. 239, para. 63: '[F]reedom of expression ... is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as matter of indifference, but also to those that offend, shock or disturb'. *See also* McBride, 'Study on Principles', *supra* note 105, para. 59. *Surek and Ozdemir* v. *Turkey*, Appl. Nos. 23927/94 and 24277/94, Judgment of 8 July 1999, para. 61. *See also Erdogdu* v. *Turkey*, Appl. No. 25723/94, Judgment of 15 June 2000, ECtHR, *Reports 2000-VI* and *Ceylan* v. *Turkey*, Appl. No. 23556/94, Judgment of 8 July 1999, *Reports 1999-IV*. The Court contrasted such messages with 'texts [which] taken as a whole ... incite to violence or hatred'.

361 *See* The Johannesburg Principles, *supra* note 12. These 'soft laws' elaborate international treaty standards in the field of free expression. *See also* Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 7 (1985) HRQ 3.

362 *United Communist Party and Others* v. *Turkey*, Appl. No. 19392/92, Judgment of 30 January 1998, ECtHR, *Reports 1998-I*, where dissolution was based on assumptions not facts, in violation of the right to association.

363 *See*, *e.g.*, *Refah Partisi (Welfare Party) and Others* v. *Turkey*, Appl. Nos. 41340/98; 41342/98; 41343/98; 41344/98), Judgment of 13 February 2003.

364 *See*, *e.g.*, *Cisse* v. *France*, Appl. No. 51346/99, Judgment of 9 April 2002, ECtHR, *Reports 2002-III.*

7A.5.7 Right to privacy

The right to privacy, or to 'private life,' protected in international legal instruments,[365] is often implicated by counter-terrorist practices. This arises most obviously in relation to search and surveillance, data collection and storage, and profiling, but also through myriad practices that label individuals as terrorists or restrict liberty, movement or property for example and have a serious impact on private lives, reputations and families in so doing. The right embraces the basic notion of autonomy, the right to have a private sphere without state interference, as well as a broader right to physical, psychological, and moral integrity, and to develop one's identity and personality, alone and through relations with others and with society more broadly.[366]

In practice, an effective counter-terrorism policy will necessarily restrict privacy to a degree. But the legal framework requires that any measure, which has an impact on a person's privacy, must be prescribed by law; thus any search, surveillance or collection of data about a person for example must be authorized by a law, which is just, predictable and precise as to the circumstances in which the interference is permitted.[367] Restrictions on private life must be justified as necessary and proportionate to a legitimate aim, and they must be implemented in a non-discriminatory manner, such that difference of treatment based to a decisive extent on a person's ethnic origin will not be 'objectively justified'.[368] As with other rights, restrictions – through surveillance or otherwise – require appropriate safeguards including the sort of independent supervision best provided through judicial oversight.[369]

One area where the law remains less developed relates to data protection. The need for protection of personal information from unauthorised access or illegitimate purpose is however increasingly recognised,[370] including in the

365 *See* Article 17 (1) of ICCPR, Article 8 (2) ECHR and article 11 (2) ACHR. It is not specifically protected in the African Charter.

366 *See X and Y* v. *the Netherlands*, § 22; *S. and Marper* v. *the United Kingdom* [GC], Appl. Nos. 30562/04 and 30566/04, § 66, 4 December 2008.

367 UN High Commissioner for HR, Fact Sheet 32, p. 45; *Rotaru* v. *Romania*, Appl. No. 28341/95, 4 May 2000, paras. 57-58.

368 *Timishev* v. *Russia*, Appl. No. 55762/00 and 55974/00, 13 Dec. 2005, paras. 54-57. *See* discussion on Profiling in Part B.

369 *See*, *e.g.*, *Klass and Others* v. *Germany*, Appl. No. 15473/89, 22 September 1993, para. 55, concerning safeguards regarding surveillance.

370 States must take effective measures to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the International Covenant on Civil and Political Rights. HRC, General Comment No. 16 (1988); *see also Rotaru* v. *Romania*, *supra* note 367.

EU Charter of Fundamental Rights[371] or the Council of Europe's Guidelines on human rights and the fight against terrorism.[372] In principle the individual should be aware of personal information retained by the state, which should be processed or shared only for specified lawful purposes, and data protection should be supervised by an independent external body as part of the safeguards against abuse.[373]

7A.5.8 Property rights

Certain human rights provisions also enshrine the right to property.[374] Undoubtedly, the state may limit the enjoyment of property, and ultimately may confiscate it, provided certain safeguards are in place. Substantively, conditions for the confiscation of property should be provided for in law, and there should be a fair process for determining whether those conditions have been met in any particular case. The right to a fair hearing in determining one's civil rights and obligations applies to the confiscation of property.[375] Where, for example, there has been a criminal conviction involving a finding that property was obtained through unlawful means involving links with terrorism, the legitimacy of confiscation is unlikely to be controversial.[376] However, confiscation pursuant to sanctions or intelligence information, or assumptions, as to the source of property, absent a fair procedure wherein the persons affected are given an opportunity to be heard, may fall foul of the obligations

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371 Charter of Fundamental Rights of the European Union, Doc. No. C 364/01, 18 December 2000, Art. 8.

372 'Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere with the respect for private life only if such collection and processing, in particular: i(i) Are governed by appropriate provisions of domestic law; i(ii) Are proportionate to the aim for which the collection and the processing were fores*ee*n; (iii) May be subject to supervision by an external independent authority.' Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies, available at: http://www.echr.coe.int/NR/rdonlyres /176C046F-C0E6-423C-A039-F66D90CC6031/0/LignesDirectrices_EN.pdf.

373 Report of the Special Rapporteur on Terrorism on the Right to Privacy, UN Doc. A/HRC/13/37, 28 December 2009.

374 Article 1, Protocol No. 1 to the ECHR; Article 14 African Charter; and Article 21, ACHR. There is no such right in the ICCPR.

375 Article 6(1) ECHR, for example, provides for the right to a fair hearing in the determination of civil rights, which applies to applicable property rights. *Stran Greek Refineries and Statis Andreadis* v. *Greece*, Appl. No. 13427/87, Judgment of 9 December 1994, ECtHR, *Series A*, No. 301-B, para. 72

376 It is noted that the SC Res. 1373 (2001), 28 September 2001, UN Doc. S/RES/1373 (2001) calls on states to taking wide-ranging measures to seize property, without specifying procedures and the legitimacy of measures taken may depend on the steps taken by the state itself. *See Phillips* v. *United Kingdom*, Appl. No. 41087/98, Judgment of 5 July 2001, *Reports 2001-VII,* paras. 35 and 53.

of the state in respect of property rights (as well as other violations).[377] Again, this right may be derogated from in the event of a national emergency, provided the derogation and the measures taken meet the tests, notably relating to necessity and proportionality, set out above.

7A.5.9 Economic, social and cultural rights

While the rights most obviously implicated in the 'war on terror' are civil and political rights, such as freedom from torture or the right to liberty, a range of economic and social rights (ESRs) are also affected, directly and indirectly.[378] While the impact of counter-terrorism on ESRs is underexplored,[379] the ICJ's 'Wall' advisory opinion provides an example of judicial recognition of violations of ESRs resulting from Israel's construction of the 'security' fence under the pretext of combating terrorism.[380] Another obvious example, where the right to health is directly implicated, is in the context of terrorism-related incommunicado detentions and interrogation, while the economic implications of those affected by sanctions regimes also clearly implicates a range of ESRs. Other examples include the branding of union organisers or social movements under the terrorism label, with varying effects on ESR advocacy and rights protection.[381] In addition, despite the historic neglect it is also increasingly recognised that respect for ESRs are a significant element in addressing so-called 'root causes' of terrorism, or in the language of the UN Global Strategy, in preventing the conditions conducive to the spread of terrorism.[382] International law obliges states to respect, protect and fulfil the economic and social rights of those subject to its jurisdiction. The nature of states' obligations varies and some rights relate to a 'core minimum' that states are obliged to guarantee immediately, while other rights require 'progressive realization.' While their

377 For example, it may potentially infringe rights relating to the right to be heard and the presumption of innocence, where the presumption of innocence was not violated as there had been a criminal conviction. *Ibid*.

378 The systematic denial of economic, social and cultural rights is often cited as one of the root causes of international terrorism: on the relationship between respect for these rights and terrorism. *See, e.g.*, A. Lieven, 'The Roots of Terrorism, and a Strategy Against It', 68 (2001) *Prospect Magazine* 13.

379 *See, e.g.*, Report of Special Rapporteur on Human Rights and Counter-terrorism, UN Doc. A/HRC/6/17, 21 November 2007, paras. 33-66.

380 *'The Wall'*, Advisory Opinion, *supra* note 47 at para. 111.

381 *See* Part B, below, for concrete examples.

382 UN GA Res. 60/288, UN Global Counter-Terrorism Strategy. There is similar recognition elsewhere of the 'social, economic and political factors … which engender conditions in which organisations can recruit and win support'. OSCE Charter on Preventing and Combating Terrorism, adopted by the Ministerial Council of the Organization for Security and Co-operation in Europe on 7 December 2002 (hereinafter 'OSCE Charter on Terrorism'), para 9.

precise content may be less well developed, ESR obligations on states are no less binding than their civil and political counterparts.

7A.5.10 Transfer: Extradition, deportation and non-refoulement

The increasingly internationalised nature of terrorism has been the catalyst to a huge increase in the number of persons transferred from one state to another in the name of security and countering terrorism. At one end of the spectrum, this takes the form of extradition of terrorist suspects, at the other extraordinary rendition for interrogation and intelligence gathering purposes outwith the legal framework,[383] and – for the vast majority of cases in between – the deportation of non-nationals on national security grounds.[384]

There is no right to enter or remain in a foreign state as such, and the state therefore enjoys very broad discretion in matters of immigration, though its laws and policies should be implemented in accordance with law and in a non-discriminatory way.[385] A key constraint imposed by the human rights framework is the prohibition on surrendering or expelling someone to another state (or another state's authority[386]), where there is a foreseeable risk of that person's rights being violated.[387] Often referred to as the obligation of 'non-refoulement,' this rule applies irrespective of whether the transfer is pursuant to the criminal process or under the more commonly invoked but much less regulated umbrella of immigration laws and processes.

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383 Rendition is addressed separately in Chapter 10; extradition and issues arising for the criminal process against terrorism see Chapter 4.A.2.1

384 By contrast to the increasingly developed regime governing extradition and inter-state criminal cooperation, immigration is an effectively unregulated in international law, there being no right *per se* to enter or reside in another state and states have the discretion (which they guard ever more jealously) to determine when non-nationals may enter their territory and when to exclude them.

385 On the duty to comply with the framework generally, as *Othman* v. *UK*, *supra* note 296, para. 184, citing *Ismoilov and Others*, §126. *See also Kiyutin* v. *Russia*, ECHR (regarding the obligation to ensure explusion is non-discriminatory – this case specically concerned discrimination on grounds of HIV status).

386 *See*, *e.g.*, *Al-Saadoon and Mufdhi* v. *United Kingdom*, Appl. No. 61498/08, Judgment, 30 June 2009, ECtHR (concerning transfer in Iraq).

387 For discussion of nature and status of the rule, *see*: E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement (Opinion)', 20 June 2001, updated 2003, §§ 244 and 250, available at: http://www.unhcr.org/refworld/docid/3b3702b15.html. *See also* discussion in C. Wouters, 'Reconciling National Security and Non-refoulement: Exceptions, Exclusion and Diplomatic Assurances', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), Ch. 22, p. 580.

Certain human rights treaties or instruments, such as the United Nations Convention against Torture,[388] the Inter-American Convention on Human Rights ('IACHR'),[389] the Convention on Enforced Disappearance,[390] the European Charter of Fundamental Rights,[391] and other instruments,[392] contain specific provisions precluding transfer to serious violations of human rights.[393] These provisions are reflected, directly and indirectly, in multilateral and bilateral extradition treaties, binding on parties to them.[394] Treaties such as the Inter-American Convention on Extradition[395] or the European Convention on Extradition[396] contain provisions either prohibiting extradition, or permitting states parties to refuse it (where they would otherwise be obliged to extradite), where there is a real risk of specific human rights being violated

388 Article 3, Convention against Torture requires that 'no state party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

389 Article 22(8), I-ACHR.

390 International Convention for the Protection of All Persons from Enforced Disappearance, (2006) Article 16(1).

391 Adopted in 2001, Article 19 of the Charter states that '(n)o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

392 UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, UN Doc. A/RES/2312(XXII), Article 3(1); UN Commission on Human Rights, Declaration on the Protection of All Persons from Enforced Disappearance, 28 February 1992, UN Doc. E/CN.4/RES/1992/29, Article 8; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, *supra* note 180, Principle 5; and The Council of Europe Guidelines. Specific protections concerning the non expulsion of foreign nationals are contained in provisions such as Article 13 of the ICCPR and Article 1 Protocol No. 7 to ECHR, which provide for example for the right to be given reasons for expulsion, to have one's case reviewed, and to be represented for these purposes before the competent authority though these provisions contain express exceptions for 'compelling reasons of national security'.

393 *See also* Article 13 of the Inter-American Convention to Prevent and Punish Torture, which prevents extradition on the grounds of torture or inhuman/degrading treatment. In the context of IHL, the Geneva Conventions also prohibit transfer of persons in particular circumstances -*see* eg Article 12, GC III and Article 45 GC IV in Chapter 10.

394 On extradition treaties, *see* Chapter 4A.2.1. The extradition provisions are of course binding only on states parties to them- a far smaller number of states than are party to the major human rights treaties.

395 Inter-American Convention on Extradition, Caracas, 25 February 1981, reprinted in 20 ILM 723, which unconditionally prohibits the extradition of a person when that person will be punished 'by the death penalty, by life imprisonment, or by degrading treatment in the requesting state'.

396 European Convention on Extradition, Paris, 13 December 1957, ETS No. 24. Article 11 limits extradition in the context of the death penaltyand where the requested state 'has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons'.

upon return.[397] Non-refoulement is reflected also in other international instruments addressing international cooperation and specific forms of terrorism.[398] Although somewhat different in its scope and characteristics, the principle is also reflected in refugee law.[399] While persons may be denied 'refugee status' because they are suspected of certain serious crimes – covering war crimes, crimes against humanity and, according to the Security Council's Resolution 1373,[400] acts of 'terrorism'[401] – the principle of non-refoulement protects all persons from transfer, including terrorist suspects.[402]

By contrast, general human rights treaties do not themselves spell out the obligation of non-refoulement. Yet as a result of consistent authoritative interpretations finding the obligation not to transfer to violation to be implicit in human rights protections, the rule of non-refoulement is now firmly established as a rule of treaty law, as well as recognised as part of customary international law.[403] In the seminal *Soering* case, the ECtHR first identified non-refoulement as an 'inherent obligation',[404] reasoning that it would 'plainly be contrary to the spirit and intention' of the Convention to enable states to transfer individuals to violations, effectively circumventing their human rights obligations of protection.[405] This has been elaborated upon across the jurisprudence of human rights bodies,[406] frequently in the context of international terrorism cases. Indeed, through the expanded practice of expulsions and transfers, and challenges thereto, the law has developed significantly in recent years. How-

397 These include the death penalty, torture or inhuman treatment, fair trial and discrimination – *see* 'scope of obligations', below. *See also* UN Model Treaty on Extradition, UN Doc. A/RES/45/116, 14 December 1990.

398 *See*, *e.g.,* International Convention against the Taking of Hostages, Article 9, and the European Convention on the Suppression of Terrorism, Article 5, which contain general clauses on non-refoulement.

399 The principle of non-refoulement under IHRL is complementary to that applicable where there is a well-founded fear of 'persecution' under REFe law. The latter excludes those who pose a danger to the security of the host State, while there are no exceptions to non-refoulement under IHRL, whether of a refugee or any other person, when freedom from torture and other ill-treatment is at stake. *See* Articles 32 and 33 of the Convention Relating to the Status of Refugees.

400 SC Res. 1373, *supra* 376.

401 Convention on the Status of Refugees, Article 1F.

402 *See*, *e.g.*, *M. B. B.* v. *Sweden*, *supra* note 95.

403 *See*, *e.g.*, *Bethlehem, supra* and part B.9 below.

404 *Soering* v. *UK*, *supra* note 287, § 88.

405 *Ibid.*

406 *See*, *e.g.*, HRC, General Comment No. 20, at § 9; HRC, General Comment No. 31, §12. For individual communications, *see*, *e.g. Chitat Ng* v. *Canada*, (1994, § 14.1); *Cox* v. *Canada* (1994); and *G.T.* v. *Australia* (1997). ECHR cases include: *Chahal* v. *UK*; *Öcalan* v. *Turkey*; *Saadi* v. *Italy*; *Othman* v. *UK*. The practice of the African Commission on Human Rights and the Inter-American Commission on Human Rights is more limited in this particular matter, but *see*, *e.g.*, ACHPR *Modise* v. *Botswana*, and IACHR *Report on Terrorism and Human Rights* (2004). See also the Report of the Special Rapporteur to the Third Committee of the GA (2001, § 28).

ever, as the evolution of the law has largely been on a piecemeal, case-by-case basis, some aspects of the duty remain in flux and may yet lack clear parameters as illustrated below.

– *Scope of Rights Protected? Non-refoulement to Serious Human Rights Violations*
The obligation of non-refoulement in relation to the risk of torture and ill-treatment is long established and deeply enshrined in law and practice. While the UN Convention Against Torture (CAT) is explicit in respect of non-refoulement to torture, human rights courts and bodies have long interpreted general human rights treaties as prohibiting transfer where there are substantial grounds for believing that there is a real risk of torture, inhuman or degrading treatment or punishment in the other state.[407]

As law and practice have developed it has become clear that, by the same rationale, the duty of non-refoulement may arise also where there are real risks of other serious rights violations, though (as will be seen below) the precise scope of this and whether it might potentially apply to all rights remains subject to question.[408] As regards the right to life, transfer to the risk of extra-judicial execution would clearly be prohibited.[409] Transfer to the death penalty is not *per se* prohibited in general international law,[410] but parties to specific treaties prohibiting that penalty may be obliged not to extradite in these circumstances; it is for example increasingly doubtful that European states can lawfully transfer an individual to the death penalty.[411] In any event,

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407 On the scope of such treatment which may arise from, for example, the application of the death penalty or life imprisonment with no possibility of early release, extreme prison conditions or harsh interrogation techniques, *see* 7A.4.3.2, above. *See also*, Dugard and Van den Wyngaert, 'Reconciling Extradition with Human Rights', 92 *Am. J. of Int'l L.*, 2, 1998, 187-212, 200.

408 This is reflected in the examples below from IHRL, and to varying degrees in extradition provisions – *see* Chapter 4. *See, e.g.* Article 3 of the Model Treaty precludes extradition where the requested state has substantial grounds to believe human rights norms on (a) discrimination, (b) torture, cruel and inhuman treatment and punishment, (c) minimum guarantees in criminal proceedings would not be respected or (d) 'the judgment of the requesting State has been rendered *in absentia*, [and] the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence'. Article 4 adds additional optional grounds for refusing extradition including in relation to the death penalty.

409 '[N]o one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extralegal, arbitrary or summary execution in that country.' Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, *supra* note 180, Principle 5.

410 *See supra* Chapter 7, 7A.4.3.1.

411 In *Al-Saadoon* v. *UK*, *supra* note 386, where transfer of Iraqi detainees from British custody to Iraqi authorities would put them at a real risk of execution by hanging, the Court recognised evolving state practice in the Council of Europe which was now 'strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances'. As the Court found the death penalty also to constitute 'inhuman or degrading

as noted above, the imposition of capital punishment in certain circumstances, may also amount to violations of the right to life or to cruel treatment, thereby prohibiting extradition or transfer.[412]

Historically there was some hesitation as to whether human rights obligations preclude transfer to violations of fair trial rights, understandably perhaps in light of the importance of facilitating inter-state cooperation in criminal matters, and differing conceptions of fair trial across systems.[413] However, the European Court of Human Rights has taken the lead in clarifying that a substantial risk of violation of fair trial rights, serious enough in all the circumstances to amount to a 'flagrant denial of justice,'[414] would preclude lawful transfer.[415] This has been held to include transfer to military commission proceedings, or to proceedings that would admit evidence obtained through torture.[416] The Inter-American Torture Convention for its part specifies that

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treatment or punishment' within the meaning of Article 3, it found a violation on that basis and it was 'not necessary' to examine whether there was a separate violation of Article 2. *See Bader and Kanbor* v. *Sweden* (2005), 46 EHRR 1497(the Court found the deportation of the applicants would breach Articles 2 and 3 because of the risk of the death penalty, albeit in that case the death penalty was a result of an unfair trial).

412 On the prohibition of deportation in face of the risk of the death penalty following an unfair trial, *see Bader* v. *Sweden*, *ibid. See also* 7A.5 on the Right to Life.

413 The Human Rights Committee declined to decide on the question in *ARJ* v. *Australia*, CCPR/C/60/D/692/1996, UN Human Rights Committee (HRC), 11 August 1997. *See also* Dugard and Van den Wyngaert, 'Reconciling Extradition', *supra* note 407, p. 204, Noting that the reluctance may reflect diverse visions of fairness.

414 On the nature of the 'flagrant denial of justice' which would render a deporting state in breach of article 6, *see* Sir Nicolas Bratza, in *Mamatkulov and Askarov* v. *Turkey* (2005) 41 EHRR 25, para. O-III14 referring to 'a breach of the principles of fair trial guaranteed by Art 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article'.

415 *See Othman* v. *UK*, *supra* note 296, for the first time the ECHR has found transfer to amount to a violation of Art 6 on fair trial grounds. Reliance on evidence obtained through torture rendered any trial of the applicants in Jordan a flagrant violation of justice, and transfer would therefore be unlawful. The principles were foreshadowed in other cases: *Öcalan* v. *Turkey*, *supra* note 74, §§ 199-213; *Tomic* v. *United Kingdom*, Appl. No. 17837/03, Admissibility decision, 14 October 2003; *Drozd and Janusek* v. *France and Spain*, para. 110, discussed above. *See* Chapter 4, 7A.4.2.i) on the nature and limits of the duty of an extraditing state to make assessments as to another state's judicial system. *See also Soering* v. *United Kingdom*, *supra* note 287, which envisaged non-extradition in cases of 'flagrant denial of a fair trial', and *Einhorn* v. *France*, Appl. No. 71555/01, Admissibility decision, 16 October 2001, where the ECtHR considered extradition pursuant to trial *in absentia* absent the possibility of obtaining a retrial as a potential violation. But the Court rejected the idea that an extremely hostile media campaign in the requesting state would itself amount to a 'flagrant denial of justice' in that case. *See also* Article 3 of the 1990 UN Model Treaty on Extradition, which refers explicitly to the fair trial guarantees of Article 14, ICCPR.

416 *Othman* v. *UK*, *supra* note 296.

extradition to face trial 'by special or *ad hoc* courts' is prohibited,[417] and recent practice beyond the Americas may likewise suggest that transfers to special *ad hoc* courts or military commissions may be unlawful under IHRL.[418] In principle, discrimination in criminal proceedings has also been recognised as potentially giving rise to a duty not to extradite.[419]

Jurisprudence on the obligations of non-refoulement in relation to freedom from arbitrary deprivation of liberty has developed in recent years, and the rationale in respect of 'flagrant denial of justice' would appear to apply. The Working Group on Arbitrary Detention, among others, has suggested that transfer to prolonged arbitrary detention would violate states international obligations,[420] with the ECtHR lending support to the prohibition on transfer to violations of basic detention rights in certain circumstances. In *El-Masri* v. *the Former Yugoslav Republic of Macedonia* the Court found a violation of this Article on account of the applicant's removal despite the real risk of a fragrant breach of his Article 5 rights,[421] while in *Othman (Abu Qatada)* v. *the UK*, the Court acknowledged that: 'A flagrant breach of Article 5 would occur if, for example, the receiving State arbitrarily detained an applicant for many years without any intention of bringing him or her to trial … [or] if an applicant would be at risk of being imprisoned for a substantial period in the receiving State, having previously been convicted after a flagrantly unfair trial.'[422]

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417 Article 13, Inter-American Convention to Prevent and Punish Torture states that 'extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State'.

418 In the Othman case on the domestic level, UK courts applying the ECHR took the view that deportation to a military commissions process was not necessarily unlawful, but may be if the assessment was that on balance the proceedings were sufficiently unfair. On the unfairness of such processes, *see fair trial above*, Chapter 4 (Criminal Justice) and 8 (Guantanamo Bay). *See also* Qatada, House of Lords, Lords of Appeal for Judgment in the Cause, Session 2008-09, [2009] UKHL 10, 18 February 2009, para. 249. *See also Ahmad &Ors* v. *UK*, Judgment 12 April 2012, paras. 51-52 (in arguing that extradition of terror suspects to US was permissible, the UK government emphasised that the individual would not be subject to trial by military commission).

419 Extradition treaties reflect this obligation more clearly than human rights law.

420 Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/4/40, 9 January 2007, para. 47-9

421 *El-Masri v the Former Yugoslav Republic of Macedonia*, [GC], No.39630/09, 13 December 2012, para. 239. *See also Tomic v. UK*, no. 17837/03, decision on admissibility of 14 October 2003, § 3; *F. v. UK*, no. 17341/03, decision on admissibility of 22 June 2004, § 2. *M.A.R. v. UK*, no. 28038/95, decision of 16 January 1997. For a national court acknowledging the principle of non-refoulement precluding lawful transfer in face of a risk of arbitrary detention over many years see *Special Adjudicator ex parte Ullah, House of Lords*, (2004) UKHL 26, para. 43, Lord Steyn.

422 *Othman (Abu Qatada) v the United Kingdom*, no.8139/09, 17 January 2012, §233. The Court noted that 'it would be "illogical" for an applicant who faced imprisonment without a trial to be bereft of protection under Article 5 to prevent his expulsion.' *Ibid*., §232

Transfer that would lead to the violation of other rights, such as private or family rights, may also be precluded by IHRL in certain circumstances.[423] It is a question of fact whether in the concrete case the implications for right to private and family life would be sufficient to prevent extradition or expulsion.[424]

As the non-refoulement rule is inherent in and an extension of the associated human rights protections, it follows that it enjoys the same status as those protections. Non-refoulement to torture, like the prohibition on such torture itself, is absolute, non-derogable and is considered by many a norm of *jus cogens*.[425] The jurisprudence of human rights bodies has long rejected the notion that threats to national security, or the challenge posed by international or domestic terrorism, affect the absolute nature of the prohibition on non-refoulement to TCIDT.[426] Likewise the characteristics, conduct or crime of which he or she may be accused, including allegations of terrorism, do not affect the obligation of non-refoulement to TCIDT.[427] It follows from their non-derogable nature that transfers to violations of *nullum crimen sine lege* – or fundamental denials of justice such as violations of core aspects of the rights

423 The Committee on the Rights of the Child has also considered a number of risks which would cause irreparable harm to transferred children, such as forced recruitment: Committee on the Rights of the Child, General Comment No. 6, *supra* note 10, p. 10. *See al Nashif* v. *Bulgaria*, (Appl. 509/99) (2002), 36 EHRR 37; *CG and Others* v. *Bulgaria*, (Appl. No. 1365/07) (2008) 47 EHRR 51, *Maslov* v. *Austria* 23/06/2008 (Grand Chamber); *Kaushal and Others* v. *Bulgaria* of 02/09/2010, *Gelerie* v. *Romania* 15/02/2011 concerning violations of Articles 8 (private and family life) arising from transfer. In relation to rights that are subject to limitation – such as private or family life or potentially freedom of expression – a high threshold is likely to be applied, and the state would be entitled to balance the risk to individual against counterveiling considerations in favour of transfer, such as the administration of justice or the risk to national security.

424 *See*, *e.g.*, *Aylor Davis* v. *France*, Appl. No. 22742/93, ECHR, Admissibility Decision, 20 January 1994, DR 76-B, 164; and Swiss Federal Tribunal judgment, *X.* v. *Bundesamt für Polizeiwesen* (1991) ATF 117 Ib 210, cited in Dugard and Van den Wyngaert, 'Reconciling Extradition', *supra* note 407, at 204.

425 *See*, *e.g.*, the Inter-American Commission has described the 'obligation of non-refoulement' in situations where there is a risk of torture as itself a peremptory norm of international law. Annual Report of the IACHR1985, OEA/Ser.L/V/II.66, Doc. 10, rev.1 1985, in F.A. Guzman, *Terrorism and Human Rights No. 2* (International Commission of Jurists, Geneva, 2003), p. 246. Cf A Duffy Expulsion to Face Torture? Non-Refoulement in International Law, *International Journal of Refugee Law, Vol. 20, Issue 3, pp. 373-390, 2008*.

426 *Chahal* v. *UK*, *supra* note 270 and *Saadi* v. *Italy*, *supra* note 262); CAT, *Agiza* v. *Sweden* (2005, § 13.8); *Aemei* v. *Switzerland* (1997, § 9.8); *M. B. B.* v. *Sweden*, *supra* note 95, §6.4; *Arana* v. *France*, (2000, § 11.5), and CAT's Concluding Observations on Germany (2004). The absolute nature of the ban has been held to apply to a transfer to proceedings that would rely on torture evidence, and amount to a 'flagrant denial of justice' *See Othman* v. *UK*, *supra* note 296; *Ahmed* v. *UK*, *supra* note 299.

427 *Chahal* v. *UK*, *supra* note 270. (Indeed the fact that a person is suspected of terrorism, in circumstances where a state is known to mistreat terror suspects, may be a factor relevant to assessing the risk to the person upon transfer, and therefore precluding transfer on grounds of non-refoulement.)

to liberty and trial -should be refused, without any such 'balancing' of interests.[428]

By contrast, in respect of those rights that can be restricted in the public interest – such as the rights to free expression, association, private and family life – the extraditing or immigration authorities may balance the risk of violation in the other state against the public interest in justice and crime prevention or indeed national security.[429] While jeopardy to these rights may preclude transfer, and justify non-extradition, it does not necessarily always do so, provided as always that the interference is necessary and proportionate to the legitimate aim pursued.

– *Assessing (and proving) the 'Real and Personal' Risk?*

The obligation of the non-refoulement rule takes effect where there are 'substantial grounds' for believing there is a 'real risk' of the relevant violations arising in the receiving state.[430] The risk has also been described as 'foreseeable' and 'personal', as opposed to speculative or general.[431]

Difficult questions can arise as to whether a particular situation in a foreign country, as applied to a particular individual, would constitute such a real, foreseeable and personal risk, which can only be determined by a 'rigorous' examination of all relevant facts.[432] An important part of this is an assessment of the human rights situation in the receiving state[433] and the existence of

428 *See ibid*.

429 *See* Dugard and Wyngaert, 'Reconciling Extradition', *supra* note 407, at 187.

430 The test according to the European Court, when considering the obligations of States in transfer cases under Article 3, is whether 'substantial grounds are shown for believing that the person concerned, if expelled, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country'. E.g., *N.* v. *Finland*, Appl. No. 38885/02, ECtHR, 26 July 2005; *Ahmed* v. *Austria*, 71/1995/577/663, ECtHR, 17 December 1996; *Soering* v. *the United Kingdom*, *supra* note 287, § 86; and *Shamayev* v. *Russia*, *supra* note 268. This test is very similar to those established by other treaties or bodies, which also refer to *'substantial grounds for believing that he would be in danger'* or *'substantial grounds'* for believing there is a *'real risk'* of the violation in question. *See, e.g.*, UNCAT, Article 3; HRC General Comment 31 (2004); *Report on Terrorism and Human Rights* (2002); *Report on the Situation of Human Rights of Asylum* Seekers *within the Canadian Refugee Determination System*, (2000, § 154); CAT General Comment 1 (1997).

431 *See*, for instance, UN Committee Against Torture, *E.A.* v. *Switzerland* (28/1995), Decision of 10 November 1997, CAT/C/19/D/28/1995, para. 11.5*; S.C.* v. *Denmark* (143/1999), Decision of 10 May 2000, CAT/C/24/D/143/1999, para. 6.6; and *Zare* v. *Sweden* (256/2004), Decision of 17 May 2006, CAT/C/36/D/256/2004, para. 9.3.

432 'In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained *proprio motu* ...'. *Saadi* v. *Italy*, *supra* note 262, at § 128.

433 *See*, *e.g.*, Human Rights Committee, *Kindler* v. *Canada* (Comm. No. 470/1991), Views of 11 November 1993, UN Doc. CCPR/C/45/D/470/1991; *Ng* v. *Canada* (Comm. No. 469/1991), Views of 7 January 1994, UN Doc. CCPR/C/49/D/469/1991. *See also* ECtHR, *Öcalan* v. *Turkey*. The Committee against Torture noted that, in deciding whether such danger exists,

a 'consistent pattern of gross, flagrant or mass violations of human rights' will provide a strong indicator of risk.[434]

While the risk must be 'personal', it may be inferred from all the circumstances, and need not be based on specific intelligence to the effect that the individual has been identified or targeted by the authorities.[435] The jurisprudence of CAT for example notes that in assessing the 'specific circumstances' that render the individual personally at risk, particular attention will be paid to any evidence that the applicant belongs, or is *perceived* to belong,[436] to an identifiable group – including a terrorist organisation – which has been targeted for ill-treatment.[437] States will therefore consider the full range of facts – general and specific – in assessing whether, in practice, the individual is at risk.[438] In some cases they have considered whether 'diplomatic assurances' are sufficiently specific and reliable to constitute an 'additional factor' of relevance to this factual evaluation of risk in particular cases.[439]

The onus is on the individuals challenging their transfer but if the individual substantiates an arguable case based on 'plausible allegations' of such a risk, it falls to the state to rebut these allegations.[440] This is consistent not

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the relevant authorities should consider 'the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights'. *Ayas* v. *Sweden*, (Comm. No. 97/1997), Views of 12 November 1998. Personal circumstances of the accused are also relevant: *see, e.g.,* the decision of the Human Rights Committee in *Kindler* v. *Canada*, above.

434 United Nations Convention against Torture (1984) Article 3(2) and International Convention for the Protection of All Persons from Enforced Disappearance (2006) Article 16(2) provide in identical terms: '2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.' *See also Othman* v. *UK*, para 186

435 *See* briefs by human rights organisations, *see* Written Comments by Amnesty International, the Association for the Prevention of Torture, Human Rights Watch, INTERIGHTS, the International Commission of Jurists, Open Society Justice Initiative and Redress, submitted to the European Court of Human Rights in *Ramzy* v. *Netherlands*, Appl. No. 25424/05, Judgment, 20 July 2010, ECtHR.

436 It is not necessary that the individual *actually* is a member of the targeted group, if believed to be so and targeted for that reason. *See* CAT, *A.* v. *The Netherlands,* (1998).

437 *See* CAT General Comment 1 (1997, § 8 (e)). For fuller elaboration, *see* INTERIGHTS' brief in *Ramzy* v. *the Netherlands*, *supra* note 435; *see also Chahal* v. *UK.*

438 *See, e.g. Othman* v. *UK*, para. 186.

439 The controversial practices of assurances as discussed at Part B.3.2 below. 'There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment.' *Othman* v. *UK*, para. 187. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time (*see Saadi* v. *Italy*, § 148). Factors relevant to assessing the practical application and weight provided at para. 189.

440 CAT General Comment 1 (1997, § 5): *'"The burden of proving a danger of torture is upon the person alleging such danger to present an 'arguable case"*. This means that there must be a factual basis for the author's position sufficient to require a response from the State party.' (emphasis added). In *Agiza* v. *Sweden* (2005, § 13.7), the burden was found to be on the State to conduct an *'effective, independent and impartial review'* once a 'plausible allegation' is made.

only with the practical difficulties individuals face in accessing evidence as to the situation in another state, but also the positive duties incumbent on the State to ensure that any transfer would not expose the individual to a risk of serious rights violations.[441]

– *Transfer, Refoulement and Due Process*

It is a basic aspect of the principle of legality and non-arbitrariness that if the protection against transfer to serious rights violations is to be meaningful it must be accompanied by appropriate opportunities to challenge and prevent transfer where rights are seriously at risk. Yet the extent to which transfer procedures are subject to basic fair trial guarantees is contentious, revealing an area where the law would benefit from further development.

The general provisions of human rights treaties guarantee due process rights in respect of the determination of the individual's 'civil rights and obligations.' It would seem logical in light of the profound implications for individuals concerned, that a decision to expel or deport must meet this threshold. Several human rights bodies take this view, and suggest that the fair trial provisions of Article 14 of the ICCPR are applicable to decisions concerning transfer.[442] By contrast, the ECtHR has generally considered the sister provision in Article 6 of the ECHR not to apply to expulsion or extradition proceedings,[443] though there may be some indication of a shift of

(emphasis added). Similarly, in *A.S.* v. *Sweden* (2000, § 8.6) it was held that if sufficient facts are adduced by the author, the burden shifts to the State *'to make sufficient efforts to determine whether there are substantial grounds for believing that the author would be in danger of being subjected to torture'.* (emphasis added). *See also* HRC, *Jonny Rubin Byahuranga* v. *Denmark*, (2004, §§ 11.2-3); UN Sub-Commission for the Promotion and Protection of Human Rights, Resolution 2005/12 on Transfer of Persons, (2005, § 4); *see* similarly, European Commission for Human Rights in the *Cruz Varas* case (1991).

441 *See* Positive Obligations and principles of interpretation *supra* 7A.4.1.

442 The Human Rights Committee, in its 2006 observations on the US Report criticised the US for not providing judicial review, noting that '[t]he State party should … adopt clear and transparent procedures with adequate *judicial* mechanisms for review before individuals are deported …' (*Concluding Observations of the Human Rights Committee: United States of America* (2006), para. 16). The Committee against Torture's Concluding Observations on Italy's fourth periodic report note notes "expulsion orders, without any judicial review" and criticizes the fact "that this expulsion procedure lacks effective protection against *refoulement*' (*Concluding Observation of the Human Rights Committee: Italy*, 16 July 2007, UN doc. CAT/C/ITA/CO/4, para. 12). *See also* the view expressed by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism in his 2007 Report, UN doc. A/62/263, 15 Aug. 2007, para. 53; UN Committee Against Torture, Decision: Agiza v. Sweden, CAT/C/34/D/233/2003, May 20, 2005, para. 13.7, available at: http://www1.umn.edu/humanrts/cat/decisions/233-2003.html.

443 The ECtHR's refusal to consider deportation proceedings as falling within Article 6 sits uncomfortably alongside the purposive approach that the ECtHR has long espoused, and the criterion for the ECHR in deciding whether article 6 is engaged, namely 'the nature of the proceedings.' *See, e.g. Shamayev* v. *Russia*, *supra* note 268.

approach.[444] In any event, despite differences of approach to the applicability of the full range of fair trial provisions, it is clear across systems that the right to challenge expulsion, and to do so meaningfully in accordance with certain basic procedural guarantees, are inherent in the right of 'non-refoulement' and the right to a remedy in respect of the same.[445] The UN Committee Against Torture has required 'an opportunity for effective, independent, and impartial review of the decision to expel or remove'.[446] Moreover, as any transfer is preceded by the detention of the individual, that detention must be in accordance with the procedural safeguards of the right to liberty above.[447]

Some legitimate controversy remains as to the extent of due process guarantees inherent in the process, and as to whether the review must always be 'judicial,' as the HRC clearly sustains ('clear and transparent procedures with adequate *judicial* mechanisms for review before individuals are deported …'[448]), or simply 'effective, independent and impartial' as the CAT suggests.[449]

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444 In *Ismoilov and Others* v. *Russia*, (Appl. No. 2947/06) (2009) 49 ECHRR 42 Article 6 was engaged in extradition proceedings where the presumption of innocence was violated by the extraditing authorities and in *A & Others*, *supra* note 109 (where the court found the Art. 6 argument admissible, although it ultimately did not need to determine them as the issue was addressed under Art. 5). *See* N. Mole, 'Restricted Immigration Procedures in National Security Cases and the Rule of Law: an Uncomfortable Relationship', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), p. 738-39

445 It has noted for example that 'the proper administration of justice requires that no irreparable action be taken while proceedings are pending' and that '[A]rticle 13 requires that the concerned party have access to a remedy with automatic suspensive effect'. *Affaire Gebremedhin* v. *France*, CAT, (Appl. No. 25389/05), Judgment of 26 April 2007, para. 66; *Shamayev* v. *Russia*, *supra* note 268.

446 *See, e.g.*, Concluding Observations on Italy's fourth periodic report, the Committee expressed concern 'at the immediate enforcement of … expulsion orders, without any judicial review, and … [at the fact that] that this expulsion procedure lacks effective protection against *refoulement*' (*Concluding Observation of the Human Rights Committee: Italy*, 16 July 2007, note 489., para 12.

447 See Chapter 7A53 above on detention beign required to have an identifiable legal basis and procedural safeguardsincluding the right to challenge the lawfulness of the basis for detention and access to a lawyer, the basic elements of which are non-derogable.

448 The Human Rights Committee, in its 2006 observations on the US Report criticised the US for not providing judicial review, noting that '[t]he State party should … adopt clear and transparent procedures with adequate *judicial* mechanisms for review before individuals are deported …' (*Concluding Observations of the Human Rights Committee: United States of America* (2006), para. 16). UNHCR requires judicial oversight and review prior to transfer as a minimum guarantee against irregular transfer; *see Report of the UNHCHR on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/HRC/4/88, 9 Mar. 2007, para. 22. *See also* the view expressed by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism in his 2007 Report, UN doc. A/62/263, 15 Aug. 2007, para. 53

449 *See* CAT.

– *Obligation of Non-Cooperation Beyond the Transfer of Persons?*

The human rights framework provides less clarity, at least as yet, as to whether there can be said to be a more general obligation of non-cooperation. In other words, just as serious rights violations will preclude transfer, do parallel obligations arise in relation to the sharing of intelligence, or gathering of evidence, or provision of other forms of support, where it is known that the net result will be violations of human rights in another state?

One the one hand, as a matter of strict treaty construction, a person subject to trial in another state is not within the requested state's 'territory', and only arguably subject to its 'jurisdiction' for the purposes of human rights treaties.[450] On the other, while the link between the cooperating state and the violations is more remote than in extradition cases, it may be none the less real in terms of impact if that state's cooperation is instrumental in the violation of the person's rights. As the European Court of Human Rights has pointed out, any interpretation of the scope of a human rights convention should be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society'.[451] The obligation to implement a treaty in good faith[452] would presumably preclude facilitating or encouraging other states to commit violations.[453] Interpreting the underlying principles of non-refoulement as applicable to other forms of cooperation also finds support in those mutual assistance treaties that reflect exceptional circumstances where human rights considerations may constitute an exception to the duty to provide such assistance.[454]

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450 As such, detention must have an identifiable legal basis, which triggers a particular legal framework and procedure governing the detention and eventual transfer itself – for example, it may be detention for the purposes of extradition, or pending deportation under immigration law. The procedural guarantees include the right to challenge the lawfulness of the basis for detention and access to a lawyer, the basic elements of which are non-derogable.

450 On 'the Jurisdiction Question', *see supra* 7A.2.1, this chapter.

451 *Soering* v. *United Kingdom*, para. 87.

452 Article 31 of the Vienna Convention on the Law of treaties states that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

453 *See* aspects of state practice post-September 11 discussed below, which may reflect the desire of states not to cooperate with the US in circumstances likely to lead to human rights violations, Chapter 4 on 'Criminal Justice' and state cooperation.

454 The European Convention on the Suppression of Terrorism, for example, confirms in Article 8, that there is no obligation to afford mutual assistance if the requested State has substantial grounds for believing that the request for mutual assistance has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that that person's position may be prejudiced for any of these reasons. *See also* UN Mutual Assistance Treaty which envisages refusal to cooperate in case of persecution, double jeopardy (*non bis in idem*) and unfair measures to compel testimony, Article 4(1)(c)-(e). As noted in Chapter 4, part B, the principle may also be reflected to a degree in preliminary state practice post-9/11.

Moreover, as set out above[455] and in Chapter 3, states may also be responsible under general international law where they aid and assist other states in the commission of human rights violations, by the provision of direct and concrete support.[456] Likewise, in the exceptional circumstances where the breach in the other state would be a gross or systematic breach of a peremptory norm, further positive duties to cooperate to end the wrong may take effect, inconsistent with cooperating with the wrongdoers.[457] Considering the human rights framework alongside broader developments in international law, there is a compelling argument that certain forms of international cooperation and support would be at odds with states' international obligations, and give rise to its responsibility, in a range of ways, as will be explored and illustrated later in this study.[458]

7A.6 CONCLUSION

It is difficult to imagine human rights that are not affected by terrorism, or by measures taken in the name of counter-terrorism. Other rights, not explored here but often restricted in times of counter-terrorism, some of which will be considered in the counter-terrorist practice in the following Section include the fundamental right to equality,[459] the right to family life, to thought, conscience and religion[460] and to seek asylum.[461] What should be clear from the foregoing is that IHRL is contained in a detailed body of human rights

455 Positive Human Rights Obligations, Terrorism and Responsibility, especially 7A.4.3.

456 ILC's Articles on State Responsibility, Article 11.

457 *See* Chapter 3; ILC's Articles on State Responsibility, Article 41. As for the specific obligations to ensure respect for the Geneva Conventions, *see* Chapter 6, part 6A.3.5.

458 Examples are discussed in relation to Guantanamo Bay (Chapter 8) and Extraordinary Rendition (Chapter 10).

459 *See* CH 7.B.9 below on measures that may infringe this underlying right.

460 Interference with religious freedom can only be justified where there is a clear link between the threat in question and the exercise of religious freedom, which may be difficult to establish in the context of terrorism. *See* ECtHR, *Agga* v. *Greece*, Judgment of 17 October 2002. Moreover, necessary interference with religious practice must not be prolonged or make religious observance impossible – *see Cháre Shalom ve Tsedek* v. *France*, Judgment of 27 June 2002. For an example of the insidious impact on religious freedom, *see, e.g.*, reported cases of prosecution for 'anti-state activity' and 'religious extremism' in Uzbekistan in *see* Human Rights Watch, 'In the Name of Counter-Terrorism: Human Rights Abuses Worldwide', Briefing Paper for the 59th Session of the United Nations Commission on Human Rights, 25 March 2003, available at: http://hrw.org/un/chr59/counter-terrorism-bck.htm.

461 Article 40, Universal Declaration of Human Rights and Refugee Convention, 1951. The right to asylum is subject to limits, notably where the individual has committed a serious non-political offence. One troubling effect of declaring that 'terrorist offences' are inherently non-political is that the individuals deemed, without due process of law, to fall under this broad rubric are then denied asylum. However, non-refoulement, *supra* applies to asylum seekers and all other persons facing expulsion for whatever reason, and no matter what offences they may be suspected of having committed.

treaties and customary law, and developed jurisprudence, including in respect of international terrorism specifically, which accommodate security concerns and the challenges of international terrorism in several different ways.

Finally, the IHRL framework must also be interpreted and applied in light of certain underlying principles – such as legality, universality, necessity and proportionality, and equality, or the prohibition on arbitrariness or discrimination[462] – which are reflected across the legal framework. Certain principles of interpretation also inform the application of the rules, as reflected in human rights jurisprudence.[463] In particular, human rights treaties need to be interpreted as 'living instruments' that evolve over time in light of evolving human rights practices,[464] in light of their (protective) purpose,[465] the principle of 'effectiveness',[466] and holistically, as part of a broader body of international law.[467] In this respect, human rights law cannot be understood in isolation but mindful of the interplay between this body of law and international humanitarian law, or the law governing states obligations in respect of peace and security, or terrorism prevention.

The flexible restraint of the human rights rules and principles set out above provides the framework for the analysis of the lawfulness, and legitimacy, of states counter-terrorism policies and practices. The following section of this chapter enquires into the application of this legal framework in practice in the context of the fight against international terrorism.

7B HUMAN RIGHTS IN PRACTICE POST-SEPTEMBER 11

Tension between counter-terrorism and human rights is nothing new and many questionable practices adopted in the name of counter-terrorism existed, like terrorism itself, long before 9/11. One of the most insidious long-term effects

462 *See generally* McBride, 'Study on Principles', *supra* note 105.

463 In addition to the examples cited below, on human rights interpretative principles generally see *Murillo v Costa Rica*, IACHR, 27 Nov 2012.

464 The content of human rights evolves over time, for example, practices that were once not considered torture or ill-treatment may come to be so considered. *See, e.g.*, *Selmouni* v. *France*, *supra* note 276; *see also* the evolving recognition of gender rights in the 'Transsexuals Cases' before the ECHR, from *Case of Rees* v. *The United Kingdom*, Appl. No. 9532/81, Judgment, 17 October 1986, to *Case of Christine Goodwin* v. *The United Kingdom*, Appl. No. 28957/95, Judgment, 11 July 2002.

465 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' VCLT, at Article 31.

466 Rights must be 'practical and effective not theoretical and illusory'. *Marckx* v. *Belgium*, Appl. No. 6833/74, ECtHR, 1979; *Barrios Altos*, *supra* note 183. The law should be capable of offering real protection or it will not be effective; conversely obligations that cannot be realized by states are unlikely to be considered effective either.

467 *See, e.g., Al-Adsani* v. *The United Kingdom*, Appl. No. 35763/97, Judgment, ECtHR, 21 November 2001.

of the events of that day and the responses thereto may, however, have been to clothe old practices in the new legitimacy of the 'global' fight against international terrorism. In addition, practice in counter-terrorism has proliferated, with a plethora of normative and political developments at the national, regional and international levels.

This section seeks to illustrate some of the key questions that have arisen recurrently, or are of particular significance, regarding the application of the framework of human rights law in the context of counter-terrorism in recent years. While the focus is on whether and how the law has been applied (or disregarded), it touches on areas where the law may itself be subject to development or require clarification.

Much of the practice described in this part reveals not specific violations of the law but a wholesale disregard for law's relevance and applicability – to terrorism as a whole, to particular people who are seen as beyond law's protection, or to particular places or situations which are seen as out of bounds for human rights protection. A fragmented approach to international law has meant that other areas of law, notably IHL applicable in armed conflict or obligations arising under Chapter VII of the UN Charter, have been used in an apparent attempt to trump human rights law in face of the challenge of international terrorism.

This part therefore first looks at broad overarching issues that relate to the relevance and applicability of IHRL, some of which raise at times difficult questions regarding the interplay of legal regimes. These are: 'security versus human rights' and the treatment of potentially conflicting obligations in respect of peace and security and human rights; the extra-territorial scope of human rights law in the war on terror; the 'war' and human rights and the interrelationship between IHL and IHRL. It then addresses specific human rights issues arising from particular policies and practices and their impact. The scope of 'anti-terrorism' laws and practices, and broad-reaching or amorphous approaches to what constitutes 'terrorism' and those associated with or supportive of it, has meant that the scope of those affected goes far beyond targeted individuals, to broader groups, families and communities. The adverse impact on human rights defenders or those rendering humanitarian assistance is only beginning to be explored.[468]

The issues addressed in this chapter are supplemented by those addressed in the case study chapters that follow, in relation to Guantánamo Bay detentions, the killing of Osama bin Laden and extraordinary rendition. A troubling feature of practice in recent years has been the imposition of restrictions on judicial supervision of rights protecting, limiting the ability of courts to contribute to a rule of law approach to countering terrorism and to

468 'Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action,' Kate Mackintosh and Patrick Duplat, July 2013, independent study commissioned by ODHA and the Norwegian Refugee Council.

provide a remedy in face of violations. Consideration of these challenges to the judicial function and, in particular, an assessment of the role that the courts have played in the protection of human rights post 9/11, is contained in Chapter 11 on human rights litigation in the 'war on terror.'

7B.1 Security v. Human Rights Post-9/11

7B.1.1 From Conflict to Complementarity?

Security and Human Rights are dual 'purposes' of the United Nations,[469] yet a dynamic and often tense relationship between the two pillars is nothing new. When security is put under strain, rights are inevitably more vulnerable, and vigilance in their protection is all the more critical. However, some perhaps inevitable tension between security and human rights gave way to a fully-fledged relationship crisis post-9/11, with the security agenda not only obscuring human rights concerns, but being portrayed as fundamentally at odds with them. Statements by state representatives, to the effect that the rulebook was 'thrown out the window', or that 'there was a before 9/11, and there was an after 9/11 ... After 9/11 the gloves come off',[470] have given voice to, and fuelled, this perception of conflict and incompatibility.

On the international level, the clearest manifestation of this phenomenon was perhaps Security Council Resolution 1373.[471] As discussed in Chapter 2, the Security Council mandated states to take a broad range of action with serious rights implications – including criminalising, limiting movement and freezing of assets – against those who are involved in or 'support' terrorism, without defining the terms or limiting, in time or scope, these broad reaching obligations. Notably and critically, it did so without any reference to the concurrent obligations to ensure that such action was taken within the framework of human rights law.[472] This was a calamitous rebuke to the relevance of human rights law, and is often attributed with having spawned widespread violations of international law, ironically in the name of compliance with obligations under the UN charter.[473]

469 Article 1 of the UN Charter, *supra* note 18.

470 Statements by Cofer Black, former CIA head of counter-terrorism, in D. Priest and B. Gellman, 'U.S. Decries Abuse but Defends Interrogations', *Washington Post*, 26 December 2002, available at: http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html.

471 SC Res. 1373.

472 Human rights are mentioned only once in the specific context of asylum seekers.

473 States introduced widereaching measures that have violated human rights pursuant to amorphous definitions of terrorism – see examples of the rights issues arising, including violations of legal certainty- discussed later in the chapter.

The myopic approach to human rights law has however shifted over time, at least if one is to measure by the language of international instruments. In counter-terrorism resolutions of the Security Council, General Assembly and regional organisations clauses providing that states must ensure that any measures taken to combat terrorism comply with all their obligations under international law including international human rights, refugee and humanitarian law have become commonplace.[474] Moreover, gradually and belatedly, there was also a further shift from considering human rights as a straightjacket or even just a necessary constraint on states' counter-terrorism armoury, to seeing it as complementary to it, recognising human rights as inherently linked to 'respect for democracy and the respect for the rule of law,' and as a critical component of an effective long-term counter-terrorism strategy.[475] A catalyst to this may have been growing recognition of the counter-productivity of the 'war on terror,' and how abusive practices may have fomented radicalisation, as seen for example in recognition of Guantánamo as 'probably the number one recruitment tool' for fledgling terrorists[476] or description of drone killings as having 'replaced Guantánamo as the recruiting tool of choice for militants'.[477] This was made clear in high level reports,[478] including Secret-

474 An early example of the UN embarking on the return trip back to human rights law was SC Security Council resolution 1456 of 20 January 2003, but this has been reiterated on many occasions since. *See, e.g.*, SC Res. 1624; 'Protection of human rights and fundamental freedoms while countering terrorism: Human Rights Resolution 2005/80', 21 April 2005; Global Counter-Terrorism Strategy (A/RES/60/288 of 8 September 2008). SC Res. 1963 (2010), fourth preambular paragraph.

475 *See* above, Human Rights Resolution 2005/80, 'Recognizing that the respect for human rights, democracy and the rule of law are interrelated and mutually reinforcing …'; *see also*, *e.g.*. OSCE Consolidated Framework for the Fight against Terrorism, PC.DEC/1063 (2012).

476 B. Obama, 'News Conference by the President' (Speech delivered at Eisenhower Executive Office Building, 22 December 2012).

477 *See*, *e.g.*, P. Alston, 'United Nations, Special Rapporteur: UNAMA Press Conference, Kabul', Media Release, 15 May 2008, available at: unama.unmissions.org/Default.aspx?ctl=Details &tabid=1761&mid=1892 &ItemID=3132>. *See also* Chapter 8 on the impact of Guantánamo and Chapter 4 on the negative impact on criminal processes.

478 Report of the High-level Panel on Threats, Challenges and Changes, A More Secure World, Our Shared Responsibility, UN Doc. 1/59/656 (2004), at para. 21. *See also* 2005 World Summit Outcome, U.N. Doc. A/RES/60/1, 24 October 2005, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement; *see also* the Secretary General's 2006 'Uniting against terrorism: recommendations for a global counter-terrorism strategy', UN Doc. (A/60/825). Secretary General Annan memorably emphasised the '5 Ds' of an effective counter-terrorism strategy: dissuade; deny terrorists means; deter states from supporting terrorism; develop capacity and defend human rights: Kofi A. Annan, The Secretary-General, United Nations, A Global Strategy for Fighting Terrorism, Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security (10 Mar. 2005). *See also* Statement to the Security Council at Meeting to Commemorate the One-Year Anniversary of the Committee on Counter-Terrorism, 4 October 2002, UN Doc. SC/7523: 'In places where human rights and democratic values are lacking, disaffected groups are more likely to opt for a path of violence, or to

ary-General Annan's report *In Larger Freedom* (2005) which stated that: 'While poverty and denial of human rights may not be said to "cause" civil war, terrorism or organized crime, they all greatly increase the risk of instability and violence.'

The UN's Comprehensive Counter-Terrorism Strategy epitomised the shift to a holistic approach by including human rights and the related concept of 'address[ing] conditions conducive to the spread of terrorism' as pillars of an effective strategy:

> the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.[479]

Subsequent resolutions affirm this shift, such as SC Resolution 1963 (2010) which was the first explicit recognition in a resolution that terrorism would not be defeated by military force, law enforcement measures, and intelligence operations alone, underlining, *inter alia*, the need to strengthen the protection of human rights and fundamental freedoms.[480]

The fragmented approach to applicable law that early Council resolutions reveal was also manifest on the institutional level. For example, the counter-terrorism committee established under SC Resolution 1373 to monitor implementation of states' counter-terrorism obligations originally emphatically rejected any human rights dimension to its mandate.[481] While multiple UN and other entities sprang to action on the human rights implications of counter-terrorism, significant among them the establishment of a dedicated special rapporteur on terrorism and human rights,[482] the message that was sent as regards the marginalisation of human rights was troubling.[483] Since then, as part of the rule of law approach reflected in the global comprehensive counter-terrorism strategy, a counter-terrorism Implementation Task Force

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sympathize with those who do.'

479 The Preamble of the UN Global Counter-Terrorism Strategy, UN Doc. A/RES/60/288, 8 September 2008, notes: '*Recognizing* that development, peace and security, and human rights are interlinked and mutually reinforcing'. *See* pillars 1 and 4 of the Strategy.

480 SC Res. 1963 (2010), fourth preambular paragraph.

481 Statement by Sir Jeremy Greenstock denied a human rights role for the Committee on 18 January 2002, 'Monitoring performance against international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate.' UN Counter-Terrorism Committee – Protecting Human Rights while Countering Terrorism, available at: http://www.un.org/en/sc/ctc/rights.html.

482 Established in April 2005 by the Commission on Human Rights, Res. 2005/80, and assumed by the Human Rights Council (UN GA Res. 60/251). For details, *see* http://www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx.

483 M. Scheinin, 'Report by the Special Rapporteur on Terrorism to the Security Council', UN Doc. A/65/258, 6 August 2010, para. 72. Concern also related to lack of coordination between branches of the UN. *Ibid*. at para. 74.

has been established to coordinate efforts within the UN and externally which should include human rights issues[484] and the Security Council's Counter-Terrorism Committee is also now committed, in principle, to consider human rights when reviewing state compliance with Council resolutions.[485] The Committee has, in fact, raised such concerns in its dialogues with states, though whether it has done so sufficiently and effectively enough has been questioned.[486]

Despite inauspicious beginnings, the approach appears to have gradually shifted from ignoring human rights law, to acknowledging it as a necessary restraint and, in turn, to recognising human rights and counter-terrorism as interrelated and mutually reinforcing.[487] While these developments hold important potential for more effective oversight in the future, challenges remain, including how to address the many laws and practices enacted in response to SC Resolution 1373 which remain in force, and how to fully implement the human rights approach across the practice of the UN, never mind in individual state practice. It remains to be seen to what extent human rights will be given the emphasis in practice that they are now given, albeit belatedly, on paper.

7B.1.2 Igniting the Debate: Security Council Responsibility for Human Rights Violations?

As foreshadowed in the previous section, the Security Council has assumed an active and controversial role in the counter-terrorism agenda since 9/11, with unusually direct and significant human rights implications for individuals. This has given new impetus to an old debate: can the UN itself be considered to have human rights obligations, and if so can it be held accountable for violations?

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484 The United Nations Counter-Terrorism Implementation Task Force (CTITF) was established by the Secretary-General in 2005 to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system. CTITF consists of 25 United Nations system entities and INTERPOL.

485 Conclusions for Policy Guidance regarding human rights and the Counter-terrorism committee (S/AC.40/2006/PG2).

486 Scheinin, '2010 Report to the Security Council', *supra* note 533, paras. 43-44. On positive developments in the committees evidence gathering, *see ibid.* at para. 47, and on implementation assessments *see* para. 50.

487 Here we deal with UN bodies' recognition of complementarity of HR and security but it has been suggested that 'too often human rights voices have conversely downplayed the centrality of peace and security to the protection of human rights and this pitfall is to be avoided also.' K. Bennoune, 'All Necessary Measures?: Reconciling International Legal Regimes Governing Peace and Security and the Protection of Persons in the Realm of Counter-terrorism', in L. van den Herik and N. Schrijver (eds.), *Counterterrorism Strategies in a Fragmented International Legal Order*, *supra* note 166.

Two groups of Security Council resolutions on counter-terrorism have impelled this debate. In different ways, they represent the Council moving beyond its traditional role in determining threats to peace and security and measures necessary to address them.[488] The first are those resolutions, most notably Resolution 1373 addressed above, which have been described as embodying a new 'legislative' function for the Council – imposing new, broad-ranging, general obligations, not linked or limited to a particular situation, time or place.[489] The Council has broad powers and discretion to identify threats and to mandate particular measures that are 'necessary' in response, but questions have arisen recurrently regarding the legitimacy of resolutions that have found 'terrorism' in the abstract to constitute a threat to international peace and security,[490] and obliged states to take broad, unspecified and unlimited measures in response.[491] The human rights implications of these broad resolutions, which have included the passage of terrorism laws that lack specificity and clarity and their use to repress a range of legitimate activity, are illustrated later in this chapter.[492] Thus, for example, in his final report to the Council, the UN Special Rapporteur on Terrorism described the continued existence of SC Res. 1373 as going beyond the powers of the Council, and as itself a continuing threat to the protection of human rights.[493]

The second type of resolutions are those sometimes referred to as 'quasi-judicial' resolutions which go beyond imposing obligations on states, to im-

488 Under Article 24, the Security Council has 'primary responsibility for the maintenance of international peace and security.' Its powers to take non-coercive and coercive measures are set down in chapters VI and VII. The Security Council has been referred to as an 'executive of the international community' in light of its most extensive powers under the Charter. Simma, *The Charter of the United Nations, A Commentary*, *supra* note 17, p. 702. As explained here, the criticisms relate to an expansion into quasi-judicial and legislative functions.

489 Paul C. Szasz, The Security Council Starts Legislating, 96 AJIL 901(2002), pp. 960-65; S. Talmon, 'The Security Council as World Legislator', (2005) 99 AJIL 175. *See* scope of resolutions that prompted the assertion in Chapter 2.

490 The SC has repeatedly found that 'terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed …': *see* SC Res. 1822 (2008).

491 'Pursuant to resolution 1373 (2001), the Security Council for the first time imposed on all States Members of the United Nations a number of general, permanent obligations, not connected to a specific conflict situation. In effect, this type of action amounts to the Council establishing new binding rules of international law. The obligations laid out in resolution 1373 (2001) contain no end in time or geography and apply to any act of terrorism worldwide. As a result, it has been contested whether it was the prerogative of the Council to take this type of de facto legislative measure.' Scheinin, '2010 Report to the Security Council', *supra* note 533, para. 34. *See also* e.g., M. Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *Leiden Journal of Int'l Law* 593.

492 *See*, *e.g* , 7B.4 7.B.11.

493 Scheinin, '2010 Report to the Security Council', *supra* note 533 at para. 39.

posing sanctions on identified individuals and groups.[494] Key resolutions here are Res. 1267 and Res. 1390, both of which provide for 'smart sanctions' – in particular the freezing of assets and travel bans – on individuals designated by the UN Sanctions Committee as linked to Osama bin Laden, al-Qaeda or the Taliban, while obliging states to adopt appropriate measures of enforcement.[495] Human rights controversies attending this 'listing,' ranging from the uncertain criteria and process for inclusion on the lists to the lack of due process to challenge inclusion, are discussed further below.[496]

A third terrorism-related resolution, although different in nature and context, is worthy of note in this context. The Council's precipitous and ultimately mistaken 'naming and shaming' of ETA as the terrorist organisation responsible for the 11/3 Madrid bombings in Resolution 1530 raised the uncomfortable spectre of a somewhat gung-ho approach to terrorism by the world's most powerful international body.[497] This has been described as fuelling concerns regarding the capacity for manipulation of the Security Council, its procedures and role as inquisitor and arbiter of evidence, as well as raising questions regarding the consequences of a 'glaringly incorrect resolution'.[498] It thus highlighted, and augmented, many of the concerns emerging in relation to the 'legislative', and in particular the 'quasi-judicial', resolutions highlighted above, and the corresponding lack of accountability of the Council.

In this context, debate has been reignited as to whether the UN, or the Security Council specifically, has a responsibility to respect human rights. The UN, unlike states, is not a party to treaties or bound by them. Some note however that it is bound by its own constituent instrument, the UN Charter, which has both peace and security and human rights as purposes of the UN.[499] Others assert that it is bound by customary law,[500] while the

494 While much invoked in recent practice, the term is not new: s*ee*, *e.g.*, O. Schachter, 'The Quasi-Judicial Role of the Security Council and the General Assembly', 58 (1964).

495 See 7B.8 below.

496 *Ibid*. Part 7B.8, 'Listing and De-listing', below.

497 *See* T. O'Donnell, 'Naming and Shaming: The Sorry Tale of Security Council Resolution 1530', 17 (2004) *The European Journal of Int'l Law* 5, 945-968.

498 O'Donnell raises questions regarding the Security Council's role as inquisitor and arbiter of evidence and the assumption of good faith on the part of members. *Ibid.* at p. 946.

499 *See* Arts. 1, 23 and 24, UN Charter, *supra* note 18. There are several bases upon which it has been asserted in recent years that the Council must nonetheless respect human rights law; s*ee*, *e.g.*, Scheinin, '2010 Report to the Security Council', *supra* note 533, para. 17, nn. 3-4, *citing*, *inter alia*, F. Mégret and F. Hoffman, 'The United Nations as a human rights violator? Some reflections on the United Nations changing human rights responsibilities', Human Rights Quarterly, vol. 25, No. 2 (May 2003), p. 317; and A. Bianchi, 'Security Council's anti-terror resolutions and their implementation by Member States', 4 (2006) *Journal of Int'l Crim. Justice* 5, p. 1062. *See also* D. Akande, 'The Security Council and Human Rights: What is the role of Art. 103 of the Charter?', *EJIL Talk*, 30 March 2009: '[T]he Council is, as a general matter, bound by human rights law. This is because the Charter says so. Art. 24(2) of the Charter provides that in discharging its duties "the Security Council shall act

minimalist position is that it is curtailed in the exercise of its powers by those human rights obligations that amount to *jus cogens* norms.[501] This has been endorsed as a minimum by several courts and bodies post 9/11 that have considered the relationship between Security Council resolutions and human rights and noted that the Council's Chapter VII powers are limited by *jus cogens*,[502] in accordance with the basic rule that no treaty, not even the Charter, can conflict with peremptory norms.[503]

Beyond the legal debate is a broader discussion on the legitimacy of a council that 'claim[s] to represent the power and authority of the law, and at the same time, claim[s] to be above the law'.[504] As such, it has been suggested that 'it would be odd indeed to hold that the organization from which the international protection of human rights originated and which still looks at their protection as one of its fundamental goals, be exempted from the obligation to respect them'.[505] However, even if one accepts responsibility in principle, the intractable reality remains that there is no forum to hold the Council to account, or to provide individuals an opportunity to challenge directly measures that may have a devastating effect on their rights.

Some fledgling acknowledgment of its responsibility for human rights may be discerned from Resolution 1822 which suggests that the role of the United Nations in leading the effort to combat terrorism should itself be in accordance with human rights,[506] fair and transparent.[507] Later, the establishment of an Ombudsperson with powers to review the al-Qaeda sanctions lists and 'recommend' delisting may provide further evidence of a degree of responsiveness to mounting pressure for a measure of Security Council accountability

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in accordance with the Purposes and Principles of the United Nations."'

500 J. Paust, 'The UN Is Bound by Human Rights: Understanding the Full Reach of Human Rights, Remedies and Non-immunity: Responding to Tom Dannenbaum, Translating the Standard of Effective Control Into a System of Effective Accountability', (2010) 51 *Harvard Int'l Law Journal* 301.

501 *See* Chapter 11

502 *See Al-Jedda* v. *United Kingdom*, Appl. No. 27021/08, Judgment, ECtHR, 7 July 2011; *see also Kadi I* Case T-315/01.

503 VCLT, at Article 64.

504 Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya* v. *United States*), Provisional Measures, Order of 14 April 1992, [1998] ICJ Rep. 110 (Dissenting Opinion of Judge Sir Robert Jennings at 110) in Bennoune. The full quote is: '[i]t is not logically possible to claim[s] to represent the power and authority of the law, and at the same time, claim[s] to be above the law.' From Bennoune, 'All Necessary Measures?', *supra* note 487.

505 Scheinin, '2010 Report to the Security Council', *supra* note 483, para. 17 (*citing* Bianchi, 'Security Council's anti-terror resolutions', *supra* note 499 at p. 1062).

506 SC Res. 1822 (2008), Preamble, which notes that the effort by states and the UN 'needs' to conform to human rights, IHL and refugee law.

507 *Ibid*. at para. 28. States must take the measures to fully implement the resolution (including in accordance with human rights), para 27. *See also* Part 7B.8.

and some recourse for individuals whose rights are directly affected by its actions.[508]

Moreover, in practice, an indirect form of oversight has emerged, as courts and bodies have adjudicated the human rights effects of resolutions, albeit quite explicitly not addressing UN responsibility as such but the responsibility of states (in contributing to the UN sanctions lists[509] or in the way they implement Council resolutions[510]). These human rights decisions may in turn contribute to momentum towards respect for human rights by the Council itself, and further improvement in its internal processes and safeguards where the Council's acts directly impact on individuals. In light of remaining gaps and uncertainties in respect of UN accountability, emphasis must for now remain on understanding the nature of *states'* obligations, and ensuring that individuals can seek justice for violations against states. Controversy in this respect has been no less acute, as addressed in the following section.

7B.1.3 Obligations of States Implementing Security Council Resolutions and Human Rights

Some of the most challenging legal issues to arise post-9/11 have involved the question of the interplay of legal norms or legal regimes.[511] Among them is the question of the inter-relationship between states' human rights obligations and their obligations under Chapter VII of the UN Charter to implement Security Council resolutions concerning the protection of international peace and security. The issue has provoked considerable controversy post-9/11, and given rise to numerous cases before national and international courts.[512] Two issues that have emerged in the context of states implementation of UN obligations are worth distinguishing. One is the question of attribution of acts carried out by states pursuant to Security Council authorisation. Some states have argued that certain measures taken pursuant to Security Council resolutions were really attributable to the UN and not to member states acting under UN

508 The Office of the Ombudsperson created by SC Res. 1904 in 2009, and extended by Res. 1989 in 2011, provides for individuals or entities seeking to be removed from the Security Council's Al-Qaida Sanctions Committee List to submit their request to the Ombudsperson who makes recommendations on delisting which will be followed unless the Committee decides otherwise by consensus within 60 days: *see* Part 7B.8. Note other sanctions lists (not relevant to this study's focus on terrorism) have no such built-in process and less accountability.

509 *Nabil Sayadi and Partricia Vinck* v. *Belgium*, Human Rights Committee, UN Doc. CCPR/C/94/D/1472/2006, 29 December 2008 ('*Sayadi* v. *Belgium*').

510 *Al-Jedda* v. *UK*, *supra* note 502; *Sayadi* v. *Belgium*, ibid; *Kadi I*, and Case T-85/09 Kadi v. *Commission* [2010] ECR II-5177 (Kadi II); *Case of Nada* v. *Switzerland*, Appl. No. 10593/08, Judgment, ECtHR, 12 September 2012.

511 On the interplay between HR and IHL, *see* The 'war' and Human Rights, 7B.3 below.

512 *See* Chapter 11.

mandate.[513] This was argued for example in the *al Jedda* v. *UK* case before the ECtHR concerning detentions by UK troops in Iraq and in the first *Kadi* case before the European Court of Justice challenging the EU sanctions listing regime.[514] Courts have rejected these arguments, emphasising that it is a question of fact whether the states, or the UN, exercised the necessary 'effective control' over the conduct in the particular situation: in the context of the UK-run prison in Iraq, for example, the *de facto* control clearly fell to the UK, not the UN.[515] Particularly given the lack of accountability of the UN itself, it is important that States have not in practice been shielded from responsibility on the simple basis that they were acting under a broad UN umbrella.

The second and more complex question is whether, and if so how, states' human rights obligations apply when implementing Security Council resolutions. Post-9/11, in relation to both the freezing of assets pursuant to the Security Council 'terrorist lists',[516] and the implementation of resolutions considered to authorise detentions in Iraq,[517] for example, states have argued that they are not accountable for alleged infringements of their human rights treaty obligations when giving effect to binding obligations arising from Chapter VII resolutions. States have often invoked Article 103 of the Charter, which provides that if there is a conflict between a state's treaty obligations and those under the Charter, the latter prevails.[518] Whether this is an unjustifiable attempt to evade human rights responsibility, or appropriate deference to the Council's role in the protection of peace and security, is a matter of hot dispute.

The specific cases in which these issues have unfolded are discussed in Chapter 11 on human rights litigation, but a few principles that emerge from the consideration of these issues post-9/11 are worth highlighting. The first is that the attempt to invoke Article 103 to completely preclude judicial con-

513 States have cited *Behrami and Behrami* v. *France* and *Saramati* v. *France, Germany and Norway*, 45 EHRR SE10 (2007) ('*Behrami and Saramati*'), both controversial cases in which the ECtHR found that acts of KFOR in Kosovo were attributable to NATO and not to member states. The Court found the UN and not states to be responsible, whereas the better view may be that both states and the UN could have concurrent responsibility. *See*, *e.g.*, M. Milanović, Posting, 14 January 2008, *Opinio Juris*, available at: http://opiniojuris.org/2008/01/14/is-the-us-army-in-iraq-acting-for-the-un.

514 *Al-Jedda* v. *UK*, Kadi I, *supra* note 502.

515 Al Jedda, *ibid*.

516 In *Sayadi* v. *Belgium*, *supra* note 509, the acts of the state had lead to the individual being listed in the first place; in *Kadi*, the acts in question related to the implementation of sanctions. *See also* Nada v Switzerland, ECtHR, note 510. On the national level the 'tension' was noted
in, *e.g.*, *Abousfian Abdelrazik v. the Minister of Foreign Affairs and the Attorney General of Canada*, 2009 FC 580, at para.4

517 *Al-Jedda* v. *UK*, *supra* note 502.

518 Art. 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

sideration by courts and bodies giving effect to states' human rights obligations has been unsuccessful.[519] Courts have been willing to look at the relevance and inter-relationship of both sets of norms in the context of the particular case. Although Article 103 cannot be (and has not been) ignored by courts applying human rights law, neither does it end the enquiry. Rather, it constitutes the starting point for an analysis in which states' obligations in the two fields have been read together.

Secondly, practice suggests that while states' responsibility to implement resolutions is beyond doubt, they must respect their human rights treaties obligations in the exercise of their discretion as to *how* to implement them. As one expert group noted, '[s]tates have a responsibility to implement Security Council resolutions. In the exercise of their discretion in the choice of methods of implementation, they should ensure conformity with human rights, international humanitarian law and other relevant bodies of international law.'[520] Put differently, it may be said that their accountability is commensurate with the extent of their discretion.[521] In a similar vein, in cases concerning detention in Iraq, or the implementation of sanctions against individuals without judicial review, states have been found to fall foul of human rights obligations that they could have met consistently with their obligations in respect of peace and security.[522]

Thirdly, it has been suggested that in interpreting the obligations imposed by the Council there should, in the words of the Human Rights Committee, 'be a presumption that the Security Council did not intend that actions taken pursuant to its resolutions should violate human rights'.[523] Both the HRC and ECtHR post-9/11 have indicated that resolutions must be interpreted in the

519 *See* Baroness Hale in the House of Lords in *Al-Jedda* v. *Secretary of State for Defence*, [2007] UKHL 58, on appeal from [2006] EWCA Civ 327 (rejecting the idea of ending legal enquiry by the invocation of Art. 103), and Judges Bedjaoui, Ranjeva and Koroma's joint declaration in the *Lockerbie* case noting that, 'it is not sufficient to invoke the provisions of Chapter VII of the Charter so as to bring to an end *ipso facto* and with immediate effect all judicial argument on the Security Council's decisions'. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya* v. *United States)*, Preliminary Objections, Judgment of 27 February 1998, [1998] ICJ Rep. 115. *See* discussion in Bennoune, 'All Necessary Measures?,' *supra* note 487.

520 'Leiden Policy Recommendations on Counter-terrorism and International Law', L. van den Herik and N. Schrijver (eds.), *Counterterrorism Strategies in a Fragmented International Legal Order*, *supra* note 142. para. 83 (hereinafter 'Leiden Policy Recommendations').

521 In *Nada*, the ECHR found the state had violated its obligations in its implementation of the UN sanctions regime. On the controversy as regards the extent of any discretion in this respect, *see* the Joint Concurring Opinion of Judges Bratza, Nicolaou and Yudkivska *supra* note 510. *See also* Chapter 11.

522 *See*, *e.g.*, ECHR: *Al-Jedda* v. *UK*, *supra* note 502, and *Nada* v. *Switzerland*, *supra* note 510; ECJ: *Kadi v. Council*, note 511.

523 *Sayadi* v. *Belgium*, *supra* note 510 at p. 36.

manner most consistent with HR obligations.[524] In most concrete cases, they have come to the conclusion that there is in fact no necessary conflict between Council obligations and their implementation consistently with human rights.[525] One open question is how the matter would be handled by the Courts if the Security Council would, or could, clearly and explicitly oblige states to take measures that did necessarily and unavoidably violate human rights obligations.[526]Another such question may be the *effect* of the right to judicial challenge on the domestic level, in the event that domestic courts find that, for example, measures against an individual are unlawful but the Council maintains the individual on its lists.[527]

In extending its approach to peace and security post-9/11, the Council has 'individualised' international obligations, with unprecedented direct affects on the rights of individuals. Human rights courts have suggested that individuals must have the right to challenge measures that infringe their rights domestically, whatever their provenance. In doing so they have refused to drive a wedge between peace and security and human rights obligations, but seek to apply them together and consistently. A number of questions remain and practice in this area is unfolding. The precise parameters of the interrelationship between states' obligations in this area, like the questions related to the responsibility and accountability of the Council itself, may be areas where law and practice are evolving under the influence of the 'war on terror',

524 *See*, *e.g.*, most recently *Nada* v. *Switzerland*, *supra* note 510 at para 170, referring also to *Al-Saadoon* v. *UK*, *supra* note 397, § 126; Al-Adsani, *supra* note 467, § 55; and *Banković* v. *Belgium*, *supra* note 60, §§ 55-57; *see also* the references cited in the ILC study group's report entitled 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law', para. 81.

525 Contrast the lack of explicit language requiring internment in *Al-Jedda* v. *UK*, to the explicit language on travel restrictions in *Nada* v. *Switzerland*. The ECHR noted in *Al-Jedda* that: 'it is to be expected that clear and explicit language would be used if the Security Council intended States to take particular measures that would conflict with their obligations under international human rights law' (para. 102). The Court accepted that the presumption did not operate due to the explicit language though it found that 'Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UN Security Council'. *Ibid.*, para. 180. The Court found it in violation, in light of this latitude, and did not have to consider whether there was a conflict with 103; *ibid. at* para 197.

526 *See* part 7B1.2. At least as regards *jus cogens*, and in the view of some customary law, resolutions mandating violations of these norms would be of doubtful validity. *Nada* v. *Switzerland*, *supra* note 510.

527 *See* M. Milanović, 'European Court Decides Nada v. Switzerland', *EJIL*, 14 September 2012, available at: http://www.ejiltalk.org/european-court-decides-nada-v-switzerland; *see also* T. Thienel, 'Nada v. Switzerland: The ECHR Does Not Pull a Kadi (But Mandates It for Domestic Law)', *Weblog of the Netherlands School of Human Rights Research*, 12 September 2012, available at: http://invisiblecollege.weblog.leidenuniv.nl/2012/09/12/nada-v-switzerland-the-ecthr-does-not-pu.

and which undoubtedly deserve greater attention and emphasis at the international level.[528]

7B.2 THE GLOBAL 'WAR ON TERROR': LEAVING HUMAN RIGHTS OBLIGATIONS AT HOME?

The 'global war on terror' (GWOT) has been executed in large part on the international stage, characterised by an increased exercise in military, intelligence gathering and/or law enforcement powers by states beyond their national boundaries. This corresponds to the assertion by the United States government that 'known political boundaries ... do not exist in the war on terrorism'.[529] In this context, critical questions arise in relation to the application of international human rights law extra-territorially,[530] rendered more pressing by the many reports of states violating human rights abroad.

Practice in the course of the so-called war on terror highlights the manipulation of the 'extra-territoriality' issue to avoid the applicability of human rights law. In its most extreme manifestation, detentions at Guantánamo were predicated on the detainees being held in an 'extra-territorial' and hence – for all intents and purposes – 'extra-legal' space.[531] But the issue arises far beyond Guantánamo, embracing for example other 'off-shore' detentions around the world,[532] the conduct of intelligence agencies and others engaged in surveillance or intelligence gathering abroad,[533] the activities of ground troops overseas[534] or targeted killings of suspected al-Qaeda operatives in Pakistan, Yemen, Somalia, Libya and, potentially, beyond.[535]

528 Leiden Policy Recommendations, *supra* note 520, para. 54; Scheinin, '2010 Report to the Security Council', *supra* note 483. This reflected in Rule of Law discussions at the UN level.

529 'The President has made clear that we will fight the war on terrorism wherever we need to fight the war on terrorism ... this is a different kind of war, with a different kind of battlefield, where known political boundaries, which previously existed in traditional wars do not exist in the war on terrorism.' Press Gaggle by Ari Fleischer, Aboard Air Force One, 5 November 2002, available at: http://georgewbush-www.whitehouse.archives.gov/news/releases/2002/11/20021105-2.html. *See* other manifestigations of this position in Chapter 6.1.1.2

530 *See* legal framework section in this chapter 7A.2.1.

531 *See* Chapter 8 on 'Guantánamo Bay'.

532 *See* Chapter 10 'Extraordinary Rendition'.

533 Chapters 7B13 and 10.

534 *See* Chapter 9 'The Killing of Osama bin Laden' and Chapter 10 'Extraordinary Rendition'.

535 For more information, *see* B.3.3 below and Chapter 6.B.2.2 on 'Targeted Killings, 'Drones' and IHL'.

7B.2.1 Detention or Interrogation of prisoners abroad?

The arrest, detention and interrogation of prisoners since 9/11 have led to widespread allegations of arbitrary detention, torture and other mistreatment.[536] Does the human rights framework apply to these arrests and detentions, or does it matter that they take place in Afghanistan, Iraq, Italy, Guantánamo Bay, Cuba, or on international waters?[537] In this respect, questions regarding the applicability of the human rights framework should be straightforward, with previous decisions from, for example, the Human Rights Committee, Inter-American Commission on Human Rights and the ECtHR having specifically decided that the human rights obligations of the state under whose authority persons are arrested or detained apply, irrespective of where, geographically, that authority is exercised.[538]

Despite this, it is noteworthy that the US has maintained before treaty bodies that its obligations under the ICCPR did not or do not arise in respect of Guantánamo, the rendition programme, and detentions in Afghanistan or Iraq for example, on the basis of, *inter alia*, the 'extra-territorial' nature of the states action.[539] The US administration has also argued that its obligations under the Convention against Torture were not applicable to operations against non-nationals abroad, including in Guantánamo or in the CIA detention programme, backing up its position by reference to a reservation to the territorial

536 *See* Chapter 6 on IHL generally, and specifically 6B.2.5 'Detentions, Terrorism and IHL', which discusses the multiple reports of mistreatment of prisoners in Afghanistan and elsewhere.

537 *See* Chapter 8 on Guantánamo Bay, discussing inmates who were detained in many states around the world prior to their transfers to Guantánamo, and Chapter 10 on Extraordinary Rendition which gives a sense of the diversity and range of locations where individuals were first detained. Reports note individuals apprehended during the military operations in Afghanistan have been detained in detention facilities in off-shore US Navy ships: *see, e.g.*, Human Rights Watch, 'Background Paper on Geneva Conventions and Persons Held by US Forces', 29 January 2002, available at: http://www.hrw.org/legacy/backgrounder/usa/pow-bck.pdf; M. Chinoy, 'Marines setting up detention center', *CNN.com*, 15 December 2001, available at: http://archives.cnn.com/2001/WORLD/asiapcf/central/ 12/15/ret.chinoy.otsc. *See also* P. Wolfowitz and Gen. Pace, *DoD News Briefing*, 18 December 2001, where the US Deputy Secretary of Defense acknowledged the presence of five detainees ('one Australian, one American, and three Taliban/al Qaeda') aboard the USS Peleliu, transcript available at: http://www.dod.gov/transcripts/2001/t12182001_t1218dsd.html.

538 Cases such as *Ilascu* v. *Russia*, *Öcalan* v. *Turkey*, *Lopez Burgos* v. *Uruguay* (HRC), and *Coard* v. *US* and *Precautionary Measures in Guantanamo Bay* (Inter-American Commission on Human Rights) all concerned arrest and detention abroad and reiterated the principle of extraterritorial application of human rights obligations in this context, as noted in 7A2.

539 The US interprets the ICCPR as only applying within its own borders though human rights bodies reject this approach: *See* its First Periodic Report: U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: United States of America, UN Doc. CCPR/C/USA/CO/3/Rev.1 (18 Dec. 2006); Second, Third and Fourth Periodic Reports of the United States to the UN Committee on Human Rights, *supra* note 21.

scope of the CAT.[540] In its 2011 submissions to the HRC for example the US tone and approach changed slightly, and it 'acknowledged' in its response that its position on the extra-territorial effect of the treaty obligations is at odds with the position of the human rights treaty bodies and ICJ, though without apparently committing to bringing its position into line with international legal authority.[541] Arguments on extra-territoriality have at times been accompanied by the broader argument, at odds with the most basic legal principles, that its obligations under international law in this respect must be understood by reference to its internal law.[542]

While the US maintains that the detention and interrogation of non-US nationals abroad falls beyond the oversight of human rights bodies,[543] this view has been roundly rejected by the bodies themselves.[544] As the Inter-American Commission reaffirmed in this context:

> The determination of a state's responsibility for violations of the international human rights of a particular individual turns not on the individual's nationality or presence within a particular geographic area, but rather whether under specific circumstances, that person fell within the state's authority and control.[545]

The issue was also contentious at least temporarily in the United Kingdom, where the government's approach shifted over time. When the issue of extra-territoriality arose in the context of persons allegedly tortured and ill-treated in UK custody in Iraq, the UK at first contended that the ECHR did not apply

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540 *See* Ratifications and Reservations: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at:http://www.ohchr.org/english/countries/ratification/9.htm#reservations. On the basis a reservation referring to the understanding of cruel treatment under domestic law, the US Administration interpreted the scope of Article 16 as covering acts committed within US territory or against a US national abroad. *See*, *e.g.*, Report of expert meeting on procedural safeguards for security detention in non-international armed conflict, Chatham House and ICRC, London, 22-23 September 2008, available at: http://www.icrc.org/eng/assets/files/other/security-detention-chatham-icrc-report-091209.pdf 5 December 2012 and Chapter 10.

541 *See* US' Fourth Periodic Report, *supra* note 21.

542 The Administration also argued that the Federal Torture Statute, which applies to acts committed outside the United States, criminalises only torture and not other inhuman treatment, so its law excluded criminal liability for cruel, inhuman or degrading treatment. *See also* interpretations of the scope of CAT above.

543 As discussed elsewhere, the rejection of the extra-territorial effect of IHRL is combined with the argument that the Geneva Conventions did not apply to detainees. *See* 'Interplay' discussion of specific issues below, part B.3; *see also* Duffy, 'Harmony in Conflict?', *supra* note 141.

544 *See* the Committee's responses in its periodic reports, above.

545 Inter-American Commission on Human Rights, *Precautionary Measures in Guantanamo Bay* (*citing Coard et al*. v. *the United States*, *supra* note 80, para. 37).

to such persons (contradicting its earlier position),[546] but it later conceded that at least as regards persons within the physical custody of the state, its human rights obligations under the Convention applied.[547] As noted in Part A this accords with a developed body of human rights jurisprudence, which was affirmed by the European Court in the Iraq cases, that states' human rights obligations do apply the detention and transfer of persons abroad.[548,549]

Judicial practice post-9/11 therefore confirms what was clear before: that where the state arrests or detains individuals abroad it exercises sufficient power, authority or control over them that they fall within its power and are protected by its human rights obligations.[550] The real issue to be addressed regarding arrest and detention is not, or should not be, whether human rights law is applicable, but whether the arrests or detentions are lawful according to the applicable legal framework.[551]

7B.2.2 Extra-territoriality and Lethal force

More controversial issues have arisen in relation to the extra-territorial application of the IHRL framework where the individual is not taken into custody but is killed by state agents abroad. Does use of force by military or other organs of the state in Iraq, Afghanistan or elsewhere fall to be assessed by reference to the state's human rights obligations? Are targeted killings through the use of drones or otherwise beyond the purview of the state's obligations due to its extra-territorial locus?[552]

This issue arose squarely in relation to the disputed applicability of the European Convention (ECHR) to the conduct of British troops in Iraq mentioned in the previous section. The resulting litigation in the *al-Skeini* case (considered in more detail in Chapter 11), both exemplifies a government seeking to draw territorial lines around its human rights obligations, and the judicial rejection

546 This arose in *al-Skeini* v. *UK*, *supra* note 62. Its position contradicted pages 13 and 24 of the UK Government's pleadings in *Banković* v. *Belgium*, *supra* note 60, wherein the government, then opposing the application of the ECHR in the context of aerial bombardment, draw a sharp distinction between those facts and the 'classic' authority of the state to arrest and apprehend.

547 *See* its position by contrast on lethal force, in *al Skeini*, discussed below and in Chapter 11.

548 *See al-Skeini* v. *UK*, *supra* note 62; *Al-Saadoon* v. *UK*, *supra* note 397; *Al-Jedda* v. *UK*.

549 Chapter 7A.2 for the legal framework.

550 *See*, *e.g.*, HRC, General Comment No. 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant'.

551 *See* rules on detention at 7A.5 above and in more detail in Chapter 8. In the context of armed conflict, the lawfulness of detention under IHRL must be understood by reference to IHL, *see* 7b.3 below.

552 *See* Chapter 6 on facts relating to drone killings, and Chapter 9 on the killing of Osama bin Laden by Special Forces.

of such artificial delimitations.[553] The UK government argued in that case, and domestic courts felt compelled to accept,[554] that while the ECHR did protect individuals in the custody of the UK it did not protect persons killed or injured by UK soldiers on the streets of Basra. It was argued by the government that absent effective territorial control, UK troops could not be expected to ensure respect for the full range of human rights under the Convention, and as the Convention could not be 'divided and tailored', it was simply inapplicable in such situations.[555] Thus it was argued and UK courts accepted, somewhat anomalously, that persons held in UK custody in Iraq *were* covered by the Convention but persons killed on the streets of Basra were not.[556] However, the Grand Chamber of the ECtHR rejected this approach. In *al-Skeini* v. *UK*, it held that the Convention applies extra-territorially where a state's agents exercise 'physical power and control' over individuals, including through the lethal use of force.[557]

Drone attacks in Yemen, Pakistan, Somalia, Libya and potentially beyond,[558] involve the extra-territorial force on a growing scale that is giving rise to mounting international concern. By the same principle employed in the *al-Skeini* case in Iraq, individuals identified and targeted by lethal force may be considered within the 'exercise of physical power and control' of the attacking state in a direct and obvious way. While the applicability of IHRL to this practice is questioned by the US,[559] the UN Special Rapporteur on Extra-judicial Executions expressed concern about compliance with the IHRL framework, rejecting any question as to the applicability of the human rights framework arising from their extra-territorial location.[560]

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553 *Al-Skeini* v. *Secretary of State for Defence*, [2007] UKHL 26, 13 June 2007. The case concerned six appellants, the first five of whom had been killed by UK 'patrols' in occupied Basra: while eating a family evening meal, during a raid on a family member's house or while driving a minibus; the sixth, Baha Mousa Baha, was tortured while in UK custody in Iraq. In its judgment of June 2007, the UK House of Lords found the European Convention to apply only to the sixth as he was in UK custody at time of death.

554 The Court felt compelled to follow the controversial Grand Chamber *Banković* v. *Belgium*, emphasising the importance of 'territorial control' as a prerequisite to jurisdiction. *See* A.2.2. above.

555 *See* UK arguments in *al-Skeini* v. *UK*, paras. 137, 142.

556 *Ibid.*

557 *Ibid.* at para. 136.

558 *See* 'the war and human rights' below on strikes and IHRL, and Chapter 6 'Drones'.

559 *See, e.g.* H. K. Koh, Legal Advisor, Department of State, 'The Obama Administration and International Law', Remarks at the Annual Meeting of the American Society of International Law (ASIL), 25 March 2010, available at: http://www.state.gov/s/l/releases/remarks/139119.htm (hereinafter 'Koh ASIL Speech'). *See also* the US' Second, Third and Fourth Periodic Reports to the HRC.

560 See P. Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions, Study on Targeted Killings, Human Rights Council, UN Doc. A/HRC/14/24/Add.6, 28 May 2010, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf (hereinafter 'Study on Targeted Killings').

Recent practice may confirm that when individuals are taken deliberately within the power and control of states, whether through detention or the use of force – by drone attack, ground troops or in a special operation consisting of trained Navy SEALs (such as in the killing of Osama bin Laden, discussed separately)[561] – the human rights framework applies irrespective of the geographic locus of the operation. The most contentious and difficult issue in relation to killings in Pakistan or Yemen, of Osama bin Laden, or of other use of force in the WOT is generally not whether IHRL is applicable or excluded, but, as discussed in the next section, whether IHL also applies, and whether the attack in question is justified according to applicable law.[562]

7B.3 THE 'WAR' AND HUMAN RIGHTS

The misleading overuse of the language of 'war' and the consequent jeopardy to the integrity of international humanitarian law was noted in the previous chapter. The impact on human rights law, and on human rights protections in practice, may be all the more profound. On one level, an emphasis on the armed conflict paradigm may contribute to the erroneous notion that terrorism should, or can, be defeated militarily.[563] The fight against terrorism post-9/11 has been characterised by the persistent conceptualisation of terrorists as abstract 'enemies,' which focuses on pursuing their 'defeat', sometimes at any cost, rather than seeing them as human beings with rights and responsibilities, subject to the penalty of law, but also the protection of it. This in turn risks undermining the perceived relevance of regular criminal law enforcement responses to terrorism and its potential to reinforce the rule of law.[564] An 'enemy-focused' or 'law of the enemy' approach to law[565] can only undermine the fundamental principle of universality, and the legitimacy of a rule of law response to the challenges of international terrorism.

In practice, the 'war' has at times been invoked post-9/11 in an apparent attempt to suggest that human rights are simply inapplicable to all matters related to the detention, treatment or killing of terrorist suspects anywhere

561 Chapter 9.

562 Chapter 7A.2.

563 On growing recognition, in particular on the international level, that terrorism will not be 'defeated' militarily, *see* SC Res. 1963 in 7B.1 'Security v. Human Rights Post-9/11'.

564 Introduction Chapter 4 on the role and potential of criminal law.

565 See the 'law of the enemy' approach – a criminal law doctrine posited by Gunther Jakobs (1985) whereby groups of (potentially dangerous) individuals are identified as 'enemies' by the criminal justice system, and singled out for differential treatment within the criminal law, involving, for example, prospective punishment and procedural irregularities, as in the war on terrorism discussed in Chapter 4. M. Tondini, 'Beyond the Law of the Enemy: Recovering from the Failures of the Global War on Terrorism through (Criminal) Law', in *Processi Storici e Politiche di Pace / Historical Processes and Peace Politics*, Vol. 3, No. 5, 2008, pp. 59-81 describes the GWOT as 'a form of law of the enemy on a global scale'.

in the world.[566] From a legal point of view this can be straightforwardly dismissed as a misunderstanding of the human rights framework's continued relevance in situations of emergency, and the co-application of IHL and IHRL in armed conflict.[567] The impact on the perceived relevance and applicability of human rights law is nonetheless insidious.[568] Even on a correct understanding of the interplay between IHRL and IHL, a precise appreciation of when 'war' is really an armed conflict as opposed to a rhetorical device, may in certain situations have a profound impact on applicable law, and is therefore critical to the shape of human rights protection, as discussed below.[569]

The correct identification of the legal framework matters for other reasons too, as practice illustrates. Even where the areas of law enjoy substantive coherence,[570] they are characterised by a procedural imbalance on the international, and perhaps the national, level.[571] The lack of an international complaints mechanism to give effect to IHL contrasts to an intricate network of international and regional human rights courts and bodies where individuals

566 *See* the US position – that its obligations under the ICCPR or IADHR do not apply to detention, rendition or lethal use of force in armed conflict – discussed below in this section. *See also* the US's Second and Third Periodic Reports to HRC, *supra* note 27; and the US' Fourth Periodic Report to HRC.

567 *See* discussion 7A.3.4 and more fully in Duffy, 'Harmony in Conflict?', *supra* note 164.

568 S*ee* by way of example the discussion on the impact of the 'war on terror' and global 'securitiation' in various Latin American states in 'Terrorism and anti-terrorism in South America with a special consideration of Argentina, Chile and Colombia', Böhm González-Fuente y Sandino, in Sistema Penal y Violencia, Porto Alegre, Volume 4 – Número 1 – pp. 46-74 – Janeiro/Junho 2012.

569 *Ibid.* While the focus here is on applicable international law, it is noted that the existence of war may also change applicable domestic law. One example may be the domestic law of the United States relating to the 'assassination' of foreign nationals prohibited during peacetime since 1975, while during wartime a different (and more permissive) body of law is used to define assassination; *see* M.N. Schmitt, 'State Sponsored Assassination in International and Domestic Law', 17 (1992) *Yale Journal of Int'l Law* 609.

570 This arises most obviously in respect of torture or inhumane treatment or fair trial, while basic principles of non-arbitrariness, due process and humane treatment of persons are guaranteed under any framework; *see*, *e.g.*, Pejic and Droege, 'The Legal Regime', *supra* note 167. But, as noted below, even in respect of classically different issues such as the application of the right to life in conflict situations, while the starting points may be different, there may be some convergence; *see below* and *e.g.*, L. Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers?', 88(64) (2006) *Int'l Review of the Red Cross*, pp. 881-904, at 897.

571 On the national level, access to courts may depend upon one or other applicable area of law. For example, in *al-Skeini* the object of the litigation was to compel the UK government to carry out an investigation into the alleged violations in Iraq as required by the ECHR, incorporated via the UK Human Rights Act. *See also* e.g. *Presidency of the Council of Ministers* v. *Markovic and ors*, Application for preliminary order on jurisdiction, no 8157; ILDC 293 (IT 2002), 08 February 2002, para. 117 where Italian law implementing IHL treaties did not confer upon individuals the right to seek compensation.

may pursue their right to a remedy.[572] Governments arguing that human rights treaty obligations did not apply in particular situations (such as the UK in Iraq or US in Guantánamo) have cited the continued application of IHL to negate the notion that this creates a 'legal vacuum.'[573] In practice the effect (and perhaps aim) of their positions would be to put their actions beyond the oversight of international or regional courts and mechanisms.[574] Clarity as to which bodies of law apply, and how that legal framework operates in particular situations therefore matters, leading to potentially different rules, to decisive differences for victims seeking remedies and accountability and to implications for those charged with implementing the law on the ground.[575]

For these reasons, and in the interest of legal certainty, it is critical to have clarity as regards two questions addressed below: whether IHL in fact applies and, if so, what is the nature of the interplay between the legal regimes in particular situations? As noted below, practice in the war on terror has obfuscated both questions. This section therefore sketches out as well as having a broader significance for legal certainty some of the more challenging issues regarding applicable law and interplay of IHL and IHRL that have arisen in practice.

7B.3.1 Armed conflict with al-Qaeda and associates and the approach to Interplay in the War on Terror

As discussed in detail in Chapter 6, the key issue around which much of the legal and policy debate has revolved in recent years is whether or not there can be a global armed conflict with terrorist organisations, specifically 'al Qaeda and associates', triggering the application of IHL. In brief, while successive United States administrations have asserted the existence of such a war with al-Qaeda and associated groups, to which the 'law of war' paradigm is

572 IHL supervisory systems such as the Protecting Power mechanism, the enquiry procedure and the International Fact-Finding Commission (Article 90 Protocol I) have been little used in practice. The role of the ICRC may be important in assisting victims of IHL violations such as detainees, but it is not an individual complaints procedure and communications are confidential. Cf.human rights mechanisms, *see* 7A.1 above.

573 *See*, *e.g.*, UK government's arguments in *R (*al Skeini*)* v. *Secretary of State for Defence*, paras. 11-25 and *al Skeini* v, *UK* at para. 119 (*citing* the applicability of IHL in support of the inadmissibility of the human rights case); or the US Government's Response to the Inter-American Commission's Request for Precautionary Measures in relation to Detainees at Guantanamo Bay, denying the jurisdiction of the Commission in respect of acts covered by IHL: U.S. Response to IACHR, Precautionary measures ILM 1015 (2002).

574 The role of international courts and bodies is particularly important where national remedies are blocked, due to *e.g.* state secrets, national security laws or immunities: *see* B.14 below and Chapter 10.

575 Duffy, 'Harmony in Conflict?', *supra* note 141.

said to apply,[576] by stark contrast, most other states appear to reject the war paradigm and with it the notion of al-Qaeda as *per se* a party to an armed conflict.[577] The test for an 'armed conflict' and the applicability of IHL is a legal one,[578] not dependent on the position of those engaged,[579] and under the current framework of IHL it is highly doubtful that there can be an armed conflict with a loose ideological network of entities such as 'al-Qaeda and associates', still less a 'global' one that is limitless in time and space.[580] While there have been and remain armed conflicts (such as in Afghanistan),[581] state practice outside the US provides an ever more resounding rejection of the notion of a broader global war on terrorism or against al-Qaeda and associated groups.[582]

It bears emphasis that for the vast majority of action against terrorism, IHL standards are not therefore applicable and have no bearing. It may be that inflated resort to the war paradigm in relation to counter terrorism over a period of years since 9/11 has distorted popular perception of human rights standards, of the relevance of IHL, or of the significance of some of the questions around interplay. For most of the measures against terrorism discussed in this chapter, international human rights law provides the appropriate legal framework for assessing lawfulness.

Where measures *are* taken in association with a genuine armed conflict, what impact does that have on human rights law? As a matter of international law, as set out above,[583] it is beyond reasonable controversy that human rights law continues to be applicable in times of armed conflict. Yet in practice,

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576 While Bush famously coined the phrase the 'global war on terror', the Obama administration contains to assert that it is at war with al-Qaeda and associated groups. The normative battle on whether there is or can be a global conflict with al-Qaeda shows no sign of ceding. *See* Chapter 6, including Obama, 'Remarks by the President on National Security', *The White House Office of the Press Secretary*, 21 May 2009, available at: http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09; *see also*, Obama, 'Inaugural Address', 20 January 2009, available at: http://www.whitehouse.gov/blog/inaugural-address: 'Our nation is at war, against a far-reaching network of violence and hatred.' Koh ASIL Speech, *supra* note 559.

577 *See* Chapter 6B.1.1 'Armed conflict with al Qaeda, associates and "terrorist groups of global reach"?'

578 *See Prosecutor* v. *Tadić*, Case No. IT-94-1-A, Judgment (Trial Chamber), 7 May 1997, 35 ILM (1996) 32;. Garraway & Dinstein, 'The Manual on the Law of Non-International Armed Conflict: With Commentary', 36 (2006) *International Institute of Humanitarian Law*, pp. 71.

579 States may deny the application of IHL for many reasons, including in order not to confer legitimacy on insurgents. In practice, in litigation applicants may not invoke it as it does not assist their case. It thus falls to the court to invoke IHL *propio motu* which it may be particularly reluctant to do. *See* F. Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body', *supra* note 147, p. 549-72.

580 Chapter 6B.1.1.

581 *Ibid.*

582 *Ibid.*

583 Chapter 7A3.

the 'war' has been invoked post-9/11 in an attempt to marginalise the relevance of human rights.[584] The absence of IHRL from legal justifications presented by successive US administrations, in relation to what the US Legal Adviser to the State Department has referred to as 'the law of 9/11', is noteworthy.[585] Likewise, in public statements and responses to international bodies in relation to a range of issues concerning detention, treatment or killing terrorist suspects, the US has explicitly rejected the applicability of human rights treaty protections to such issues, in part on the basis that such measures are or were taken as part of conducting an armed conflict to which the laws of war apply.[586] While some slight shift in the US position has emerged over time, towards acceptance in principle that IHRL is not suspended in its entirety in armed conflict, on all relevant issues related to US conduct abroad referred to above, the US government denies the relevance of IHRL.[587]

In support of its position, the US has generally cited IHL as '*lex specialis*' on relevant issues from detention, treatment of persons to the killing of terrorist suspects, to the effective exclusion of IHRL.[588] This suggests an apparently monolithic approach to the inter-relationship between IHL and IHRL, with the former replacing wholesale the latter on all issues related to the conflict, which denies several aspects of the symbiotic relationship between the two branches of law set out in Part A.[589]

It fails to recognise that the inter-relationship between IHL and IHRL has to be determined norm-by-norm in the context of particular situations and not on a regime wide basis. By denying the relevance of IHRL, it fails to pursue a harmonious approach to the bodies of law where possible, or to acknowledge

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584 *See*, *e.g.*, U.S. Response to IACHR, *supra* note 573;. *See also*, *e.g.*, Koh ASIL Speech, *supra* note 559, which justifies detentions and lethal force by reference to the existence of a conflict (and self defence), without any reference to the applicability of IHRL.

585 *Ibid.*

586 *See*, *e.g.*, U.S. Response to IACHR, *supra* note 573 and; the US Periodic Reports to the HRC, *supra* note 21.

587 *See* shifted in the Fourth Periodic Report of the United States the UN Committee on Human Rights, *supra* note 21: recognises that *'a time of war does not suspend the operation of the Covenant to matters within its scope of application,'* citing the rights to adopt a religion or belief of one's choice or the right to vote (para. 506). It distinguishes these from a 'state's conduct in the actual conduct of hostilities', to which it apparently takes a very broad approach, determining that covers all relevant issues related to detention, treatment of persons and the use force (para. 507). On these, it appears to continues to deny the applicability of ICCPR, though in less explicit terms than previously.

588 Statements by US officials notably ignore or discard the relevance of IHRL: *see*, *e.g.*, Koh ASIL Speech, *supra* note 559; the US Second and Third Periodic Report to HRC, and the marginal shift of position in the Fourth Periodic Report to HRC, *supra* note 21.

589 For a more detailed discussion, *see* Duffy, 'Harmony in Conflict?', *supra* note 141. In the Fourth Periodic approach that reflects some movement in principle by noting some difficult issues arise and that it should be a fact specific determination, but the net effect on its position remaisn the same – that it denies the applicability of IHRL to the various issues of detention, treatment and use of force discussed below. It may show some potential for future development of approach. US' Fourth Periodic Report to HRC, *supra* note 21.

any ongoing role for IHRL as an interpretative tool even where there are norms of *lex specialis*.[590] Critically, as the examples below highlight, a simplistic approach to displacement of IHRL by IHL by reference to '*lex specialis*' denies any difficulty in the identification of applicable norms. *Lex specialis* arises where there is a norm more appropriately directed towards (or in the views of some more precisely or specifically addressing) the conduct in question.[591] While in many armed conflict situations this will be IHL, particularly in conduct of hostilities situations which IHL is particularly directed towards, and in international conflicts where a detailed normative framework may be more likely to provide the required legal clarity and specificity, this may not be the case in non-international armed conflict situations, where IHL may well not specify binding norms, or ones that provide clear specific parameters for particular action.[592] Moreover, within either type of armed conflict, the particular scenario or issue may in all the circumstances be more akin to the sort of situations to which IHRL was in fact directed.[593] There may then be many situations where it is doubtful that IHL provides legal rules at all, or ones that do in fact appear more precisely directed to the situation in hand, sufficient to displace IHRL.[594]

While the issue of interplay is contentious, what is clear is that there is no legal basis for the wholesale displacement of IHRL by IHL on a regime wide basis, or for the refusal to even consider IHRL norms as applicable to issues related to the conduct of an armed conflict.[595] This section highlights three issues that illustrate different aspects of this interrelationship between human rights and IHL, which have arisen in practice post-9/11. They highlight the implications of the disregard of IHRL in favour of an exclusive approach to IHL, but also, in places, some of the more genuinely challenging legal issues regarding interplay.

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590 On harmonious interpretation, *see* A.3.3 above and Duffy, ibid, ILC Report 2006, *supra* note 21, para. 43.

591 *See* 7A.3.3 *ibid.* as to how the notion has been used in practice to embrace at least two broad conceptually different ideas of a) contextual relevance or appropriateness on the one hand, and b) clarity and precision on the other.

592 *See*, *e.g.*, 'Review of Lawfulness of detention' below; acknowledgement that NIACs within one state's borders raise complex issues in US' Fourth Periodic Report to HRC, *supra* note 21, para. 206, but this would not appear to apply to the cross border conflict it purports to be engaged in with al-Qaeda.

593 The issue of which norm is more appropriately or specifically directed to the issue at hand depends on a broader range of contextual factors than simply the existence of armed conflict; *e.g.*, situations of occupation, hostage taking, in the many situations beyond active hostilities. The situation may be closer to one IHRL was directed towards..

594 Put differently, absent a *lex specialis*, the *lex generalis* of IHRL continues to apply at all times.

595 As noted above, the US's Fourth Periodic Report talks of IHL applying without IHRL in conduct of hostilities, but appears to take an expansive view, considering detention, interrogation, rendition and treatment of persons as falling under that rubric.

7B.3.2 *Interplay 1:* Detention in non-international armed conflict?

As recalled at the start of this section, the grounds for detention in IHL and IHRL differ substantially. IHL provides detailed rules for international conflict, essentially allowing for the detention of persons taking part in hostilities for the duration of the conflict, or of civilians where imperative while reasons of security so demand.[596] The IHRL rules, addressed above, strictly circumscribe detention without criminal charge.[597] While in the context of an armed conflict, limited in time and place, the IHL rules provide a *lex specialis* that justifies detentions that would otherwise be arbitrary, that have been relied upon in the context of an uncertain war on an undefined enemy that is potentially global, and which may never end[598] to justify the potentially indefinite detention of persons on security grounds.

The question of the procedural safeguards to which 'security detainees' are entitled, particularly in non-international conflict, raises particular challenges concerning the interplay of IHL and HRL.[599] Human rights and IHL again differ considerably on this point. IHRL sets down in some detail procedural guarantees which include the right – applicable at all times – to access to a court to challenge the lawfulness of detention, as well as surrounding rights concerning access to a lawyer and to a core of the underlying evidence.[600] The question of whether all detainees, wherever detained, are entitled to this basic review of the lawfulness of detention, and specifically to *judicial* review as required by human rights law, has provoked serious controversy.[601]

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596 J. Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force', ICRC, in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012).

597 Ch 7A.5.3 Liberty and Detention; *see also* B.6 'Restricitng Liberty in Liberty's Name'.

598 Chapter 6 B.1.1.1 'The "Global" War', and 6B1.1.2 'War without End?'

599 Sassóli and Olson, 'The relationship between international humanitarian and human rights law', *supra* note 148, p. 616. The legal source of any power to detain in NIAC is itself controversial, though it may be considered implicit, and the alternative would be great loss of life, this could not be consistent with the principles of IHL of humanity and military necessity. The focus here is however on procedural guarantees. Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence' 87(858) (2005) *International Review of the Red Cross* 375.

600 *See* Part A on detention, and Chapter 8 on Guantánamo Bay: the lawful bases for detention differ between IHL and IHRL and a more limited right of judicial oversight exists under the former. Under IHRL, while some detailed due process guarantees are derogable, it has been held that the 'core' in non-derogable and specifically that access to a court is a right applicable at all times, even in situations of crisis and emergency. Regarding evidence, this can be limited under IHRL as long as there is a meaningful opportunity to challenge and sufficient information to this end.

601 The US position is that there is no right to habeas for 'enemy combatants' as clear from litigation discussed below. Human rights jurisprudence suggests otherwise as noted below.

It is also a subject of acute importance in practice. While the US Supreme Court has found persons detained at Guantánamo Bay pursuant to a non-international armed conflict entitled to habeas corpus,[602] the application of habeas to detainees elsewhere, including many in custody in Afghanistan, has thus far been denied on the basis that they are detained in a zone of armed conflict.[603] In an interesting twist, as discussed in Chapter 11, the litigation seeking the right to habeas corpus for Bagram detainees reveals that some of those detained at Bagram had not been captured in Afghanistan at all, but elsewhere around the globe and transferred *into* the zone of conflict for detention purposes.[604] The federal district court judge therefore ruled that as these detainees were not *captured* in an area of war, they had the right to challenge their detention; the appeals court overturned, finding that as the site of their *detention* was in an 'active theatre of military combat,' the detainees held at Bagram had no right to challenge their detention in a US court.[605]

As a matter of international law, according to which legal framework (and by reference to which approach to the inter-relationship) do we begin to answer the question of the extent and nature of a detainee's entitlement to review of the lawfulness of detention in a non-international armed conflict such as Afghanistan?[606] Is it IHRL, with its clear right to challenge lawfulness before an independent court of law, or is there a conflicting norm of IHL?[607]

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602 *Lakhdar Boumediene, et al., Petitioners* v. George W. Bush, *President of the United States, et al.* 553 U.S. For a discussion of US and other litigation, on Guantanamo Bay or Bagram, Afghanistan *see* Chapter 11. For the habeas right in practice in Guatánamo, *see* Chapter 8.

603 The US administration denies the applicability of *habeas*, invoking the 'law of war' paradigm as purported justification (without accepting that the standards of review under GCIV apply either). *See* the unfolding litigation, referred to further *below,* in this section, *see, e.g., Al-Maqaleh, et al.,* v. *Gates et al, US Court of Appeals for District of Columbia,* Case No. 09-5265 decided 21 May 2010. Some detainees continue to be held by the US without access to a lawyer or other procedural safeguards. On current review processes in Afghanistan, *see* Goodman, Rationales for Detention: Security Threats and Intelligence Value, 85 *International Law Studies* (Naval War College, 2009).

604 Petitions for habeas relief were brought in April 2009 by a Tunisian and two Yemenis who allege that they were captured outside Afghanistan (in Thailand, Pakistan and another locations beyond the Afghan border, all far from hostilities), mistakenly identified as terrorists and transferred for imprisonment to the Bagram Air Base military prison in Afghanistan..

605 *Al-Maqaleh, et al., supra* note 603. The Court stated that 'the *Boumediene* analysis has no application beyond territories that are, like Guantanamo, outside the *de jure* sovereignty of the United States but are subject to its *de facto* sovereignty'. The Supreme Court has declined to exercise jurisdiction.

606 The key issue is whether the entitlement is to review by a court, thought fundamental in human rights law, by contrast to IHL's provisions (in international conflict only) providing for other forms of review.

607 *See, e.g., Öcalan* v. *Turkey*, paras. 103-5; Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, 6 October 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987). UN Joint Study on Global Practices, at para. 47, in relation to secret detention; General Comment No. 29 on States of Emergency,

If the conflict were international, there would be specific provisions on POW protections, including limited review of their status by an Article 5 GC III tribunal, or on periodic review of the detention of civilians on imperative security grounds by an 'appropriate court *or* administrative body', and a right of appeal, under GC IV.[608] But for a non-international armed conflict, such as that in Afghanistan, the situation is very different:[609] while the prohibition on arbitrary detention in general has been described as customary law in either type of conflict,[610] there are no specific IHL rules on challenging lawfulness in non-international conflicts at all.

Where IHL makes no specific provision, several approaches can be identified. One approach that has been suggested is the application by 'analogy' of law applicable in international armed conflict.[611] Another suggests that there is a 'gap' to be filled, and proposes a new document setting out basic standards and procedures for administrative detention in armed conflict.[612] However, if there is no norm of IHL on one side, and a norm of IHRL on the other, it may be doubtful whether there is normative conflict, or a gap to be filled that might justify such application by analogy.[613] If we accept that IHRL applies in armed conflict, and there is no *lex specialis* to supersede IHRL, then the rules of that body of law should, presumably, apply. In this vein, it is noteworthy that for example a group of UN experts concluded in the context of the war on terror that the right to habeas corpus and other main elements of the rights to detention and fair trial 'must be respected even in times of emergency, including armed conflict'.[614]

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supra note 30 at para. 14.

608 *See* Chapter 6 'Detention' and Chapter 8, referring to Article 5, GC III; Articles 43 and 78 of GC IV. By providing for such review by an 'appropriate court *or* administrative body' GC IV accepts that judicial review is not always required though it may imply there should be such review where it *is* feasible.

609 NIAC is the most relevant scenario now in respect of Afghanistan for example (and more broadly if one were to take the minority view, as the US administration has and the Supreme Court may have done in the *Hamdan* case – of accepting the existence of a broader NIAC with al-Qaeda and associated forces. *See* 6B.2.5.

610 Henckaerts and Doswald-Beck, *supra* note 187 at p. 344, though for NIACs, it is human rights law that the Commentary cites in support of the view of customary IHL.

611 Sassóli and Olson, 'The relationship between international humanitarian and human rights law', *supra* note 602, p. 623; *see* Goodman, *supra* note 661, on the application of GC IV review board in Afghanistan.

612 Pejic, 'Procedural principles', *supra* note 658. Both approaches emphasise IHL principles, motivated by a desire to ensure that applicable law is realistic and feasible and that it will ultimately be complied with. *See also* Sassóli and Olson, ibid, pp. 617-18.

613 One question is whether binding law can be displaced by principles applied by analogy, and whether that would that be beneficial to the end of securing rule of law in any event; Duffy, 'Harmony in Conflict?'.

614 UN Joint Study, para. 47. 'In short, the main elements of articles 9 and 14 of the Covenant, namely the right to habeas corpus, the presumption of innocence and minimum fair trial guarantees, as well as the prohibition of unacknowledged detention, must be respected even in times of emergency, including armed conflict.'

Some question whether IHRL can adapt to the realities of detention in conflict situations, most often citing intense battlefield scenarios or situations where courts may be unavailable, though these may not often be the situations that have arisen in the so called war on terror.[615] A certain degree of flexibility is inherent in the application of the IHRL framework in light of particular contextual realities, and while judicial review of the lawfulness of detention is not a right that can be dispensed with,[616] it remains to be seen how human rights courts would apply that rule in the context of, for example, short term delayed judicial access in the oft-invoked genuine battlefield detention scenario.[617] But certainly over time and with distance from such a scenario, there is less legitimate claim to the need for flexibility.[618] *A fortiori*, where the individuals have been transferred *into* conflict situations by their captors, as has transpired to be the case in the '*Bagram* cases' for example, it would seem highly unlikely that arguments concerning the exigencies of the situation would be viewed sympathetically.[619] Caution may be due to ensure that an unduly broad recourse to 'battlefield' scenarios is not allowed to justify the absence of human rights protections in situations where individuals could in fact be brought before a court.

The nature of procedural rights governing detention in non-international armed conflict is clearly an area where there are reasonable differences of

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615 Pejic, 'Procedural principles', *supra* note 658.

616 *See* UN Office for the High Commissioner of Human Rights, Human Rights and the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers at Chapter 5, 4.2; IACtHR, Advisory Opinion OC-8/87, 30 January 1987, Ser. A, No.9 (Advisory Opinion on Emergency Situations); *Brogan* v. *United Kingdom* (1988) Ser. A, No. 145-B, 11 EHRR 117; HRC, General Comment 29, *supra* note 30 at para. 16. Other aspects of the right to liberty can be derogated from: *e.g.*, the ECHR has recalled in the context of military detention in Iraq that the right to detain under IHL on grounds that would be impermissible under IHRL required derogation from Article 5 of the ECHR: *Al-Jedda* v. *UK*. The court was critised for refusing, however to consider IHL as regards other lawful bases of detention; J. Pejic, 'The European Court of Human Rights' *Al-Jedda* judgment: the oversight of international humanitarian law', 93(883) 2011 *International Review of the Red Cross* 837.

617 The 'battlefield' scenario has often been used loosely and abstractly in the war on terror..A distinction is due between a genuine battlefield scenario and this broader notional 'battle'. Courts are likely to consider whether regularly constituted courts were genuinely unavailable and for how long – *see*, *e.g.*, *Medvedyev and Ors.* v. *France*, *supra* note 78, and perhaps whether temporary alternative independent but non-judicial review were provided immediately.

618 In such circumstances the IHRL framework – and maybe even also the principles of IHL – would require that judicial review be provided; *see* Sassóli and Olson, 'The relationship between international humanitarian and human rights law', *supra* note 602, on 'harmonious' interpretation in this context.

619 As noted in Chapter 11, the DC Circuit Appeals court referred to 'pragmatic obstacles' stemming from the detention being within the sovereign territory of another state, but noted the 'speculation' as to the government avoiding oversight by using the base in this way. *Al-Maqaleh, et al.*, at p. 25.

approach to the question of interplay, and as regards the nature of the review to which detainees are entitled. While many questions remain, what is clear is that invoking armed conflict and IHL as a *lex specialis* governing detainee's rights in non-international armed conflict, to the exclusion of IHRL, cannot provide all the answers.

7B.3.3 *Interplay 2:* Drones and Targeted Killings: Armed Conflict or Assassination?

The classic scenario in which the *lex specialis* of IHL has been long recognised as applying is in relation to the lethal targeting of persons who are combatants or take a direct part in hostilities.[620] The rules of IHRL and IHL are different on this issue, as are the assumptions on which the rules are based. Notably the fundamental principle of distinction that underpins IHL – protecting the immunity of certain persons from attack, while others are legitimate targets – is foreign to IHRL, which emphasises instead the universality of human rights protections, as well as the prevention of loss of life and minimisation of harm.

By resort to IHL and the permissibility of attacking 'legitimate objectives' in conflict, the US seeks to justify one of the most controversial practices of the war on terror: the widespread targeted killings of allegedly high-level members of al-Qaeda.[621] When, on 3 November 2003, US authorities carried out an aerial attack on Yemeni soil resulting in the death of Qaed Senyan al-Harithi – a suspected high-level member of al-Qaeda – and five other suspected al-Qaeda associates,[622] it began a campaign of lethal attacks that has dramatically increased in scale and intensity – with media reports indicating that drone strikes killed 2,525-3,613 people in Pakistan from June 2004 through mid-October 2013[623] – and in geographic scope, having reportedly spread to Pakistan, Afghanistan, Yemen, Somalia and beyond.[624] In this way a policy

620 *See* Kretzmer, 'Rethinking the Application of International Humanitarian Law in Non-International Armed Conflicts', (2009) 42 *Israel Law Review* 1.

621 For more detail *see* Chapter 6.

622 'CIA missile kills al-Qaida suspects' *The Guardian*, 5 November 2002, available at: http://www.guardian.co.uk/world/2002/nov/05/alqaida.terrorism.

623 The Bureau of Investigative Journalism (TBIJ), an independent journalist organisation, reports that drone strikes killed 2,525-3,613 people in Pakistan from June 2004 through mid-October 2012; http://www.thebureauinvestigates.com/category/projects/drones; *see generally*, Study on Targeted Killings, *supra* note 561; 'Living Under Drones: Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan', Stanford Law School and NYU Law School, September 2012, available at: http://livingunderdrones.org/wp-content/uploads/2012/10/Stanford-NYU-LIVING-UNDER-DRONES.pdf (hereinafter 'Living Under Drones'). For more detail see Chapter 6.

624 *See*, *e.g.*, Living Under Drones, *ibid.*; *see also* P. Harris, 'ACLU takes CIA to court as agency denies existence of drone programme', *The Guardian*, 19 September 2012, available at: http://www.guardian.co.uk/world/2012/sep/19/aclu-us-drone-programme-court (hereinafter

of assassinations, long rejected by the US,[625] has been *de facto* re-introduced, reflecting similar practices long used by some other states against alleged terrorists (and condemned internationally).[626] Information continues to emerge that raises or deepens concern as to the frequency of attacks, nature of the targets (as well as reliability of information and intelligence on which targeting decisions are made) and sheer scale of the number of victims.[627]

These attacks have, however, been justified as military operations related to an armed conflict, governed by the laws of IHL and by reference to the right of 'self defence'.[628] The self defence referred to is not the immediate protection of the life of individuals carrying out an operation or others, which IHRL might recognise as justifying the lethal force in exceptional circumstances where strictly necessary.[629] It is, rather, the right to use lethal force in self defence of the state (*jus ad bellum)* discussed at Chapter 5, which is independent of the question whether the force is employed lawfully (*jus in bello*), which must be assessed by reference to the framework of IHL or IHRL discussed here.

The IHL justification depends primarily on the intractable threshold question of whether there is an armed conflict and whether any particular attack is

'ACLU takes CIA to court').

625 The ban, originally contained in an Executive Order adopted by President Ford in 1975, is now in force as Executive Order No. 12,333 (Exec. Order No. 12,333, 3 C.F.R. § 200 (1982), reprinted in 50 USC § 401 (1982)), though it has been noted that there are 'so many options ... to get around the ban that the Order should not be viewed as a practical ban, but instead as a preventive measure to stop unilateral actions by officials within the government and a guarantee that the authority to order assassinations lies with the President alone'; N. Canestaro, 'American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the *Status Quo*', 26 (2003) *Boston College International and Comparative Law Review* 1, p.24. *See* for more detail M.N. Schmitt, 'State Sponsored Assassination', *supra* note 569 at p. 616.

626 As noted in Chapters 5 'Peaceful Resolution of Disputes and Use of Force' and 9 'The Killing of Osama bin Laden', related 'counter-terrorist' policies by Israel and Russia have met with condemnation. *See*, *e.g.*, European Council statement condemning the Israeli strike on Sheikh Ahmed Yassin, March 2004, Presidency Conclusions, 9048/04.

627 *See* Chapter 6.B.2.2 Targeted Killings, 'Drones' and IHL.

628 Official justifications for such killings have been set out in speeches over time: *see*, e.g., J. Brennan, Assistant to the President for Homeland Security and Terrorism, The Ethics and Efficacy of the President's Counterterrorism Strategy, Address at the Woodrow Wilson International Center for Scholars, 30 April 2012, available at: http://www.lawfareblog.com/2012/04/brennanspeech; E. Holder, Attorney General, Department of Justice, Address at Northwestern University School of Law, 5 March 2012, available at: http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html; J. C. Johnson, General Counsel, Department of Defense, National Security Law, Lawyers and Lawyering in the Obama Administration, Address at Yale Law School, 22 February 2012, available at: http://www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448; Koh ASIL Speech, *supra* note 559. Obama's speech of 13 May 2013 on US drone and counterterror policy, in Chapter 6, purported to set new policy guidelines. Legal justifications refer to IHL (discussed in Chapter 6) and to self defence (see Chapter 5) but not to IHRL.

629 See 7A.5.1 and Chapter 9.

carried out in the context thereof. If one rejects the assertion of a global war against al-Qaeda and associates, a determination falls to be made case-by-case as regards whether particular attacks targeted persons who were combatants or persons taking an active part in another (genuine) armed conflict in Afghanistan or possibly Pakistan.[630] If, as seems more likely for many individuals targeted in Yemen, Pakistan, Somalia or beyond, they are targeted in what is considered an efficient way of removing would be 'terrorists',[631] but not in relation to an armed conflict to which IHL applies, their killings fall to be assessed exclusively under IHRL. Under IHRL the use of force may be lawful in exceptional circumstances, but it is subject to extremely strict limits.[632] As explored elsewhere, the use of lethal force may be lawful where 'strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury' and provided operations were carefully planned and executed to prevent and to minimise the use of lethal force.[633] While difficult issues of necessity and proportionality may arise in capture operations gone-wrong, as highlighted by the questions around the killing of Osama bin Laden in Chapter 9, this is distinct from planned killings, where the use of force is not based on an imminent threat and no attempt is made (or, given the technology, could be made) to apprehend the suspected criminal. As such, human rights bodies have long condemned the practices of targeted killings as a violation of IHRL, irrespective of the threat of terrorism that the state may seek to confront.[634]

Viewed through the prism of human rights law, then, targeted killings constitute a violation of the internationally recognised right to life, amounting to extra-judicial executions, an international legal norm that has been described

630 On the strong basis to doubt the compatibility of many of the strikes with IHL, *see* 6B.2.2. IHL questions include whether the particular individuals targeted were directly participating in hostilities at the time of the attack, whether they could and in the circumstances should have been captured rather than killed, and whether rules regarding proportionality were respected. The nature of some of the targets, including mosques, schools, funeral processions and meetings, have been criticised as having disproportionate civilian casualties; *see*, *e.g.*, Living Under Drones, *supra* note 623.

631 When Leon Panetta admitted to using drones in October 2011, he referred to them as 'the only game in town'. 'Panetta admits to Employing Drones in Pakistan' *The Tribune*, 8 October 2011, available at: http://tribune.com.pk/story/269384/panetta-admits-to-employing-drones-in-pakistan. Several public statements have spoken to the efficiency and effectiveness of drones; s*ee, e.g.*, Living Under Drones, *supra* note 623.

632 *See*. 7A.4.3.1.

633 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, paras. 87, 107. *See* Chapter 7A.4.3.1 and 9 on the immediacy requirement for self-defence in the context of the Bin Laden operation.

634 *See* Concluding observations of the Human Rights Committee: Peru, UN Doc. CCPR/C/79/Add.8 (1992), para. 8. E. Gross, 'Thwarting Terrorist Attacks by Attacking the Perpetrators or Their Commanders as an Act of Self Defence: Human Rights Versus the State's Duty to Protect its Citizens', 15 (2001) *Temple International and Comparative Law Journal* 195.

as having attained *jus cogens* status.[635] Among the growing critics of the Obama administration's policy of targeted killings and the failure to investigate in their wake are the UN Special rapporteur on extra-judicial executions who has noted that if other states invoked the same practice and justifications the result would be 'chaos', as well as the High Commissioner for Human Rights, academic institutions and NGOs.[636] Attention is also increasingly focused on the broad 'terrorising impact' of drones on communities beyond those targeted,[637] which may violate several other rights beyond the right to life, as well as having broader implications for security and recruitment to terrorism.[638]

So far as IHL does apply, a question of relevance that has arisen increasingly post-9/11 is whether and in what circumstances there is also an obligation under IHL to capture instead of kill the adversary, and whether there are implications for the question of interplay? This was the subject of a well-known judgment on the use of lethal force against suspected terrorists in the Israeli Supreme Court's '*Targeted Killings*'[639] case of 2006. The Court decided that despite the existence – in the court's view – of an armed conflict,[640] where arrest of an adversary was in all the circumstances a feasible alternative to lethal killing and posed no risk to the opposing party, the army was bound

635 Restatement (Third) of the Foreign Relations Law of the United States, para. 102(2). There can be no derogation from the right to life under human rights treaties, and 'necessity' cannot justify violations of *jus cogens* norms..

636 Study on Targeted Killings, *supra* note 614; O. Bowcott, 'Drone Strikes Threaten 50 Years of International Law, Says UN Rapporteur', *The Guardian*, 21 June 2012, available at: http://www.guardian.co.uk/world/2012/jun/21/drone-strikes-international-law-un#start-of-comments; 'US Drone Strikes "Raise Questions"-UN's Navi Pillay', *BBC News*, 8 June 2012, available at: http://www.bbc.co.uk/news/world-asia-18363003; Letter from Amnesty International et al. to Barack Obama, President of the United States, 31 May 2012, available at: http://www.madre.org/index/resources-12/madre-statements-57/news/letter-to-administration-pressing-for-transparency-on-drone-strikes-805.html; 'US: Transfer CIA Drone Strikes to Military', Human Rights Watch, 20 April 2012, available at: http://www.hrw.org/news/2012/04/20/us-transfer-cia-drone-strikes-military; M. E. O'Connell, 'Lawful Use of Combat Drones', Subcomittee on Natonal Security and Foreign Affairs, 28 April 2010.

637 Living Under Drones, *supra* note 623, pp. 73-103.

638 *Ibid.* at pp. 131-138. Rights implications may include for the right to private life, family life, an adeaquate standard of living, housing and health. On concerns regarding counter-productivity, *see* B.1 above.

639 *Public Committee Against Torture in Israel* v. *Government of Israel* (Supreme Court of Israel, HCJ 769/02, December 2006) (hereinafter 'Targeted Killings'), available at: http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM.

640 This determination is controversial. *See*, for example, M. Milanović, 'Lessons for human rights and humanitarian law in the war on terror: comparing *Hamdan* and the Israeli *Targeted Killings* Case' (2007) 89(866) *International Review of the Red Cross* 373, at 383.

to capture, not kill.[641] More recently, the ICRC has adopted a broadly similar approach in its Guidance on Direct Participation in Hostilities.[642]

These developments are often cited as demonstrating the relevance of human rights standards (on the use of lethal force as a last resort) in armed conflict contexts. The developments may, alternatively, indicate that in certain situations the outcome of the application of IHL and IHRL are not as dissimilar as is sometimes assumed. The rationale underpinning the decision by the Israeli Court, and certainly the ICRC Guidance, was based on principles of respect for military necessity and humanity, which are underlying IHL principles.[643] The mutual influence of IHRL and IHL is undoubtedly seen, however, in the Supreme Court's adoption of language drawn over from the human rights world, which may reflect implicit recognition that, even in the broad context of what was understood as an international armed conflict, there are certain factual scenarios where IHRL principles are particularly relevant to the interpretation of IHL.[644] These developments may suggest that the gulf between the areas of law is gradually narrowing, in line with the evolution and 'humanisation' of IHL, influenced by the parallel development of IHRL.

So far as this approach is reflected elsewhere and continues to evolve, the issue of normative conflict in this field, and the vulnerability of individuals to gaps in the legal framework, may become less significant. While interplay raises complex issues, what is clear from war on terror practice is that invoking a war paradigm does not provide carte blanche for the lethal use of force. Still less can a putative global conflict with an ill-defined ideological enemy provide legal justification for sidestepping the right to life on a potentially global scale.

7B.3.4 *Interplay 3:* Investigating and remedying violations

One issue that has provoked controversy in the context of drone killings, which also raises interesting issues of interplay, is the duty to investigate and to provide a remedy for violations. States need to make assessments based on information that will not always be in the public domain, and intelligence or the decisions based on it cannot be readily second-guessed, yet the limited information available regarding the drone programme, and the history of the war on terror, may provide an unlikely basis for confidence that the correct legal determinations can be left entirely in the hands of government.[645] The

641 *Targeted Killings*, *supra* note 639.

642 Interpretative Guidance on the Notion of Direct Participation in Hostilities under IHL', ICRC, Geneva, 2009 (hereinafter 'ICRC DPH Guidance'), pp.991-1047. See Chapter 6, 6A.1.

643 The ICRC commentary refers to the principle of humanity.

644 This reflects *e.g.*, *Guerrero* v. *Colombia* HRC decision, *supra* note 228, albeit the current case is more controversial as it concerns a clear rule of IHL on targeting combatants in IAC.

645 On attempts to access information concerning the drones programme, *see*, *e.g.*, 'ACLU takes CIA to court', *supra* note 624.

lack of official information on drones compounds growing concerns regarding the limitless power that is being afforded to the president to decide who lives and who dies, absent oversight, and the inability for individuals or family members of those on the CIA hit list to challenge wrongful inclusion.[646] In principle, the onus lies on the state carrying out an attack to demonstrate its legitimacy, and to investigate promptly, effectively and independently where there are plausible allegations of criminality.[647]

In relation to the duties to investigate and provide a remedy, there are examples of emerging practice that encourage the co-application and harmonious interpretation of IHRL and IHL, interpreting one body to give content and detail to the other.[648] The then Special Rapporteur on Arbitrary Executions pointed out that the duty of states to investigate alleged unlawful killings does not cease in time of conflict (and indeed the duty is reflected in IHL provisions too), though it must be applied sufficiently flexibly that it takes account of contextual realities.[649] In turn, in relation to the right to a remedy, IHL may be less clear but the rights elaborated in the context of human rights law have been drawn across as tools to interpret and put flesh on the skeletal approach of IHL. This is seen for example in the United Nations 'Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law'.[650]

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646 *See*, *e.g.*, litigation that sought information regarding the grounds for putting someone on a 'kill-list' and the lawful basis for this asserted authority to use lethal force in *Al-Aulaqi* v. *Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10 Civ. 1469) in Chapter 6. Related cases have been brought in Pakistani and UK courts.

647 Multiple crimes may be committed depending on each context: the war crime of unlawful killing of protected persons or disproportionately affecting civilians; extra-judicial executions as a form of crime against humanity or simply various forms of unlawful killing common in domestic law; *see* Chapter 4A. On duty to investigate *see* Chapter 7A.3.

648 IHRL has detailed rules on these matters, *ibid*., whereas IHL arguably reflects these rules but does not provide the same level of detail as to their content IHRL may help to clarify the precise nature of states obligations to, e.g., carry out a prompt, thorough, effective and independent investigation into serious violations of IHL. For more detail *see* Duffy, 'Harmony in Conflict?', *supra* note 141.

649 Alston, 2006 Report, *supra* note 290 at para. 26: '36. Armed conflict and occupation do not discharge the State's duty to investigate and prosecute human rights abuses. ... It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate – this would eviscerate the non-derogable character of the right to life – but they may affect the modalities or particulars of the investigation. In addition to being fully responsible for the conduct of their agents, in relation to the acts of private actors States are also held to a standard of due diligence in armed conflicts as well as peace. On a case-by-case basis a State might utilize less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality.'

650 Basic Principles on the Right to a Remedy and Reparation, *supra* note 174.

These examples show the role of the United Nations in the cross-fertilisation and harmonisation between the two areas of law, through the elaboration of (in this case 'soft law') standards.[651] They certainly support the suggestion that resort to IHL as a purported basis for setting aside human rights obligations is inconsistent with the international legal framework.

7B.3.5 Conclusion

In conclusion, the attempt to justify as lawful the alarming increase in the number of targeted killings in recent years is the clearest example of how resort to the ambiguous language of war may be invoked to avoid responsibility under IHRL. The relevance of IHL in the post-9/11 terrorism context is limited. Counter-terrorism should pursue criminal accountability and prevention within a rule of law approach, which involves strict adherence to IHRL. It is important to resist the erroneous reshaping of legal standards to accommodate an IHL component to the legal framework that simply does not apply outside genuine armed conflict. Where IHL does apply, it does so alongside IHRL, creating a more comprehensive and adaptable legal framework that falls to be applied norm by norm in the particular scenarios.

If a state does seek to rely on 'wartime' standards, it may be reasonable to expect that the consequences of the application of the IHL framework be taken on board in their entirety. Yet it is this attempt to suspend one set of legal protections, without acknowledging the application of another, that leaves rights particularly vulnerable.[652] While targeted killings are justified as military operations against persons engaged in an armed conflict, governed by the laws of IHL, the consequences that flow from the corresponding IHL status of captured individuals, whether as a combatant/prisoner of war or a civilian taking part in hostilities, are denied.[653] Many other examples of selectivity, and exploitation of putative gaps between legal regimes, can be found in practice, where detainees have been denied IHRL protections, purportedly as they are detained in relation to an armed conflict, and then

651 Mutual influence in the drafting of international standards is well recognized. E.g. art. 75 API is often cited as incorporating directly Art. 14 ICCPR fair trial standards, while the development of human rights law of forced disappearance including the Convention for the Protection of All Persons from Enforced Disappearance 2006, UN GA Res. 61/177, 20 Dec. 20 2006, has been cited as showing the influence of IHL standards on the right to information for example.

652 Note that IHL itself enshrines protections of the human person that in some cases go beyond those of IHRL – *see, e.g.*, Prisoners of War discussion in Chapter 8, Guantánamo Bay.

653 If combatants for targeting purposes, the detainees should entitled to be treated as POWs if captured. If, on the other hand, they are considered 'unprivileged' belligerents, they are for IHL purposes 'civilians' entitled to the protections of the Fourth Geneva Convention upon capture. *See* Article 50, GC IV; *see generally*, Chapters 6 and 8.

subsequently denied IHL safeguards on the basis that they were 'dangerous terrorists' or 'enemy combatants,' beyond the protection of the Geneva Conventions.[654]

The anomalous situation in which individuals are transferred *into* an armed conflict situation, which is then used to justify the non-applicability of human rights protections on detention, is another example of the pernicious approach to carving out gaps in individual protections and undermining the effectiveness, credibility and legitimacy of the legal framework.[655] The ongoing lack of procedural guarantees for Bagram detainees and creation of other Guantánamo-esque detention black holes beyond the reach of judicial oversight,[656] like the extent of targeted killings, highlight how a lax approach to armed conflict and a simplistic approach to *lex specialis* has marginalised human rights law in the war on terror to grave effect.

7B.4 DEROGATION AND EMERGENCY POST-9/11

It has occasionally been suggested that a state of 'global emergency' arose following the 2001 terror attacks.[657] While legally there can be no such thing as an international state of emergency, states individually can, and occasionally have, legitimately derogated from some of their human rights obligations on the basis of a terrorist threat alleged to constitute an emergency threatening the life of the nation.[658]

As the human rights framework set out above makes clear that not all rights are derogable,[659] attempts to invoke 'emergency' as relevant to torture or ill-treatment or the right to life have thus been rejected.[660] But among the most controversial of the measures adopted post-9/11 are those that relate to the rights to liberty and fair trial,[661] as highlighted by this and other

654 Denying legal protections to Guantánamo inmates were coupled by assertions by Defence Secretary Rumsfeld that they were 'terrorists, trainers, bomb makers, recruiters, financiers … would be suicide bombers, probably the 20th 9/11 hijacker'; Though White House Press Secretary Scott McClallan noted 'These detainees are dangerous enemy combatants … They were picked up on the battlefield, fighting American forces, trying to kill American forces'. *See* http://www.nationaljournal.com/magazine/opening-argument-falsehoods-about-guantanamo-20060204.

655 As highlighted by the situation of the Bagram detainees discussed above.

656 *See* Chapter 7B7 Restricting Liberty in Liberty's Name below.

657 *See, e.g.*, N. Norberg, 'Terrorism and International Criminal Justice: Dim Prospects for a Future Together', 8 *Santa Clara J. Int'l L.* 11 (2010), p. 35.

658 *See* limited state practice post-9/11,7B4.3.4 below.

659 Chapter 7A3 for the legal framework.

660 *See* 7B.5 on questioning the absolute nature of that prohibiton; *e.g.*, *Saadi* v. *Italy*; *Othman* v. *UK*.

661 *See* 7B.7.6. below.

chapters.[662] While certain core aspects of the rights to liberty and fair trial cannot be derogated from in any circumstances,[663] much of the content of these rights can be restricted, provided there is a public emergency and certain conditions are met. This section addresses some of questions that arise in relation to derogation post-9/11.

7B.4.1 The Practice of Derogation post-9/11

Perhaps the most noteworthy feature of practice in relation to derogation post-9/11 is its scarcity. When the UK derogated from certain obligations under the ECHR and the ICCPR following the September 11 attacks, this provoked controversy on a range of levels, some of which will be highlighted below.[664] Perhaps greater controversy should surround the fact that it was in such slim company; as the Special Rapporteur on Terrorism noted in 2010, only Israel, Nepal, and UK have derogated from human rights obligations on account of the threat of terrorism, and the UK was the only state to do so post-9/11.[665]

By contrast, the United States has not formally sought to derogate from its obligations under the ICCPR,[666] though the fact that the administration considers itself in a situation of emergency is plain (not least as reflected in the internally declared state of emergency).[667] As a matter of international law, the US would appear to be either accepting that the full range of human rights apply, or disregarding its obligations in respect of the operation of the human rights procedures. The failure to notify derogation by states relying on supposed situations of emergency and crisis to justify infringing rights post-9/11 may reveal contempt for international legal process.[668] It raises questions

662 *See* 7B.6 below and Chapter 8.

663 Those aspects – such as the right to *habeas corpus* and the right to access counsel – are discussed in relation to the application of the legal framework to the Guantánamo detainees, in Chapter 8.

664 Note Verbale from the Permanent Representation of the United Kingdom, dated 18 December 2001, registered by the Secretariat General on 18 December 2001: the text of the note is available at: http://conventions.coe.int.

665 M. Scheinin and M. Vermeulen, 'Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight against Terrorism', EUI Working Papers, 2010, p. 23.'

666 Immediately after the attacks of 9/11, the US President declared a state of national emergency. *See* Proclamation No. 7453, Declaration of a National Emergency by Reason of Certain Terrorist Attacks, 14 September 2001, 66 Fed. Reg. 48, available at: http://www.whitehouse.gov/news/releases/2001/09/print/20010914-4.html. However, as Scheinin and Vermeulen, *ibid*., note the US 'has resorted to a number of other arguments or constructions but not the formal mechanism of derogation' under human rights treaties.

667 *See* US Declaration of National Emergency, *ibid*. The Patriot Act of 2001 was extended by the PATRIOT Sunsets Extension Act of 2011, which extends the validity of provisions of the PATRIOT Act until 1 June 2015.

668 Scheinin and Vermeulen, *supra* note 665.

at least as to how seriously states take the obligation to notify the human rights court or body of derogation,[669] and perhaps the need to clarify whether derogation notification is a genuine prerequisite to be taken seriously.[670]

7B.4.2 An emergency threatening the life of the nation?

As explained in Part A, states have long been afforded broad, but not unlimited, discretion to assess their own security situations and whether there is in fact an emergency threatening the life of their nation.[671] Thus, had a derogation clause been invoked by the United States in the immediate aftermath of September 11, this issue would almost certainly not have been subject to dispute. The appropriateness of derogation did, however, give rise to controversy – and was the subject of legal challenge[672] – in the context of the United Kingdom, which derogated from its obligations despite the fact that at the relevant time it had not been the subject of any related terrorist attack in the UK.[673] The fact that no other European states, and almost no other state worldwide, saw the need for derogation (post-9/11 or indeed in the context of other 'terrorist' threats) compounded doubts as to the reality of the 'emergency' and the necessity of derogation.[674]

This spawned an interesting debate on whether and at what point the threat of terrorism constitutes an 'emergency threatening the life of a nation', and who decides. The result was a challenge in domestic courts to the UK government's derogation, the first prong of which was to argue that there was no

669 As the framework in Part A of this chapter notes, a valid process of derogation involves notification of derogation, which itself ensures a degree of transparency and accountability, and despite great deference afforded to the state's assessment,the body charged with oversight of the treaty determines whether the derogation is valid.

670 The HRC has on occasion found measures impermissible on account of the lack of notification but in 2008, in *Sayadi* v. *Belgium*, *supra* note 509, it cast some doubt on the proposition noting that lack of notification is not necessarily evidence of no derogation.

671 On the state's discretion to determine whether there is in fact an emergency threatening the life of the nation in the context of the ECHR, *see, e.g.*, *Brannigan and McBride* v. *the United Kingdom* (App 1453/89 and 1454/89), Judgment, 26 May 1993, *Series A*, No. 258, para. 43-7; *Ireland* v. *the United Kingdom*, Judgment, 18 January 1978, ECtHR, *Series A, No. 25*, pp. 78-9, para. 207 and *A & Ors* v. *UK*, *supra* note 109.

672 A challenge to the lawfulness of the UK's derogation to the ECHR was denied by the Court of Appeal in *A & Others* v. *Secretary of State for the Home Department*, *supra* note 359. The issue eventually went ot the Grand Chamber of the ECHR in *A & Ors*. v. *UK*, ibid. *See also* Chapter 11.

673 The threat was described as speculative, although the attack of 7 July 2005 changed this. D. Pannick, 'Opinion on the derogation from Article 5(1) of the European Convention on Human Rights to allow for detention without trial', on file with author. It remained questionable thereafter whether that threat could be described as an 'emergency threatening the life of the nation as such,' *see A & Ors* v. *UK*, *supra* note 109.

674 *See* B.4.4. below.

real emergency threatening the life of the British nation.[675] In the House of Lords judgment, the majority was typically deferential to the state's determination of the nature of the terrorist threat, and the point at which it becomes an emergency.[676] A strident dissent by one of the Law Lords questioned whether the threat of terrorism could really constitute a threat against 'our institutions of government or our existence as a civil community' in the following terms:

> Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda … Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community ... The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve.[677]

However, when the case made its way to the ECHR, the court took a more flexible view of the threat than Lord Hoffman had suggested. It stated that it must have regard to a 'broader range of factors' in determining the nature and degree of the 'actual or imminent' threat to the nation, and noting that emergency situations have been held to exist in other contexts 'even though the institutions of the State did not appear to be imperilled to the extent envisaged by Lord Hoffman'.[678]

While derogation from human rights treaties may be scarce, resort to states of 'emergency' on the national level, including in relation to allegations of 'terrorism', is not,with several states having been under state of emergency for decades with no meaningful oversight of the legitimacy of that classification.[679] The experience of Arab states living under prolonged emergency laws that gradually began to lift as part of the 'Arab Spring' are a reminder of the danger of the threat of terrorism being used to institutionalise a state of 'emergency', and the importance of ensuring that such situations are carefully cur-

675 *A & Others* v. *Secretary of State for the Home Department*, *supra* note 109.
676 *Ibid.* at para 180. *See* Chapter 11 on Human Rights Litigation.
677 *Ibid.*, Lord Hoffman, paras. 95-97.
678 *A & Ors* v. *UK*, *supra* note 109 at para. 179. *See generally* paras. 75-79
679 *See generally* the 'List of States which have proclaimed or continued a state of emergency' contained in the paper on 'The Administration of Justice and Human Rights: Question of Human Rights and States of Emergency' prepared by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 5 July 1999, UN Doc. E/CN.4/Sub.2/1999/31. An example is the state of emergency declared by Israel in 1948 which remained in force unexamined until 1996, when the Knesset replaced it with the Basic Law. Since then, the Knesset has routinely extended the state of emergency without seriously considering whether Israel's situation warrants such an extension (*see* Consideration of reports submitted by States parties under Article 40 of the Covenant: Israel, UN Doc. CCPR/C/ISR/2001/2 (2001); Concluding observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add.93 (1998), para. 11). *See* other examples, notably from the Middle East, set out in the Framework section.

tailed.[680] This concern resonates with criticism of the Security Council for its determination that international terrorism may be an open-ended and potentially endless 'threat to international peace and security'.[681] Open-endedness is particularly troubling in the context of a 'war' without obvious end against an enemy that can never be entirely vanquished.[682] If, as has been suggested, the struggle against terrorism post-9/11 is a war or an emergency the duration of which 'is measured by the continuing existence of terrorism, or persistence of fear that the enemy retains the capacity to fight',[683] there is a real risk of seeping into a state of perceived 'permanent emergency', wherein exceptional measures become the norm.[684]

Emergencies are, by definition, exceptional and temporary, allowing for measures that could never be justified under normal circumstances, but which are permitted in genuine situations of crisis. As human rights courts and bodies have, in different ways, made clear post-9/11, this makes review of the existence of an emergency on an ongoing basis (including judicial oversight), and the lifting of the derogation as soon as it is no longer strictly required, absolutely essential.[685]

Finally, practice post-9/11 has also raised the question whether states can, or should, be able to derogate from their obligations when active extra-territorially. Thus, for example, the UK did not purport to derogate from its detention obligations in respect of detentions in Iraq, and was ultimately found in violation of relevant ECHR provisions by the ECtHR.[686] Some experts suggest it may not be possible under current IHRL to do so, in part as there would not be an emergency threatening at least the life of the state's own nation as noted

680 Egypt and Algeria are both examples. The Egyptiam states of emergency was lifted on 31 May 2012 (after 31 years of security forces using sweeping powers to detain and try in special courts), but even afterwards, up until the time of writing, the state continued to rely on special courts and emergency powers. Algeria maintained a state of emergency for 17 years until it was lifted in 2011. *See, e.g.*, 'Counter-terrorism against the background of an endless state of emergency', FIDH, 2010, available at: http://www.fidh.org/IMG/pdf/Egyptantiterro534UK.pdf.

681 *See* Part 7B.1.

682 *See* Chapter 6, B.1.2.3.

683 J. Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights', 14 (2003) *E.J.I.L.* 2, 241-262, 251.

684 *See* HRC, General Comment No. 29, *supra* note 30, p. 186, para. 2 noting that derogating measures must be '*exceptional and temporary*' and para. 4: '[A] fundamental requirement 'limited to the extent strictly required [which] relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation'.

685 HRC GC29, *ibid.* at para. 2. The ECHR in *A & Others* did 'not consider that derogating measures put in place in the immediate aftermath of the al'Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, can be said to be invalid on the ground that they were not "temporary"', at paras. 178; 175-89.

686 In *Al-Jedda* v. *UK*, the UK relied on attribution to the UN, and Security Council authorisation as effectively trumping IHRL obligations on the other.

above.[687] However, the Court's observation that the UK did not purport to derogate implies that it could have done so.[688] This has been highlighted as an area where the law may be ripe for development, or perhaps simply for clarification through practice,[689] to ensure that the legal framework can adjust appropriately to the realities of situations in which the state finds itself, including situations of genuine emergency, whether at home or abroad.[690]

7B.4.3 Linkage between measures taken and the emergency?

While governments are often shown considerable deference by courts, in particular international courts, as regards what constitutes 'emergency', there is greater rigour in the critique of the necessity and proportionality of particular measures of derogation taken in response. Post-9/11, given its unique decision to derogate, the UK was again the setting for controversies to play out in this regard. On one level concern related to the scope of the anti-terrorist law, covering, for example, persons suspected of having 'links' with a terrorist organisation (including organisations not involved in 9/11 and that posed no threat to the United Kingdom but rather to other states), with measures against such individuals arguably not being linked to the events of September 11 or the 'emergency' that was deemed to arise in its wake. It was therefore questioned to what extent these legislative measures could be said to be responsive to, still less 'strictly required' by, the emergency in question in the United Kingdom.[691]

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687 Pejic, 'The European Court of Human Rights' *Al-Jedda* judgment', *supra* note 676 at p. 850, stating that 'It is unclear[] whether an ECHR member state could successfully invoke Article 15 based on the plain language of the text', referring to the life of the nation and questions as to which state should derogate from which obligations. *See also* Chatham House, *supra* note 540. Government's Arguments in *Al-Jedda* v. *UK*, *supra* note 553 at p. 54 rejecting the applicant's argument that the Convention recognised limits through the power of derogation under Article 15.

688 *Al-Jedda* v. *UK*, *supra* note 553 at p. 58, para. 100 (the Court notes that 'The Government does not contend that the detention was justified under any of the exceptions set out in subparagraphs (a) to (f) of Article 5 § 1, nor did they purport to derogate under Article 15.') This suggests derogation would have been possible.

689 *See* Leiden Policy Recommendations, *supra* note 520 at para. 29; Pejic, 'The European Court of Human Rights' *Al-Jedda* judgment', *supra* note 676 at p. 850 (noting that no European state has ever derogated in respect of military operations abroad).

690 The ECtHR has consistently adopted a 'living instrument,' evolutive interpretation of the Convention, to ensure rights are 'effective' in practice and in context, not 'theretical and illusory': *see* Conclusion, Part A. Its interpretation on this matter should also be consistent with its approach to extra-territoriality. *See*, *e.g.*, *al-Skeini* v. *UK*, *supra* note 62. *See* part B.1.2.3, above.

691 D. Anderson and J. Statford, 'Joint Opinion on Proposed Derogation from Article 5 of the European Convention on Human Rights; Anti-Terrorism, Crime and Security Bill, Clauses 21-32', on file with author.

When the matter was before the UK House of Lords, the Court famously determined that potentially indefinite detention of non-UK nationals could not be justified as strictly necessary pursuant to the emergency. It did so on the basis that 'if derogation is not strictly required in the case of one group [nationals], it cannot be strictly required in the case of the other group [non-nationals] that presents the same threat'.[692] There are many other examples of measures affecting detention and fair trial rights post-9/11 that raise doubts as to the requirements of necessity and proportionality, including the limitation on or denial of access to lawyers, or interference with lawyer-client confidentiality and severe limitations on access to evidence.[693]

The requirement of the necessity of each measure of derogation also opens up broader questions as to the need to carefully scrutinise effectiveness; if a rights restrictive counter-terrorism strategy is counterproductive,[694] it cannot reasonably be considered effective to achieve the stated aim and logically cannot be necessary or proportionate to it either.

7B.5 THE 'TERRORISM' LABEL AND THE LEGALITY PRINCIPLE

7B.5.1 The scope and impact of the 'terrorism' label post-9/11

It has been noted that in the wake of 9/11, the Security Council called on states to take wide-ranging 'counter-terrorist' measures, including against 'any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts',[695] despite the lack of an accepted definition of what constitutes terrorism under general international law.[696] What has been described as 'opening the hunting season on terrorism', without

692 *A & Ors (Derogation)*, by 8 votes to 1, found a violation of the rights to liberty and non-discrimiantion on this basis; *see* Lord Bingham, para. 73.

693 *See* International Bar Association's Task Force on International Terrorism, 'International Terrorism: Challenges and Responses' (2003) ('IBA Task Force Report 2003'), pp. 132-3.

694 *See* 7B1.on growing recognition – in, *e.g.*, the *UN High Level Panel* and UN *Global Counter-Terrorism Strategy*, statements by the UN Secretary General as well as by government officials (including president Obama in respect of Guantanamo) – of the terrorism 'recruitment' potential of certain violations. *See* Chapter 4B4 on the impact of 'war on terror' violations on international cooperation, evidence and the criminal process more broadly.

695 SC Res. 1373, passed under Chapter VII of the UN Charter and imposing a legal obligation on member states of the UN, including to ensure that 'terrorist acts' are criminalised in domestic law.

696 *See* Chapter 2. The closest to a definition is perhaps SC Res. 1566 which does not provide a binding definition but was intended as a guide for states; the Special Rapporteur on Terrorism suggests that states ensure that definitions meet the elements set out in that definition. *See* Special Tribunal for Lebanon (STL) Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Interlocutory Decision), STL-11-01-I, 16 February 2011, and criticism thereof in Saul, 'Legislating from a Radical Hague', *supra* note 349.

providing guidelines as to the target, provided the basis for a proliferation of broad anti-terrorism laws on the national level. The Counter-Terrorism Committee for its part was criticised for its failure to even record its interest, at an early stage, in 'curtailing politically inspired over-inclusive national definitions of terrorism that pose both a threat to human rights and to the efficiency of proper counter-terrorism measures'.[697] In turn, international and regional definitions that were advanced have themselves been criticised as falling short of the legality requirements.[698]

The work of human rights courts and bodies is replete with criticism of definitions couched in ambiguous language in states as diverse as Australia, Estonia and Sudan, and many others in between.[699] The Human Rights Committee for example has frequently criticised numerous times the 'exceedingly broad scope of ... proposed legislation', and specifically for the adoption of 'broad and vague definition[s] of acts of terrorism.'[700]

Such laws have provided the framework for a broad range of conduct to be drawn under the terrorism rubric, encompassing serious and less serious offences, and conduct not properly culpable at all.[701] Yet the terrorist label is often invoked precisely to connote a degree of gravity, thereby purportedly justifying measures not otherwise considered acceptable.

Terrorism legislation, and the exceptional measures it authorises, have had a creeping reach – once enacted they have been used in other contexts, to embrace conduct not in fact linked to terrorism in any way. The Special Rapporteur on Terrorism has noted how the 'failure to restrict counter-terrorism laws and implementing measures to the countering of conduct which is truly terrorist in nature also pose the risk that, where such laws and measures restrict the enjoyment of rights and freedoms, they will offend the principles of necessity and proportionality that govern the permissibility of any restriction

697 Scheinin, '2010 Report to the Security Council', para 44. See B1 for the development of its mandate.

698 International or regional definitions of terrorism, proposed or adopted post-9/11, have been subject to criticism, for example, for their extreme breadth and lack of specificity. *See* above Chapter 2.

699 *See*, *e.g.*. Concluding observations of the Human Rights Committee: Estonia (above), para. 8; Concluding observations of the Human Rights Committee on Australia, CCPR/C/AUS/CO/5 7 May 2009 noting inter alia 'the vagueness of the definition of terrorist act.' Chapter 4. See infra in this section examples from Australia, Sudan, Phillipines, United States, UK, Chile (*e.g.*, below 7B11 proscribing dissent).

700 Concluding Observations of the Human Rights Committee: Philippines, UN Doc. CCPR/CO/79/PHL (2003), para. 9, and Concluding observations of the Human Rights Committee: Egypt, *supra* note 137 at para. 9; Concluding observations of the Human Rights Committee: New Zealand, UN Doc. CCPR/CO/75/NZL (2002), para. 11.

701 *See*, *e.g.*, Concluding Observations of the HRC, Egypt, *ibid*. at para. 8.

on human rights'.[702] There are numerous examples among the practice referred to in this book of 'terrorism' being invoked against those engaged in activity far removed from what we would ordinarily understand as terrorism, or exceptional executive powers introduced in the terrorism context being carried across into other areas.[703]

At times, the problem relates not only to the amorphous nature of 'terrorism' itself, but to a lax approach to those deemed to be 'associated' with terrorism, or 'supportive' of terrorist organisations or their aims.[704] Several examples are found in United Kingdom anti-terror legislation. The early Anti-terrorism, Crime and Security Act 2001,[705] like the United States Military Order of 13 November 2001,[706] extends to persons considered to have undefined 'links' with organisations deemed to constitute a 'terrorist' threat;[707] the 2006 Act added crimes such as 'encouragement' of terrorism; and the 2011 Terrorism Prevention and Investigation Act adds broadly defined 'involvement in terrorism,' which includes support and assistance to those that 'encourage' terrorism for example.[708] Illustrations on the international plane include broadly defined 'participation' in terrorist activities,[709] the 'public

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702 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 'Ten areas of best practices in countering terrorism', 22 December 2010, A/HRC/16/51, para. 26 (hereinafter 'Best Practices').

703 *See*, *e.g.*, 7B11 on measures taken against indigenous rights or labour organisers, or womens groups. *See also* Chapter 11 for litigation examples and the extension of special powers to non-terrorism cases in Chapter 4.

704 *See* Chapter 4 'Criminal Justice' on broad reaching crimes and modes of liability.

705 *See* www.hmso.gov.uk/acts/acts2001/20010024.htm.

706 Military Order relating to 'Detention, treatment, and trial of certain non-citizens in the war against terrorism', issued 13 November 2001 by the President of the United States.

707 Both go well beyond persons associated with al-Qaeda. *See also*, for example, concern expressed by the Human Rights Committee in relation to the broad definition of terrorism and of 'belonging to a terrorist group' in Estonia's penal code: *see* Observations finales du Comité des droits de l'homme: Estonia (15/04/2003), UN Doc. CCPR/CO/77/EST, para. 8.

708 Art. 4 Terrorism Prevention and Investigation Measures Act 2011 defines such involvement as including 'conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so; (c) conduct which gives *encouragement* to the commission, preparation or instigation of such acts, or which is intended to do so; (d) conduct which gives *support or assistance* to individuals who are known or believed by the individual concerned to be involved in conduct falling within paragraphs (a) to (c)…'. It adds that 'it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism in general'.

709 *See* European Council, Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, 27 December 2001, OJ L 344, 28 December 2001, p. 93, Article 2(3)(k): 'participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group'. *See also* the European Council Framework Decision on Combating Terrorism, 13 June 2002 (2002/475/JHA), OJ L 164/3 of 22 June 2002, which includes various forms of association and other links with terrorist groups.

provocation' and 'indirect incitement' endorsed by the EU,[710] or the 'support', 'justification' or 'glorification' referred to in Security Council resolutions.[711] Illustrations from the criminal law sphere and their implications are discussed in Chapter 4, which shows the expansion of criminal laws within a preventative paradigm to draw an ever-broader range of acts and omissions, and affected individuals, within the sphere of criminality.[712] This is epitomised by the crime of providing 'material support' of any type for terrorism, and the decision by the US Supreme Court that even those teaching humanitarian law to proscribed organisations might fall within its scope.[713] Another illustration is found in Sudanese penal legislation, reported to the Security Council post-9/11,[714] where a very broad definition of terrorism, which involves threats aimed at 'striking terror or awe upon the people',[715] is matched by a definition of terrorist organisation which includes anyone who 'abets, attempts, participates or facilitates, by word of mouth, deed or publication the operation of an organised and planned network for the commission of any terrorist offence'.[716]

Despite the lack of clarity as to its meaning, the terrorism label has been applied with grave effect post-9/11. It has been invoked to justify a wide array of measures, some of which are highlighted below in this chapter or others, including denial of citizenship or expulsion, 'preventive' detention, criminal trial by special 'anti-terrorist' tribunals, the application of unduly onerous penalties, interference with privacy, freedom of religion and free expression. The Sudanese law mentioned above, for example, stipulates that any person deemed to fall into the extremely elastic group covered by the terrorism law

710 European Council Framework Decision on Combating Terrorism, 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA.

711 SC Res. 1624 (2005).

712 Offences removed from the harm caused, *e.g.*, possession of information, expression of opinion, or other broad forms of contribution, membership of or support for prohibited organisations, coupled with serious penalties, raise tensions in respect of consistency with the primordial principal that criminal law should only address (and punishment should be commensurate with) the responsibility of the individual. *See* Chapter 4. *See, e.g.*, Report of Special Rapporteur on terrorism, Martin Scheinin, 14 December 2006, A/HRC/4/26/Add.3, para. 40.

713 *Holder* v. *Humanitarian Law Project*, 561 U. S. __ (2010) (regarding the USA PATRIOT Act). Further discussed in Chapter 4B2 on the changing face of criminal law.

714 This legislation, the Terrorism (Combating) Act 2000, was reported to the Security Council after 9/11 in support of Sudan's claim to have met its international obligations; *see* Sudan's Report to the Counter-Terrorism Committee Pursuant to Paragraph 6 of Resolution 1373, UN Doc. S/2001/1317, available at: http://www.un.org/Docs/sc/committees/1373/submission_list.html.

715 Terrorism includes threats 'aimed at striking terror or awe upon the people by, inter alia, hurting them or exposing their lives or security to danger ... or exposing one of the native or or national strategic resources to danger'. *Ibid.* Sn. 2.

716 *Ibid.* Sn. 6. The definition requires also that the act 'may constitute a danger to persons or property or public tranquillity'.

will be prosecuted by an *ad hoc* combating terrorism court and if convicted 'shall be punished with death or life imprisonment'.[717] Obvious tension arises in respect of the principle of legality, a requirement for any restriction of rights, even in time of emergency.[718] Specific issues relate to the particularly stringent requirements of *nullum crimen sine lege*, requiring clarity and precision in criminal law.[719] The obligations of the state in respect of the legality principle are non-derogable and generally unaffected by national security concerns, or states of emergency. To the extent that laws enshrining vague and imprecise definitions of terrorism or related offences purport to criminalise conduct, concerns clearly arise regarding compatibility with Article 15 of the ICCPR. As discussed in Chapter 4 they may also raise issues concerning individual criminal responsibility and the presumption of innocence, as well as implicating a range of other rights from freedom of expression or association.[720]

Some levels of impact are less apparent and remain uncertain. More and more individuals, families and arguably whole communities have been brought under the ever-broader terrorism (and 'association' with terrorism) umbrella, impacting lives and reputations, as well as arguably the effectiveness of counter-terrorism strategies.[721] Terrorism laws on support and financing terrorism and sanctions regimes also have a serious impact further afield, on the work of humanitarian organisations that is impeded, or indeed criminalised, by national laws and sanctions regimes.[722] Conversely, as noted further elsewhere, the equally ambiguous mantra of 'counter-terrorism' has been relied on to afford enhanced powers, to reduce protections to victims or to grant

717 *Ibid.*

718 *See* McBride, 'Study on Principles', *supra* note 105; J. Fitzpatrick, *Human Rights in Crisis*, *supra* note 25, pp. 46-47. Some of the other human rights issues emerging from or related to the definitional ambiguity and the 'doubts and the opportunity for abuse of power' (*Castillo Petruzzi*, *supra* note 282 at para. 121) created thereby are highlighted later in this section.

719 *See* Chapter 4 for a fuller discussion of these principles in the criminal law context.

720 *See* Chapter 4 and 7B11 on criminalising association and expression, through 'material support,' 'glorification' or 'apology' for terrorism for example.

721 *See generally*, C. Campbell, 'Beyond Radicalization: Towards an Integrated Anti-Violence Rule of Law Strategy', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012).

722 'Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action,' Kate Mackintosh and Patrick Duplat, July 2013, independent study commissioned by ODHA and the Norwegian Refugee Council. The report describes it as practically impossible for such organisations to avoid interaction with prohibited groups, even if that were desirable or compatible with the requirements of *e.g.* UN General Assembly Resolution 46/182 and other UN resolutions that require humanitarian actors to treat state and non-state parties to an armed conflict on an equal basis. The report looks at the adverse impact of national laws and sanction regimes on humanitarian assistance.

impunity, to those that violate human rights, in certain contexts of counter-terrorism operations.[723]

7B.5.2 Retroactivity of Criminal Prosecutions

Concerns regarding consistency with other aspects of Article 15 beyond the requirements of legality and certainty have also, less frequently, demanded attention, such as the prohibition of retroactive application of criminal law or the extension of criminal law by analogy. An early reaction came from the Indonesian constitutional court, which struck down new anti-terror legislation based on its retroactive effect.[724] Another example of note is the overturning of one of very few US military commission convictions on grounds of the retroactive application of criminal law regarding the conviction for 'material support for terrorism' as a war crime.[725]

As Article 15(2) acknowledges, the legality principle does not prevent prosecution for serious crimes established as such under international law – such as crimes against humanity of the type committed on 9/11.[726] It may however preclude prosecution for other acts that did not amount to such crimes, unless penalised in domestic law at the time committed; as discussed above, prosecution for 'terrorism' on the basis of its status as a crime under international law would be controversial, given definitional dilemmas, while inchoate offences such as membership of or support for terrorist organisations may lay still less claim to international criminal status.[727]

7B.5.3 Punishing Terrorism

Finally, Chapter 4 also discusses how terrorism and associated offences have been invoked to justify exceptional penalties of greater severity than those that would attach to the conduct if differently classified. So far as greater penalties are imposed retroactively, a violation of the '*nulla poena sine lege*'

723 See, *e.g.*, *Maskhadovy* v. *Russian Federation*, ECtHR 2013, on the Russian law refusing to return the body of those killed in counter-terrorism operations, in Chapter 11.

724 Law No. 16 of 2004 was relied upon in the convictions in respect of the 'Bali bombings'. *See, e.g.*, Bali terrorism conviction violates constitution, Indonesian court rules, 23 July 2004, available at: http://www.cnews.canoe.ca/CNEWS/World/WarOnTerrorism/2004/07/23/553317-ap.html.

725 *Hamdan* v. *Rumsfeld*, 415 F.3d 33 (2005), reversing the decision of the Court of Military Commission Review and direct that Hamdan's conviction for material support for terrorism be vacated.

726 Chapter 4.A.1

727 Depending on the treaty in question, certain forms of support may constitute 'treaty crimes'; *see, e.g.*, the Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, UN Doc. A/Res/54/109 (1999).

principle may clearly arise.[728] Issues also arise regarding the proportionality of the penalties attaching to 'terrorist' offences.

Although IHRL is not as developed on the proportionality of penalties as on many other issues, the basic principle reflected in criminal law that 'punishment should fit the crime' is increasingly recognised as an element of the *nulla poena* rule under IHRL.[729] This principle is reflected more fully in practice in the work of international criminal tribunals.[730] The issue is acutely relevant in the war on terror context in which terrorism is emphasised as the gravest of crimes to be repressed with the firmest of penalties, yet – given the potential scope of vague definitions – in reality the conduct may not be nearly as grave as the terrorist epithet suggests.

One of the effects of burgeoning terrorism laws post-9/11 has been to 'increase the number of offences attracting the death penalty'.[731] The Human Rights Committee has recalled post-9/11 that an expansion of the penalty 'runs counter to the sense of [the right to life in] article 6, paragraph 2, of the Covenant'.[732] There are also examples of onerous mandatory sentences including the death penalty being prescribed for terrorism,[733] such as under

728 The principle of *nulla poena sine lege* is recognised in the Universal Declaration of Human Rights, Article 11(2): 'Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed', as in Article 7(1) ECHR, Article 9(2) ACHR, Article 7(2) African Charter and Article 23 (*Nulla poena sine lege*) of the ICC Statute. Note that the principle of legality is recognised also by the main instruments of IHL: *see* Article 99(1) GC III; Article 75(4)(c) AP I; Article 6(2)(d) AP II. Legality requirements expressly do not preclude prosecution for acts which, at the time, were 'criminal according to the general principles of law recognised by the community of nations', such as crimes against humanity, despite the fact that no penalties are specified in international law. It would, however, apply to other acts labelled 'terrorist' but which are not established crimes under international law.

729 *See*, *e.g.*, D. van Zyl Smit and A. Ashworth, *Disproportionate sentences as human rights violations,* Modern Law Review, July 2006, Vol. 67 No.4, 541-560. *See also* Recommendation No. R(92) 17 of the Committee of Ministers to Member States concerning Consistency in Sentencing (adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers' Deputies): 'Whatever rationales for sentencing are declared, disproportionality between the seriousness of the offence and the sentence should be avoided.'

730 The ICTY and ICTR have repeatedly stated that *e.g.*, '[T]he penalty imposed must be proportionate to the wrongdoing, in other words, that the punishment be made to fit the crime': *Todorovic*, ICTY Trial Chamber I, 31 July 2001, 29. *See also Plavsic* ICTY Trial Chamber III, 27 Feb. 2003, 23; *Furundzija* (IT-95-17/1-T), Judgment, 10 December 1998, 290 on 'proportionality between the gravity of the offence and the degree of responsibility of the offender'; *Prosecutor* v. *Deronjić*, ICTY, Case No. IT-02-61, Trial Chamber II, 30 Mar. 2004, para. 154; *Jelisić Decision of the* Appeals Chamber, para. 96.

731 Concluding observations of the Human Rights Committee: Egypt, *supra* note 115, para. 16.

732 *Ibid. See* A.5.1 on the lack of general prohibition on capital punishment in international law has been noted *supra* but e.g. the expansion of the death penalty is a direct violation of other treaty obligations, notably the ACHR, Article 4(2).

733 On the mandatory death sentence in terrorism cases, *see* applicants' arguments in *EIPR and INTERIGHTS (on behalf of Sabbeh & Ors.)* v. *Egypt*, ACHPR, No. 334/06 (2012) before the ACHPR, available at: www.interights.org/taba.

Egypt's security laws, which falls foul of the obligation to ensure that penalties are commensurate with the offence and take into account all the circumstances of the crime and the individual convicted.[734] Moreover, to the extent that the death penalty is being imposed in circumstances that do not meet the highest standards of justice – which must include clarity and precision in the definition of the crime as well as respect for fair trial rights – there is a real risk of violation of the right to life itself.[735]

7B.6 TORTURE AND INHUMAN TREATMENT: *ABU GHRAIB AND (FAR) BEYOND*

– *Torture as an Instrument of the WOT*

The images of torture inflicted on prisoners at Abu Ghraib in Iraq that ricocheted around the world provided perhaps the most graphic evidence of human rights violations committed in the broad context of the 'war on terror'.[736] Since an official enquiry confirmed the abuse of detainees by military police in Iraq, particularly those deemed of 'intelligence value',[737] it has become apparent that the US administration has used torture and ill treatment extensively, of which Abu Ghraib was a manifestation rather than an aberration. While this section focuses principally on examples from United States practice, anti-terrorist fervour has been said to have created 'an atmosphere conducive to torture' in other states,[738] and the use of torture or ill treatment by many states in the name of counter-terrorism is notorious.[739] The prevalence of torture and ill-treatment, despite universal acceptance of

734 *See Francisco Juan Larranaga* v. *The Philippines* (Comm. no. 1421/2005), Human Rights Committee, 24 July 2006, para. 7.2: '[T]he automatic and mandatory imposition of death penalty constitute an arbitrary deprivation of life, in violation of Article 6 (1), in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.'

735 *See, e.g. International Pen, Constitutional Rights Project, Interights* (*on behalf of Ken Saro-Wiwa)* v. *Nigeria* (Comm. nos 137/94, 139/94, 154/96 and 161/97) and 7A.5.1 'Life'.

736 P. Carter, 'The Road to Abu Ghraib', 35 Wash. Monthly 20, 29 (2004), cited in J.W. Smith III, 'A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System', 27 *Whittier L. Rev*. 671, 677, 693 (2006).

737 *See* Article 15-6 Investigation of the 800th Military Police Brigade, Official Military Inquiry into Abu Ghraib, May 2004, p. 17 et seq. (hereinafter 'Taguba report'), noting different rules for '[t]he rest of the wings [where there] are regular prisoners and 1A/B [where there] are Military Intelligence (MI) holds'. *Ibid.* at p. 19. On CIA approach to high value detainees, *see* Chapter 10A.1.

738 V.S. Ganesalingam, 'Case study of custodial torture survivors' *Beyond the Wall: Home for Human Rights Quarterly Journal on Human Rights News and Views*, Colombo, Sri Lanka, January-March 2005, at 21.

739 For example, the UK official inquiry into the death of Baha Mousa by UK military personnel in Iraq, published in 2011, documented horrific abuses and systemic failures: Hon. W. Gage, The Report of the Baha Mousa Inquiry, Vols. I-III, (The Stationary Office, 2012), available at: http://www.bahamousainquiry.org/report/index.htm.

the prohibition under international law, is one of the paradoxes that impugns the effectiveness and credibility of the international legal order.[740]

A deluge of reports in recent years document abuses by the United States, from Afghanistan[741] to Guantánamo,[742] Thailand to Morocco,[743] and elsewhere across the globe.[744] While much information remains secret,[745] a flood of revelations have emerged through Freedom of Information Act (FOIA) requests,[746] official enquiries,[747] insiders' testimonies,[748] NGO[749] and academic[750] reports, and direct testimony from those detainees who were re-

740 '[T]orture is reported with growing frequency from all regions of the world ... .' United Nations, Press Release, Joint Statement on the Occasion of the United Nations International Day in Support of Victims of Torture, by the Special Rapporteur of the Commission on Human Rights on the question of torture and the High Commissioner for Human Rights, 26 June 2005.

741 *See*, *e.g.*, Treatment of Conflict-Related Detainees in Afghan Custody, United States Assistance Mission in Afghanistan, UN Office of the High Commissioner for Human Rights, October 2011, Kabul, Afghanistan, p. 49, available at: http://www.ohchr.org/documents/countries/ AF/UNAMA_Detention_en.pdf. UNAMA found a 'compelling pattern and practice of systematic torture and ill-treatment'.

742 *See* Chapter 8, including *e.g.*, UN Commission on Human Rights, Situation of Detainees at Guantánamo Bay, 27 February 2006, E/CN.4/2006/120, available at: http://www.unhcr.org/refworld/docid/45377b0b0.html; 'Guantanamo Record Contradicts Claims that Prisoner Abuse Was Isolated', *The Guardian*, 19 May 2004, reporting that 'the abuse at Abu Ghraib was systematic, part of a policy instituted at US military detention centres from Guantanamo and Afghanistan to Iraq.'

743 *See*, *e.g.*, torture and ill-treatment of Abu Zubaydah at these locations, in *Zayn al-Abidin Muhammad Husayn* (*Abu Zubaydah*) v. *The Republic of Lithuania*, and *Zayn al-Abidin Muhammad Husayn* (*Abu Zubaydah*) v. *The Republic of Poland*, Applications to the ECtHR at: http://www.interights.org/document/181/index.html (hereinafter 'Abu Zubaydah Application').

744 *See* Chapter 10 on extraordinary rendition; *e.g.*, UN Joint Study, *supra* note 35 and leaked confidential 2007 ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody, 14 February 2007, WAS07/76, available at: http://wlstorage.net/file/icrc-report-2007.pdf) (hereinafter 'ICRC High Value Detainee Report').

745 *See*, *e.g.*, 'Government Withholds Key Torture Documents In ACLU Lawsuit', American Civil Liberties Union press release, 1 September 2009, available at: http://www.aclu.org/national-security/government-withholds-key-torture-documents-aclu-lawsuit.

746 *Ibid.*

747 'Inquiry into the Treatment of Detainees in US Custody', Report of the Committee on Armed Services, United States Senate (hereinafter 'Levin Report'), 20 November 2008, available at: http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022% 202009.pdf ; *see also* Taguba Report, *supra* note 755.

748 *See*, *e.g.*, M. Isikoff, '"We Could Have Done This the Right Way": How Ali Soufan, an FBI agent, got Abu Zubaydah to talk without torture,' *Newsweek*, 24 April 2009, available at: http://www. newsweek.com/id/195089 (hereinafter 'Ali Soufan Statements').

749 *See*, *e.g.*, 'Getting Away with Torture: the Bush Administration and Mistreatment of Detainees', Human Rights Watch, July 2011, available at: http://www.hrw.org/sites/default/files/reports/us0711 webwcover.pdf (hereinafter 'Getting Away with Torture').

750 J. Paust, 'Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims Unchecked Executive Power', 2007 Utah L. Rev. 345 (2007) (hereinafter 'Above the Law').

leased and able to tell their stories.[751] Specific officially recognised incidents, such as the 'waterboarding'[752] of one detainee 183 times in a single month, detailed in the CIA Inspector General's Report,[753] or the interrogation of one individual for 18 to 20 hours a day for 54 consecutive days,[754] leave little doubt as to the extent to which human beings were transformed into objects of potential intelligence value. Numerous reports provide appalling lists of accepted CIA 'enhanced interrogation techniques' or practices commonly invoked by military police in Iraq, involving the most serious physical, sexual, and mental torture or ill-treatment[755] as a 'standard operating technique'.[756]

It is clear that these recurrent practices of torture have involved a broad range of actors, raising questions as to the institutional and individual respons-

751 Note that some of those still in detention cannot communicate with the outside world – *see*, *e.g.*, Abu Zubaydah and others who are banned by a court order from any communication with the outside world; Abu Zubaydah ECHR Applications.

752 For the ICRC definition of waterboarding, *see* ICRC Report, *supra* note 744, at § 1.3. It has been described as torture by several Special Rapporteurs and others; see eg former advisor on terrorism to the US departments of Homeland Security, Special Operations and Intelligence, L. Doyle, 'Waterboarding is torture – I did it myself, says US advisor', *The Independent*, 1 November 2007, available at: http://www.independent.co.uk/news/world/americas/waterboarding-is-torture--i-did-it-myself-says-us-advisor-398490.html.

753 CIA Inspector General Special Review, 'Counter-Terrorism, Detention and Interrogation Activities, September 2001-October 2003', 7 May 2004, available at: http://www.aclu.org/torturefoia/released/052708/052708_Special_Review.pdf, on the waterboarding of Khalid Sheikh Mohammad. Reports also acknowledge that Abu Zubaydah was waterboarded 83 times. *See* Abu Zubaydah ECHR Applications, note 760.

754 B. Woodward, 'Guantanamo Detainee Was Tortured Says Official Overseeing Military Trials', *Washington Post*, 14 January 2009, available at: http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html.

755 *See* the examples of CIA 'enhanced interrogation techniques' in Chapter 10. *See* similar official military report on military police abuse in Iraq states included physical abuse, rape and sexual violence: '... the intentional abuse of detainees by military police personnel included the following acts: a. Punching, slapping, and kicking detainees; jumping on their naked feet; b. Videotaping and photographing naked male and female detainees; c. Forcibly arranging detainees in various sexually explicit positions for photographing; d. Forcing detainees to remove their clothing and keeping them naked for several days at a time; e. Forcing naked male detainees to wear women's underwear; f. Forcing groups of male detainees to masturbate themselves while being photographed and videotaped; g. Arranging naked male detainees in a pile and then jumping on them; h. Positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture; i. Writing "I am a Rapest" (sic) on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked; j. Placing a dog chain or strap around a naked detainee's neck and having a female Soldier pose for a picture; k. A male MP guard having sex with a female detainee; l. Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee; m. Taking photographs of dead Iraqi detainees.' Taguba report, *supra* note 737 at p. 16-17.

756 The ICRC report refers to the '"systematic" ill-treatment or torture of detainees with 'intelligence value' as 'part of the standard operating procedures by military intelligence personnel to obtain confessions and extract evidence.' ICRC High Value Detainee Report, *supra* note 744, para. 24.

ibility of many. A critical factor for increasing resort to torture has been said to be the role of intelligence agencies in interrogation and detention,[757] though there have also been egregious cases of abuse at the hands of the military.[758] Government lawyers' legal advice provided cover for techniques prohibited under international law by advising (apparently upon request) that the basic protections against torture did not apply, or that defences of necessity or self-defence would be available to agents engaged in 'enhanced interrogation techniques'.[759] Medical personnel are also reported as having been directly involved in interrogations.[760] Private companies have played a critical facilitating role, as demonstrated by the role of aviation companies in the rendition programme explored more fully elsewhere.[761] While in many cases the torture occurred at the hands of US personnel, in others it was conducted by 'proxy', by other states at US behest, or with the direct involvement or facilitation of foreign authorities.[762]

The picture that emerges suggests a pattern and policy of torture and cruel, inhuman or degrading treatment ('TCIDT') potentially orchestrated at the highest levels of government.[763] Then Secretary of Defence Donald Rumsfeld is reported to have ordered certain techniques, including the use of dogs, enforced

757 *See*, *e.g.*, 'Assessing Damage, Urging Action', Report of the Eminent Jurists Panel, 2009 (hereinafter 'Eminent Jurists Report'); *see also* M. Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development', 4 February 2009, UN Doc. A/HRC/10/3 (detailing intelligence agencies' involvement in detainee abuse).

758 *See* Taguba report, *supra* note 737.

759 *See*, *e.g.*, Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (December 30, 2004); Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (1 August 2002) (hereinafter 'Bybee Memo'). *See* all of the infamous 'torture memos' along with a detailed timeline here: N. Lewis et al., 'A Guide to the Memos on Torture', *New York Times*, available at: http://www.nytimes.com/ref/international/24MEMO-GUIDE.html (hereinafter 'Torture Memos'). *See also* Phillipe Sands, 'Torture Team: Deception, Cruelty and the Compromise of Law' (2008).

760 The ICRC High Value Detainee Report, *supra* note 819, records the involvement of medical personnel in torture and ill-treatment.

761 *See* Chapter 10 and litigation against companies such as Jeppesen International for their involvement in the rendition programme: *e.g.*, *Mohamed* v. *Jeppesen Dataplan, Inc.*, 586 F.3d 1108 (9th Cir. 2008).

762 Chapter 10 and the Special Rapporteur on Terrorism's 2009 report, *supra* note 832, which outlines reports of many other states' involvement in interrogations of CIA detainees and those held at Guantánamo. *See also* K. Sullivan, 'Role of British Intelligence in Alleged Torture To Be Examined', *Washington Post Foreign Service*, 27 March 2009, available at: http://www.washingtonpost.com/wp-dyn/content/article/2009/03/26/AR2009032601335.html.

763 *See* Getting Away with Torture, *supra* note 74; Paust, Above the Law, *supra* note 750; Levin Report, *supra* note 747; *see generally* Ali Soufan statements, *supra* note 823.

nudity, stress positions, and food deprivation.[764] Then President Bush and Defence Secretary Rumsfeld publicly supported 'tough' interrogation techniques and 'enhanced methods of interrogation',[765] and they and other high-level officials have now openly admitted to authorising waterboarding.[766] Bush's Legal Adviser John Yoo talked of a 'common, unifying approach' to coercive interrogation techniques across the administration.[767] Reports also indicate how personnel engaged in interrogations were used across locations, with some personnel moving between Guantánamo, Afghanistan, Abu Ghraib, and vice versa.[768] Statements from high-level officials and politicians – rejecting, explicitly and implicitly, the need to be constrained by the law in the treatment of terrorist suspects – littered political discourse around the treatment of detainees.[769] Indeed, objections were raised from those at the highest levels that a prohibition on cruel, inhuman or degrading treatment would affect applicable interrogating procedures.[770]

Under both IHRL and criminal law, there are obligations on those in positions of responsibility to take all feasible measures to prevent torture by subordinates.[771] Some questions relate to the orders, or high-level authorisa-

764 *See* Paust, Above the Law, *supra* note 750, p. 348.

765 G. W. Bush, *Decision Points* (New York: Random House, 2010); Sands Torture Team, *supra*.

766 Bush, *ibid.*, p. 169. 'I would have preferred that we get the information another way. But the choice between security and values was real. Had I not authorized waterboarding on senior al Qaeda leaders, I could have had to accept a greater risk that the country would be attacked ... . I approved the use of the interrogation techniques.' *See also* Jose Rodriguez, the former head of the CIA's Clandestine Service, discussing his authorization of waterboarding in his book, J. Rodriguez, *Hard Measures: How Aggressive CIA Actions After 9/11 Saved American Lives*, (New York: Threshold Editions, 2012), p. 64.

767 J. Yoo, *War by Other Means: an Insider's Account of the War on Terror*, (New York: Atlantic Monthly Press, 2006), p. ix.

768 Paust, Above the Law, *supra* note 825, p. 347.

769 *See*, *e.g.*, Vice-President Cheney publicly referring to the need to work on the 'dark side' in handling of al-Qaeda suspects and not to 'tie the hands' of intelligence communities: Interview with U.S. Vice President Cheney on Meet the Press (16 September 2001) Chapter 10. *See also* Senator Graham's famous public statement: 'And when they say, "I want my lawyer," you tell them, "Shut up. You don't get a lawyer."' C. Savage, 'Senate Declines to Clarify Rights of American Qaeda Suspects Arrested in U.S.', *New York Times*, 1 December 2011.

770 Vice President Cheney objected vociferously to Senator McCain's amendment to prohibit ill treatment and President Bush expressed his dissent in a signing statement, while it may be seen as an admission of the practice of ill treatment, then Director of the CIA noted that it would affect procedures. *See*, *e.g.*, 'Goss Says CIA "Does Not Do Torture," but Reiterates Need for Interrogation Flexibility', *Frontrunner*, 21 November 2005, cited in Paust, Above the Law, *supra* note 825, p. 352. *See also* Paust, Above the Law, *supra* note 825, p. 353-54 (citing Editorial, 'Director for Torture', Washington Post, 23 November 2005.

771 *See* Chapter 4A on Superior Responsibility. On positive obligations to prevent *see* 7A.4.1.

tion,[772] of torture or ill-treatment, while others relate less directly to the messages that were sent, explicitly and otherwise, and the impact on the commission of abuses.[773] Evidence given to the US official enquiry into abuses in Iraq indicates that individual soldiers had both the perception that such abuses were authorised, or at least condoned, and confidence in the lack of accountability (based on impunity in other cases).[774]

The allegations of abuse are coupled with others concerning the tardiness and feebleness of the authorities' response to information exposing torture and ill-treatment, including the lack of action to stop or prevent torture, including in Abu Ghraib where concerns were drawn to the state's attention some time before the scandal became public.[775] Questions arise as to the sufficiency of measures taken to act upon this warning to ensure the prevention of acts of torture, and to respond immediately to ensure that they cease, as required by the law. Such doubts are likely to continue until they are confirmed, or dispelled, by the thorough and independent investigation and accountability required by international law.[776]

The US government's decision, shortly after the Obama administration came to office in 2008, to reject torture[777] and revoke the memoranda that had purported to justify it, was one of the most significant repudiations of these practices.[778] While the US government no longer justifies acts of torture or ill-treatment, there are allegations of the continued abuse at the behest of the

772 *See*, *e.g.*, instructions to interrogators in 12 October 2003 memorandum from Lt. Gen. Ricardo S. Sanchez, US Commander of the Combined Joint Task Force in Iraq, at http://www.aclu.org/files/FilesPDFs/october%20sanchez%20memo.pdf, or those recorded in the Taguba report, *supra* note 737 at p. 19.

773 Public positions and statements adopted by those at the highest levels of government would be a key contributor to to such messages, as would the approach to investigation or experience of impunity ex-post facto. Taguba, *ibid*.

774 Taguba report, *supra* note 812 at p. 19-20.

775 'Report of the ICRC on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation', February 2004 refers to several occasions during 2003 when the issue of ill-treatment was brought to the Coalition Forces' attention (para. 34). *See* para. 45 on the 'systematic' ill-treatment or torture of detainees with 'intelligence value' as 'part of the standard operating procedures by military intelligence personnel to obtain confessions and extract evidence,' para 24.

776 *See* 7B14 Justice and Accountability below; *see* Chapter 7A.4.1. on the states' obligations.

777 Obama prohibited waterboarding and other forms of torture and ill-treatment by executive order on day two of his presidency. *See* 'Executive Order 13491 – Ensuring Lawful Interrogations', *The White House*, 22 January 2009, available at: http://www.whitehouse.gov/the_press_office/ EnsuringLawfulInterrogations; *See also* V. Buschschluter, 'The Obama approach to interrogation', *BBC*, 29 January 2009, available at: http://news.bbc.co.uk/2/hi/americas/7847405.stm.

778 *See ibid.*

US by the hand of other states' officials however.[779] Among the criticisms of the states policies and failures the sharpest relates to the dearth of reparation and accountability, whereby a policy of torture is said to have given way to a policy of impunity.[780] Some of the other paradigmatic issues arising from WOT practice and the protection against TCIDT are highlighted below, in relation both to US practice in the WOT and more broadly.

7B.6.1 Justifying Torture? Redefinitions, 'Executive Privilege' and the undefusable 'Ticking Bomb'

During the war on terror, the US has employed a panoply of justifications and legal constructions in an attempt to avoid scrutiny of allegations of TCIDT. Among them are the arguments that its international obligations do not apply, given its rejection of the extra-territorial scope of its obligations under the CAT or the ICCPR, particularly in light of its reservation to the scope of the CAT.[781] Likewise, at odds with the most basic legal principles, it has suggested that its obligations under international law must be understood by reference to internal law.[782] This selective approach ignores the fact that the torture prohibition cuts across IHRL, IHL, and customary law and has the status of *jus cogens* norms,[783] such that no reservation or exception could justify conduct that violates the prohibition on TCIDT.

The notorious torture memos revealed another exceptionalist approach which sought to undermine the protection against torture by *redefining* torture in a way that might lend themselves to desired outcomes and permit certain

779 *See, e.g.*, A. McCoy, 'Impunity at Home, Rendition Abroad', *Huffington Post*, 14 August 2012, available at: http://www.huffingtonpost.com/alfred-w-mccoy/extraordinary-rendition-torture_b_1775438.html: 'In July 2009, for example, Kenyan police snatched an al-Qaeda suspect, Ahmed Abdullahi Hassan, from a Nairobi slum and delivered him to that city's airport for a CIA flight to Mogadishu. ... While Somali guards (paid for with U.S. funds) ran the prison, CIA operatives, reported the Nation's Jeremy Scahill, have open access for extended interrogation.' Reports of other US-run secret detention centers continue to emerge, amidst allegations of torture and also of UK involvement. *See* I. Cobain, 'British personnel reveal horrors of secret US base in Baghdad', Guardian 1 April 2013 accessed at http://www.guardian.co.uk/world/2013/apr/01/camp-nama-iraq-human-rights-abuses.

780 *See* Chapter 7.A.4.1 on positive obligations and 7.B.14 below.

781 *See* 'Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Reservation made by United States of America', United Nations High Commissioner for Human Rights, available at: http://www.unhchr.ch/tbs/doc.nsf/0/5d7ce66547377b1f802567fd0056b533. The US Senate's reservation on Article 16 limits the scope to such acts are committed within US territory or when the acts are committed against a US national abroad.

782 The administration also argued that the Federal Torture Statute which applies to acts committed outside the United States criminalizes only torture and not other inhuman treatment.

783 *See* Part A.5.2 above.

interrogation techniques. This is evident for instance in a leaked memo from the US Assistant Attorney General that advised, for example, that the severity threshold for torture required 'injury so severe that death, organ failure or permanent damage resulting in a loss of significant bodily function will likely result.'[784] These contortions of the elements of torture find no support in international law or the extensive practice set out in Part A.[785]

In addition, concerns about the practice of torture and degrading treatment have been compounded by what is broadly perceived as official attempts to *justify* it in a variety of ways. One manifestation of this in relation to the US practices of torture was the statement that torture might be 'justified by the executive branch's constitutional authority to protect the nation from attack'.[786] Suggestions were made from within the US administration shortly after 9/11 that the possibility of resorting to torture in the context of interrogations is a matter of 'executive privilege', to be determined under 'the President's ultimate authority' and that criminal courts prosecuting torturers might be held to be interfering unlawfully with this power of the US President.[787] Assertions were also made that torture or ill-treatment might on occasion be justified by reference to 'self defense or necessity,' directly questioning the absolute nature of the prohibition.[788] Likewise, the legal advice given in relation to interrogation in Afghanistan was that it was not illegal to threaten imminent death to detainees or their families, on the basis that it was not 'intentional' and there was a 'compelling governmental interest'.[789]

The sacrosanct nature of the prohibition on torture or ill-treatment has also been rendered vulnerable through reopening of the old debate as to whether

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784 *See* Bybee Memo, *supra* note 759 at p. 13. Other qualifications included that death threats would not suffice unless the death was threatened 'imminently', and that the mental element for torture would not be satisfied unless the defendant acted with the 'express purpose to disobey the law' (p. 3), that knowledge that the severe physical or mental harm would result from his or her actions would not suffice if this was not ultimately his 'objective,' but instead he was committing the acts of torture in 'good faith' (pp. 4 and 8).

785 See Part A.5.2.

786 *See* Bybee Memo, *supra* note 759 at p. 46. Cf. definition of torture in the Convention against Torture.

787 'Enforcement of the [torture] Statute would represent an unconstitutional infringement of the President's authority to conduct war.' Bybee Memo, *supra* note 834, p. 2; Cf pp. 36-38. *See* H.C.J. 5100/94, *Pub. Comm. Against Torture in Israel* v. *The State of Israel et al.*, Judgment of 6 September 1999, *supra* note 274, where the Israeli Supreme Court disregarded any 'necessity' justification for torture.

788 '. . [I]t seems to me that if something is necessary for self-defense, it's permissible to deviate from the principles of Geneva.' 'Frontline: The Torture Question, Interview with John Yoo', *PBS television broadcast*, 19 July 2005, available at: http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html.

789 Memorandum for Commander, Joint Task Force 170, Judge Advocate Weaver, 11 October 2002, p. 6, para. f, available at: http://www.defense.gov/news/Jun2004/d20040622doc3.pdf. Cf., e.g. the case of *Maritza Uruttia* v. *Guatemala*, 27 November 2003 (Merits, Reparations and Costs), Inter-Am. Ct. H.R., (Ser. C) No. 103, para. 92 on threats as "psychological torture."'

torture can ever be justified by a hypothetical 'ticking bomb' scenario in which the use of torture or ill-treatment purports to be required to save lives from terrorism.[790] Provocative proposals regarding the introduction of torture warrants, to ensure accountability in light of the perceived inevitability of the practice,[791] ride roughshod over perhaps the most fundamental prohibition in IHRL.[792] Although much of the debate in response focuses on the fallacious nature (or 'vanishing unlikelihood') of the 'ticking bomb' scenario,[793] its corrosive presence lingers on in political discourse. Its rejection as a legal justification for authorising torture can however be seen for example from decisions of courts before and since 9/11.[794]

Much has been made, in the same vein, of the utility of information obtained through 'enhanced interrogation techniques', such as that which allegedly led to finding Osama bin Laden, as purported justification for resort to prohibited forms of treatment.[795] Others, including insiders and former interrogators, have refuted the utility of torture as reaping useless results, unreliable evidence, and providing a recruiting tool for terrorism that exacerbates the problem.[796]

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790 For examples of the extensive debate, *see* A. Dershowitz, 'The Case for Torture Warrants', 2002, available at: http://www.alandershowitz.com/publications/docs/torturewarrants.html and D. Luban, 'Liberalism, Torture, and the Ticking Bomb', 91 *Virginia L. Rev.* 1425 (2005). The scenario where torture might be justified by such life-saving intentions was rejected in principle, even where a concrete child's life may have been in danger, in *Gäfgen* v. *Germany*, *supra* note 273.

791 Juan Mendez alerts to a culture shift or 'resignation'that perceives torture as inevitable in light of internaitonal terrorism is many countries. *See* statement at Chatham House http://www.chathamhouse.org/sites/default/files/public/General/100912Mendez.pdf.

792 *See*, *e.g.*, Essay by A. Dershowitz titled 'Tortured Reasoning', appearing in S. Levinson, 'Torture: A Collection' (USA: Oxford University Press, 2006), p. 257. *See also* Dershowitz, The Case for Torture Warrants, *supra* note 790.

793 *See* Luban, Liberalism, Torture, and the Ticking Bomb, *supra* note 790. The scenario does not appear to have arisen in practice in the WOT although the rationale has been referred to often, directly and indirectly.

794 For example, the Israeli Supreme Court has found that torture cannot be authorized in any circumstances:*Pub. Comm. Against Torture in Israel* v. *The State of Israel et al.*, *supra* note 274. *See also*, *e.g.*, *Gafgen* v. *Germany*, ECtHR, *supra* note 272 and above Chapter A.5.2.

795 *See e.g.*, S. Joseph, 'The Killing of Osama Bin Laden: his right to life and the new torture debate', *Castan Centre*, 5 May 2011, available at: http://castancentre.com/2011/05/05/the-killing-of-osama-bin-laden-his-right-to-life-and-the-new-torture-debate, on the claim that torture led to the identification of bin Laden.

796 *See, e.g.*, M. Fallon, 'Interrogators Speak Out: Torture is Illegal, Immoral and Ineffective,' *Human Rights First*, 30 April 2012, available at: http://www.humanrightsfirst.org/2012/04/30/interrogators-speak-out-torture-is-illegal-immoral-and-ineffective ; Press Release, 'Interrogators: Torture Undermines U.S. Intelligence,' *Human Rights First*, 26 April 2012, available at: http://www.humanrightsfirst.org/2012/04/26/interrogators-torture-undermines-u-s-intelligence ; M.A. Costanzo and E. Gerrity, 'The Effects and Effectiveness of Using Torture as an Interrogation Device: Using Research to Inform the Policy Debate', 3 Social Issues & Policy Rev. 179, available at: http://www.cgu.edu/pdffiles/sbos/costanzo_effects_of_interrogation.pdf. On the consequences of, for example, Abu Ghraib on the terrorist threat,

Whatever the respective strengths of the utilitarian arguments, the debate jars with the philosophical underpinnings and the letter of international human rights law. As noted at the outset of this chapter, human dignity is not at the disposal of the state, and the structure of the legal framework in which some rights are non-derogable, in which some norms (including torture) have attained *jus cogens* status, is designed to ensure limits to law's flexibility and that no circumstances or conditions can justify acts such as torture. As one of the most basic human rights protections, the mandatory application of the torture prohibition at all times, to all human beings, remains – at least as a matter of law – uncontroversial. The continued and renewed reiteration of the absolute nature of the prohibition in response to those practices in the context of international terrorism put this beyond doubt.[797] The prevalence of recourse to it in the war on terror, however, and the legal and political positions surrounding it at least at the early stages, provides a striking example of the extent of disregard for that legal framework in the war on terror.

7B.6.2 Undermining the Absolute Nature of Safeguards against Torture and the Exclusionary rule

The absolute nature of the prohibition on torture or cruel, inhuman and degrading treatment (TCIDT) has also been questioned in other contexts and in other ways. Notably, while most governments would not claim the right to torture, and even condemn it unreservedly, many have eroded safeguards against torture and the positive obligations long recognised as essential to give meaningful effect to the prohibition.

It is well recognised as a matter of law that evidence obtained through torture should not be admitted in any proceedings, reflected explicitly in Article 15 of the Convention against Torture.[798] However, in many states, evidence or confessions obtained through torture have been used as a basis to detain, convict, or otherwise take action against persons suspected of terrorism. Prominent examples emerge from the UK,[799] Egypt,[800] Sri Lanka,[801]

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see Carter, The Road to Abu Ghraib, *supra* note 736. *See* Chapter 4B4 for the impact on the criminal process.

797 *See*, *e.g.*, United Nations Human Rights Committee General Comment 20, U.N. CCPR 44th Sess., 1138th mtg. (1992) (replacing General Comment 7); *Sabbah* v. *Egypt*; *Gäfgen* v. *Germany*, para. 107 (not concerning terrorism but asserting that '[t]orture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk.'); Report of the Secretary General of the United Nations, 'Protection of human rights and fundamental freedoms while countering terrorism', A/58/266, 8 August 2003, para. 55; *Paez* v. *Sweden*, Committee against Torture, no. 39/1996, 28 April 1997, para 14.5; *Chahal* v. *UK*, para. 76.

798 CAT, Art. 15.

799 *A & Ors.* v. *Secretary of State for the Home Department*, *supra* note 359.

800 *Sabbah* v. *Egypt*, *supra* note 170.

and Belgium,[802] where states have sought to justify reliance on such evidence in the purported basis of international terrorism.

In general, courts and human rights bodies have responded by seizing the opportunity to reassert the absolute nature of this prohibition, but the devil may lie in the detail. The suggestion that evidence may be relied upon where the individual cannot prove conclusively that it was obtained through torture, creates a potentially impossible burden for the applicant that risks rendering the right illusory.[803] Likewise, it has been suggested that, consistent with the principle of the exclusionary rule, evidence may be taken into consideration where there is some doubt in this respect, albeit while affording that evidence less weight.[804] The real challenges that stem from increased international cooperation in intelligence gathering and criminal enforcement make some determinations as to the provenance of evidence much more difficult, and the implications for intelligence gathering and sharing give legitimate cause for concern. At the same time, there is a danger that unduly 'flexible' approaches to the application of the exclusionary rule in practice, albeit alongside its principled reassertion, erode the absolute nature of the prohibition.[805] The Special Rapporteur on Torture has highlighted the importance of clarifying and reasserting the exclusionary rule as a fundamental safeguard against torture.[806]

Basic guarantees during detention – such as access to a court, lawyer, or medical assistance – have also consistently been found to be part of the states' obligations to protect against torture, before and since 9/11.[807] The denial of such guarantees to detainees has however been a notorious feature of the WOT. This includes the denial of access to courts to determine lawfulness of detention, as set out in relation to Guantánamo detainees in Chapter 8, or the refusal to allow access to lawyers, epitomized by the public exhortation of a US senator: 'When they say, "I want my lawyer," you tell them, "Shut up. You don't get a lawyer. You are an enemy combatant, and we are going to

801 Section 17 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 overrides the provisions of the Evidence Ordinance which render confessions extracted by torture or while a person is in custody inadmissible

802 *El-Haski* v. *Belgium*, Appl. No. 649/08, Judgment of 25 September 2012, 35 (2005) 41 EHRR 494.

803 *Ibid.* Belgium argued that a defendant would have to prove without reasonable doubt that torture or inhuman treatment had been used in gathering evidence for the evidence to be inadmissible. See also CAT, Concluding Observations on the Fifth Perioidc report of the U.K., 31 May 2013.

804 *See A & Others case* in Chapter 11A.2.

805 *See* the response of the courts in Chapter 11A.2.

806 Juan Mendez, Enforcing the Absolute Prohibition Against Torture, Chatham House, 10 September 2012 at http://www.chathamhouse.org/events/view/185367 last accessed 27 April 2013.

807 Part A.5.2.

talk to you about why you joined Al Qaeda."'[808] Denial of access to a lawyer upon detention has been repeatedly found not only to constitute a breach of fair trial or detention rights, but also as contributing directly to the incidence of TCIDT.[809] Incommunicado detention has been reported as a common feature of exceptionalist terrorism regimes in many states in recent years, contributing to the incidence of TCIDT. Although the prevalence of this practice is troubling, it has lead to a positive reassertion and in some cases expansion of the nature of the scope of positive obligations. This is exemplified in cases such as *Sabbah and Others* v. *Egypt* before the African Commission which built on the jurisprudence of other courts and bodies and upheld the state's obligations to afford terrorism suspects prompt access to courts, lawyers, and medical personnel as an essential aspect of the right to be free from torture or ill-treatment.[810] Attempts to undermine the prohibition are also seen in the context of the transfer of individuals to states where they risk TCIDT, as discussed under 'refoulement' below.[811]

Finally and critically, the legal framework requires prompt, thorough, and impartial investigation of allegations of even a single act of torture or cruel, inhuman and degrading treatment. It requires that those responsible be held to account, and punished with appropriately severe penalties, and that victims of torture have a right to a remedy and to reparation. Yet practice in this area falls alarmingly far short of the law. As explored further in relation to 'Justice and Accountability' below,[812] while the Obama administration rejection of torture was an important reassertion of values, its failure to meet its obligations of investigation and accountability have provoked widespread criticism, and lead to the allegations of a culture of torture having been replaced by a culture of impunity for torture.[813] Beyond the US, the search for criminal accountability for torture by other states, while ongoing, has also been a faltering

808 C. Savage, 'Senate Declines to Clarify Rights of American Qaeda Suspects Arrested in U.S.', *supra* note 769.

809 This is true across regional human rights systems; *see*, *e.g.*, Chapter A.5.2

810 *See Sabbah* v. *Egypt*, *supra* note 170.

811 See 7.B.10 below.

812 7B.14, Justice and Accountability.

813 *See* The Baltimore Sun, 'The Truth about Torture' 21 April 2013 viewed at: http://www.baltimoresun.com/news/opinion/editorial/bs-ed-torture-report-20130421,0,3618443.story. For a discussion of the disparity between punitive measures against soldiers who are subject to court-martial, and impunity for officers who are involved in acts of misconduct either as principals, accessories, or through the doctrine of command responsibility, who are allowed to either retire, resign their commissions, or receive administrative reprimands, *see* Smith III, 'A Few Good Scapegoats', supra note 736, p. 671. *See also* S. Murphy, 'Contemporary Practice of the United States Relating to International Law', 94 *Am. J. Int'l L.* 2, April 2000, p. 348-81, and S. Murphy, 'U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison', 98 *Am. J. Int'l L.* 3, July 2004, p. 591-96. *See also* 'Justice Accountability', Part B.12, below. The Abu Ghraib soldiers were discharged but no commanding officer was punished. *See* 'Justice and Accountability' in Part B.12, below, and Chapter 10 'Extraordinary Rendition'.

process.[814] The recognition of the rights of torture victims, long hailed as paramount for the international community, has been completely neglected by states in the counter-terrorism context.[815] In this way, it may well be that a critical aspect of the legal framework, the positive obligations to prevent and protect from torture through investigation and accountability, has been eroded through the practice of the war on terror.

In conclusion, torture and the debate that has unfolded around it provide a chilling illustration of the extent to which legal standards that were once taken for granted have been questioned and rendered vulnerable in the name of counter-terrorism. While this section singles out the United States' practice and policies, torture and ill-treatment of terrorist suspects is a growing problem around the world. Although torture is not a novelty of the WOT, it is a defining feature of it. One may question whether such notorious practices, and attempts to relativize terror and torture, have legitimised such practices by others. Reports of billboards of photos of Abu Ghraib in Tehran and Cuba are a reminder of how it is used to undermine the authority and moral leadership of those that engage in it.[816] One may speculate as to whether the war on terror will in the longer run be seen as undermining the universal condemnation of torture, or as having been a catalyst to a more determined reassertion of it.

The practical implications also remain uncertain. As Chapter 4 suggests, as criminal prosecutions for 'terrorist' offences continue to unfold, the extent to which the mistreatment of prisoners will impact on the viability of prosecutions and accountability for such offences, and on admissible evidence, are becoming apparent.[817] States may have eroded not only their own legitimacies, and fundamental norms, but also, paradoxically, the prospects of securing and achieving justice in respect of international terrorism.

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814 *See*, *e.g.*, UK failure to prosecute in respect of the Baha Mousa torture in Iraq. 'Former Attorney General Baroness Scotland granted the troops immunity against criminal prosecution based on their own evidence to the inquiry.' J. Bingham, 'Baha Mousa inquiry: innocent father died due to Army's failings', *The Telegraph*, 8 September 2011, available at: http://www.telegraph.co.uk/news/uknews/defence/8749250/Baha-Mousa-inquiry-innocent-father-died-due-to-Armys-failings.html. *See also* the failure to criminally prosecute Binyam Mohamed's torturers in Pakistan due to potential exposure of U.S. State secrets. C. Savage, 'Court Dismisses a Case Asserting Torture by C.I.A.', *New York Times*, 8 September 2010, available at: http://www.nytimes.com/2010/09/09/us/09secrets.html?pagewanted=all.

815 On efforts by individual victims to seek redress through courts which have been blocked or impaired by a range of obstacles from state secrecy to immunities, *see* B.14 below and Chapters 10 and 11.

816 On billboards in Tehran, *see*, *e.g.*, Administrative Evil, and Moral Inversion: The Value of "Putting Cruelty First", Public Administration Review, September |October 2006, p.60. In Cuba, see e.g.. Cuba Erects Iraq Abuse Billboards Near US Mission http://www.commondreams.org/headlines04/1218-04.htm.

817 *See* 4B4 and 7B.10 in this chapter.

7B.7 Restricting Liberty in Liberty's Name: Preventative Detention and Control Orders

7B.7.1 Detention

Broad-reaching indefinite detention of persons on the basis of 'terrorism' has long been common practice in many parts of the world, but since 9/11 prolonged detention of persons perceived by government as dangerous and the limitation of judicial guarantees has become widespread, including through adoption of new – or resort to existing – terrorism laws and 'creative' use of immigration laws. Questions regarding the lawfulness of detention are therefore coupled with the defining feature of the lack of procedural safeguards.[818]

The most notorious case, of detentions at the military base in Guantánamo Bay, Cuba became the 'ugly face' of the war on terror, provoking strident international reaction, as well as judicial rebuke, as discussed separately in Chapter 8. As noted above in relation to the significance of the 'war' paradigm, new Guantánamo-esque black holes have arisen elsewhere, such as in Afghanistan,[819] and by or at the behest of the US in other countries around the world.[820] The notorious CIA detention centres have been closed, though more recent allegations suggest that individuals continue to be abducted and transferred and held by other states but at US behest, pay and with US involvement.[821] In addition, creative use of existing immigration laws[822] and the USA Patriot Act[823] have been described as providing the basis for prolonged

818 *See* discussion of legal challenges in Chapter 11. While the US supreme court has found GB detainees have such right, not so security detainees in situations of conflict as in Bagram, Afghanistan.

819 *See* discussion on Bagram litigation above under 'War and Human Rights'.

820 *See*, *e.g.*. A. McCoy, 'Impunity at Home, Rendition Abroad', *Huffington Post*, 14 August 2012, available at: http://www.huffingtonpost.com/alfred-w-mccoy/extraordinary-rendition-torture_b_1775438.html on rendition of *Ahmed Abdullahi Hassan* by Kenyan police toa Somali prison where *guards are paid with U.S. funds and the CIA has 'open access for extended interrogation'; see also* Chapter 6, section B on detentions in Afghanistan and elsewhere. Chapter 10 on 'Extraordinary Rendition' and secret detention abroad. UN Joint Study, *supra*. *See also* R. Brody, 'What about the Other Secret U.S. Prisons?' *International Herald Tribune*, 4 May 2004.

821 McCoy, *ibid*.

822 *See* Human Rights First, *In Liberty's Shadow – U.S. Detention of Asylum* Seekers *in the Era of Homeland Security* (New York, 2004), in particular at pp. 7-16.

823 *Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*, Pub. L. 107-56, 115 Stat. 272 (26 October 2001) (hereinafter 'USA PATRIOT Act'). On the impact of the USA PATRIOT Act on civil liberties and on the specific issue of indefinite detention of certain aliens authorised by the Act, *see* W.A. Aceves, 'Arbitrary Detention in the United States and the United Kingdom. Some post-9/11 Developments', in P. Hoffman (ed.), *ACLU International Civil Liberties Report 2003*, available at: http://sdshh.com/ICLR/ICLR_2003/ICLR2003.html, ch. 3, at pp. 4-6.

detention of many within the US, absent normal procedural safeguards.[824] A joint study of global practices in relation to secret detention conducted by UN Special Rapporteurs and Working Groups in 2010 concluded that 'secret detention … is widespread and has been invigorated by the "global war on terror."'[825]

The US is far from being the only state to adopt such measures.[826] In the UK for example, the Anti-Terrorism, Crime and Security Act permitted long-term detention under immigration laws of persons the Home Secretary suspected of being terrorists, members of a terrorist organisation or otherwise linked to terrorism, where there was neither evidence to prosecute nor the possibility of deportation.[827] Although the UK scheme benefitted from comparison to that of its US partner in Guantánamo Bay, in that there was at least some limited judicial review, it also gave rise to serious due process concerns.[828] This scheme of 'potentially indefinite detention' was ultimately rejected by the courts as a violation of the rights to liberty and to non-discrimination and revoked as described in Chapter 11.

In many other states indefinite detention is nothing new, but September 11 and international response thereto provides a pretext for hitherto unacceptable practice. One of many from South Asia is found in Sri Lanka, where the Prevention of Terrorism Act – long criticised for permitting prolonged incommunicado detention[829] – was suspended prior to September 11, but proposals were floated by the government to effectively reintroduce it post-September 11, representing a potentially serious setback for rights protection in that country.[830] Another is the widespread preventative detention without judicial review of a broad range of alleged terrorists (reportedly including political opponents, activists and others) under the old Malaysian Internal Security Act of 1960, justified by broad reference to the security imperative of the war on terror.[831] Across Africa and the Middle East also, the use of arbitrary de-

824 Minor immigration irregularities have often been relied upon for detention in the US: *see*, *e.g.*, 'Muslim Cleric Held in US', *The Guardian*, 15 January 2004, concerning 'a senior Muslim cleric ... arrested ... for allegedly making false statements when applying for American citizenship more than ten years ago'.

825 UN Joint Study, *supra* note 35.

826 Report of the Working Group on Arbitrary Detention, 16 December 2002, UN Doc. E/CN.4/2003/8, para. 61.

827 *See* www.hmso.gov.uk/acts/acts2001/20010024.htm, Sn 21. 5 December 2012

828 *A & Others case* in Chapter 11.

829 *See* Concluding Observations of the Human Rights Committee: Sri Lanka, UN Doc. CCPR/CO/79/LKA (2003), para. 13. *See also* the decision of the Committee in *Sarma* v. *Sri Lanka* (Comm. No. 950/2000), Views of 31 July 2003, UN Doc. CCPR/C/78/D/950/2000.

830 *See* Concluding Observations of the Human Rights Committee: Sri Lanka, *supra* para. 13.

831 C. Landa, 'Executive Power and the Use of the State of Emergency', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), Ch. 8, p. 224.

tention, particularly in the terrorist context, is a matter of serious ongoing concern, exacerbated by the putative mandate of the war on terror.[832]

7B.7.2 Control Orders

Another mechanism of control, short of administrative detention, which has had a direct impact on, *inter alia*, the right to liberty is the institution of control orders. Such orders have been used, notably in UK and Australia, in circumstances where surveillance is deemed insufficient, detention has been set aside by the courts or rejected on policy grounds and criminal prosecution is not considered feasible for whatever reason.[833]

A preliminary question regarding lawfulness that emerged in the UK was whether control orders amount to 'deprivations of liberty' under the human rights instruments. Courts in the UK found it to be a question of fact and degree, in terms of the nature and extent of control over the individual, whether the orders constitute 'detention' as opposed to limits on freedom of movement.[834] Orders that allowed for persons to be confined to specified areas for up to 18 hours per day and cut off from contact with the outside world were held to amount to detention, by any other name, and required derogation from Article 5 of the ECHR to be permissible on security grounds.[835] Lesser restrictions, while still significant and requiring justification as necessary and proportionate interferences with rights – including freedom

832 By way of example, *see*, Concluding observations of the Human Rights Committee: Yemen, UN Doc. CCPR/CO/75/YEM (2002), para. 18: on the 'security forces, including Political Security, proceeding to arrest and detain anyone suspected of links with terrorism, in violation of the guarantees set out in the Covenant (Article 9).'

833 *See* Chapter 11 noting they emerged when offending legislation on security detention was held to be a violation of human rights and withdrawn, though they were also challenged. On control orders in the UK authorised by the Prevention of Terrorism Act 2005 and their operation, *see* 'Control Orders Update (11 March 2008 – 10 June 2008)' 12 June 2008 by Tony McNulty Minister for Security, Counter-Terrorism, Crime and Policing (The Rt Hon Tony McNulty): Section 14(1) of the 2005 Act available at: http://security.homeoffice.gov.uk/news-publications/news-speeches/control-orders-update-0608. The act authorized both derogating control orders where the government recognized that derogation from the ECHR was required and non derogating orders, where in the government's view, it was not. *See* Chapter 11 noting they emerged when offending legislation on security detention was held to be a violation of human rights and withdrawn. In Australia *see Thomas* v. *Mowbray* [2007] HCA 33 (High Court of Australia, 2 August 2007).

834 *Secretary of State for the Home Department (Appellant)* v. *JJ and others (FC) (Respondents)*, House of Lords, [2007] UKHL 45, decided 31 October 2007 in the UK.

835 *See also* 'kettling' cases in the ECtHR: in *Austin* v. *UK*, the Grand Chamber found holding a demonstrator and passers-by in a police cordon for several hours during a protest did not amount to detention; cf earlier protest cases which did give rise to violations of liberty, *e.g.*, *Steel and Others* v. *UK (1998)* and *Schwabe and MG* v. *Germany* (2011). In *Gillan and Quinton* v. *UK* (2010) concerning stop and search powers, the Court considered it unnecessary to determine the issue as it found a violation of private life, Article 8.

of movement or private and family life – did not amount to deprivations of liberty as such, and did not therefore require derogation.[836]

Control orders led to extreme infringements on a range of rights of many people, beyond those directly targeted. In many cases, they included involuntary relocation while most involved extended 'curfews ... confinement within a geographical boundary, tagging, financial reporting requirements and restrictions on association and communication.'[837] Ultimately in the UK, control orders laws were repealed and replaced with terrorism 'prevention and investigation measures' (TPIMs).[838] While the language has transformed, TPIMs have been described as 'control-orders lite' and the controversy around the extent of the restrictions of liberty, imposed outside the criminal process and with limited opportunity to challenge inclusion, continues.[839]

Where control orders have been used following a criminal sentence, when the criminal conviction would normally be considered spent, it has been suggested that they may also raise the question of double jeopardy.[840] This was the case in respect of the Australian former Guantánamo detainee David Hicks, who was convicted by military commission, served out his sentence in Australia and was then subject to a control order.[841]

7B.7.3 Deprivations of Liberty: Burden of Proof and Procedural Safeguards

Among the most contentious issues to arise in practice has been the burden of proof required to impose restrictions on liberty (as on other rights) and the

836 Note that restrictions on, *e.g.*, private life on grounds of security are allowed under the claw back clauses in the legal framework, whereas the right to liberty does not entail such a clause, and therefore requires derogation.

837 'Final Report of the Independent Reviewer of Terrorism Measures', 2012, noting also that 23 of the 52 controlled persons were subject to involuntary relocation to a different town or city in the UK.

838 The TPIMs empower the Secretary of State to impose a broad range of restrictions on travel, movement, property, association, financial and other activity, on a broad range of individuals. While temporary, they can be extended. On the scope of those covered, see 'Terrorism and Legality' 7.B.5 above.

839 The PTA 2005 was replaced by the Terrorism Prevention and Investigation Measures Act 2011. The Final Report of the Independent Reviewer of Terrorism Measures, 2012, at http://www.statewatch.org/news/2012/mar/uk-terr-rev-control-orders-2011.pdf, notes that 'The TPIMs, as the replacement measures are known, are similar to control orders in many respects' but with changes motivated by 'civil liberties concerns'. In addition to TPIMs, comparable restrictions to those imposed by control orders can still be imposed by the executive under asset freezing and immigration powers: p.4.

840 2006 Report of Special Rapporteur on terrorism Martin Scheinin, *supra* note 712 at para. 40; B. Saul, 'Criminality and Terrorism', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), p. 167.

841 *See* Saul, *ibid.*, and Chapter 8 on Guatanamo more broadly.

extent of the right of challenge. While restrictions have generally been applied according to a civil standard of proof of 'balance of probabilities', it has been suggested that given the implications for the individual's rights – including loss of liberty for the individual concerned and other human rights consequences – a higher standard should be applied.[842] Given the inherent flexibility they provide, there is a risk of deprivations of liberty, or control or preventative orders, being used as an alternative to criminal law, with similarly serious consequences for the person 'accused' but far less safeguards.[843] As such, the UK House of Lords, looking at the extent of disclosure to the individual required in such cases, found the procedural protections normally applicable in criminal law should apply also in control order proceedings,[844] a view that was endorsed by the ECtHR.[845]

Likewise, particular concerns have attended the lack of due process by which such decisions are made and notably lack of access to evidence. It has to be acknowledged that full disclosure is sometimes not possible,[846] but courts have noted that there must, at a minimum, be a 'meaningful opportunity' for the individual affected to know the evidence against him and to 'effectively challenge' the restrictions.[847] In this context, the UK like other states has offered various schemes to protect information within the legal process, such as in camera to closed proceedings or the use of 'special advocates,' both of which have been roundly criticised as undermining principles of open justice, the effective functioning of the lawyer-client relationship and the integrity of the justice process more broadly.[848] The question remains whether in all the circumstances the process was such that the individual had enough

842 2008 Report of the Special Rapporteur on Terrorism, M. Scheinin, 6 August 2008, para 42.

843 Saul, *supra* note 840, discussing the measures as a way to circumvent procedural protections due in criminal law.

844 *SS* v. *AF* [2009] UKHL 28 [2010], para. 57.

845 Moreover, in the circumstances of the present case, and in view of the dramatic impact of the lengthy – and what appeared at that time to be indefinite – deprivation of liberty on the applicants' fundamental rights, Article 5 § 4 must import substantially the same fair trial guarantees as Article 6 § 1 in its criminal aspect: *A & Ors.*, *supra* note 109, para. 217.

846 This is reflected in cases post-9/11, such as *A & Ors.*, ibid at para. 220, and previously *e.g.*, *Chahal*, 23 Eur. H.R. Rep. at 469, para. 131.

847 *A & Ors.*, ibid, at para. 218: 'Where full disclosure was not possible, Article 5 § 4 required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.'

848 See, *e.g.*, 'Secret Evidence', E. Metcalfe, Justice (2009) which describes special advocates as 'merely the most common and most visible symptom of the unfairness caused by the decision to allow evidence to be withheld from the defendant.' The UK Justice and Security Act 2013 expanded the categories of cases in which 'closed material' proceedings – in which evidence is hear without one of the parties and a judgment may be open only to one of the parties – can be employed in UK courts. It also employs a 'special advocate' scheme much criticized in the context of immigration detention proceedings before the Special Immigration Appeals Commission (SIAC).

information and sufficient opportunity to provide instructions to his lawyer, information to the court, and a meaningful right to challenge.[849] Notably, these initiatives that represent exceptions to the normal principles of due process have gradually been extended to apply in a broader range of proceedings.[850]

7B.8 Listing and De-listing: Rights Sanctioned

Terrorism 'lists' have sprung up on various levels post-9/11. At one extreme are the CIA 'kill lists', which, although still not officially recognised, have long been acknowledged by officials and others.[851] At another, are the myriad 'watch lists', such as one secret US list reported to have swollen to 875,000 people by 2013.[852] On the international, regional and national levels, official 'lists' are kept of individuals and organisations considered to be linked in some way with terrorism, with varying but often wide-reaching human rights implications.

The best known on the international level is 'the Al-Qaida and Taliban' list overseen by the UN 'Sanctions Committee', established originally under SC Res. 1267,[853] to designate individuals and entities associated with al-Qaeda, Osama bin Laden and/or the Taleban wherever located for inclusion on the 'Consolidated List'.[854] The EU also maintains lists – both to implement Council

849 *A & Ors.*, *supra* note 109 at para. 220.

850 'Once the special advocate system became functional, it quickly spread to other legal settings, including the Information Tribunal, the High Court, the Parole Board and the Employment Tribunal'. *Special Advocates: The Face of Secrect Justice*, FBIJ, 1 Nov 2012. *See also* Justice and Security Act 2013 which expanded the categories of cases in which a 'closed material' proceeding- in which evidence is heard without one of the parties and a judgment may be open only to one of the parties – can be employed in UK courts (*see* Chapter 11). It also employs the special advocate scheme adopted in the SIAC detention cases.

851 *See*, *e.g.*, the *Aulaqi* case wherein the ACLU Challenged to the Secrecy surrounding the existence of the targeted killing programme in 7B.3 'War and Human Rights'.

852 The US National Counter-Terrorism Center, which manages the database, made public in May 2013 that 875,000 people are on that list; 'Terror watch list grows to 875,000', *Washington Post*, 3 May 2013.

853 Although the sanctions regime against al-Qaeda and the Taleban was a pre-9/11 invention (SC Res. 1267 (1999)), it was modified and expanded post-9/11 by SC Res. 1390 (2002), 16 January 2002, UN Doc. S/RES/1390 (2002), which creates an open-ended sanctions regime of a potentially global nature. Resolution 1267 established a Security Council committee, known as 'the Al-Qaida and Taliban Sanctions Committee' (hereinafter, 'the Committee'). Resolution 1267 has been modified and extended by numerous subsequent resolutions..

854 SC Res. 1267 (1999), 15 October 1999, UN Doc. S/RES/1267 (1999), paras. 4(a), 4(b) and 6. The sanctions regime has successively been extended to cover 'individual and entities associated with [Osama bin Laden], including those in the al-Qaida organisation'. *See* SC Res. 1333 (2000), 19 December 2000, UN Doc. S/RES/1333 (2000), para. 8.

resolutions and separately.[855] Commonly these lists provide a basis to freeze assets, preclude travel and limit movement, though they may involve the imposition of other restrictions, and have broader human rights implications.[856]

Identifying those engaged in and providing financial support to international terrorism, and prompt cooperation to freeze assets, impede operations and drain the financial lifeblood from terrorism, are essential to effectively combat terrorism.[857] Such preventative measures must be available to states as they act in the interest of national security and protection of their populations from terrorism, which, as noted above, is itself a human rights obligation.

It is perhaps unsurprising that the human rights framework does not proscribe listing as such, but it constrains it within rule of law limits. To be lawful, measures that restrict qualified rights, such as private life, movement or property, must be prescribed by law and pursue a legitimate aim – requirements that are likely to be met where for example measures are mandated by the Security Council, as borne out by litigation.[858] The listing and measures taken in response must also be necessary and proportionate, which is an assessment to be made case-by-case in light of the specific circumstances of the individual. Any interference must be minimised.[859] Thus the ECHR has found a state to have violated the right to private life of an individual who was not allowed to enter the state on the basis of the travel ban arising from the Security Council lists, where there were measures within the state's discretion that it could have taken to avoid or limit the interference with the rights.[860]

While many human rights concerns have arisen in relation to lists, it is however the lack of an effective opportunity for individuals and entities to know the basis for their inclusion and to challenge their listing that has been

855 Some EU sanctions give effect to Security Council resolutions while others are separate EU lists. EU sanctions have been taken against third states, individuals and organsiations under Art. 215, Treaty on the Functioning of the EU2007 (in force 2009). They involve trade embargoes, financial sanctions and transport bans and often have direct effect, as noted in *e.g. Abousfian Abdelrazik v. the Minister of Foreign Affairs and the Attorney General of Canada*, 2009 FC 580, at para.53. A. Rosas, 'Counter-Terrorism and the Rule of Law: Issues of Judicial Control', in A. Salinas de Frías, K. Samuel, and N. White (eds.), Counter-Terrorism: International Law and Practice (Oxford: Oxford University Press, 2012), Ch. 4; and *Kadi v. Council*, *supra* note 511.

856 Member States are required to take the following actions with regard to individuals and entities on the Consolidated List: (1) freeze their assets; (2) ban their entry into and travel through their territories; and (3) impose an arms embargo.

857 *See*, *e.g.*, the Terrorist Financing Convention.

858 *Nada* v. *Switzerland*, *supra* note 511.

859 *Ibid*. at paras. 195-96.

860 *See* Chapter 11 on Human Rights Litigation for further discussion of *Nada* v. *Switzerland*, where the state could have taken action to have the individual removed and failed to do so, the measures it took pursuant to the lists was considered a disporporitonate interference. *Nada* v. *Switzerland*, *supra* note 511.

at the heart of much of the human rights critique.[861] Basic procedural safeguards, involving an opportunity to meaningfully challenge inclusion on the list, are required for all persons whose rights are restricted, consistent with the underlying principle of legality and prohibition on arbitrariness.[862] This includes, in principle, knowledge that one is listed, and access to at least sufficient information to know the basis of the allegations and an opportunity to refute them before an independent arbiter according to basic due process guarantees. While Security Council action in including individuals on its lists may not itself be reviewable,[863] courts have found that individuals must have this right to challenge particular states' actions against them that fall foul of human rights obligations.[864]

The failure to respect basic due process in the listing schemes has given rise to virulent criticism. For example, a Council of Europe Special Rapporteur described the 'flagrant injustice' of Security Council listing[865] while the UN Special Rapporteur alerted to accountability and fundamental human rights issues arising.[866] A Canadian Federal Court judge went further, condemning the regime as 'untenable under the principles of human rights', noting that the 'situation for a listed person is not unlike that of Josef K in Kafka's *The Trial*, who awakens one morning, and for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime'.[867] Indeed, as discussed in Chapter 11 on human rights litigation, successive courts, including the European Court of Justice, the UN Human Rights Committee, the ECtHR and national courts, have found that measures taken against individuals on the basis of Security Council or other lists haven fallen foul of legal human rights requirements. In the cases before the ECJ, EU implementing legislation giving effect to Security Council sanctions lists was struck down,

861 *Ibid.* at 4-5.

862 *See* the principles set out in relation to 'control orders' above should be applied in the particular context and in light of the type of measures taken against the individual.

863 *See* UN and Human Rights, above.

864 *See* Chapter 11, 'Human Rights Litigation.'

865 On 25 April 2007, Council of Europe Parliamentary Assembly (PACE) investigator Dick Marty (Switzerland, 'strongly deplored' the UN Security Council for the «flagrant injustice» of blacklisting individuals suspected of having links to terrorism without evidence of any wrong-doing, flouting its own principles.

866 In August 2006, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms, Martin Scheinin, called for proper procedural due process safeguards for the UNSC targeted economic sanctions regimes. UN General Assembly, Report of the Special Rapporteur, UN Doc. A61/27 (2006), at para. 34. As noted *supra* the 2005 reports followed the Report of the High-level Panel on Threats, Challenges and Changes, A More Secure World, Our Shared Responsibility, UN Doc. 1/59/656 (2004), at para. 153, which noted that 'the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions'.

867 *Ibid*, para 51 and 53; *see* Rosas, 'Counter-Terrorism and the Rule of Law', *supra* note 855, p. 100.

preventing 27 states from implementing the Security Council sanctions on human rights grounds.[868]

In face of these criticisms and challenges, the Security Council process has itself evolved over time. A rudimentary 'de-listing' procedure[869] existed early on, allowing states to challenge on behalf of individuals (as first invoked in a Swedish challenge that led to the removal of two individuals who had been included on the list despite no apparent evidence of terrorist links in 2002),[870] but this secret, rare and selective procedure served to highlight the dangers for the majority of organisations or persons who could not count on state willingness to represent them. The momentum towards change was impelled by the indirect judicial oversight through the judicial review of states' actions mentioned above, but an important additional catalyst may have been the High Level Report of 2005, wherein UN member States 'call[ed] upon the Security Council with the support of the Secretary-General to ensure that *fair and clear procedures* exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions'.[871] The 'Fassbender' report and recommendations followed,[872] and the Security Council adopted several resolutions making minor and gradual amendments to the listing procedure.[873]

The more significant shift institutionally, and certainly if one is to judge by results, was the Security Council's Resolution 1904 of December 17, 2009, since extended, establishing the Office of the Ombudsperson to deal with

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868 *Yassin Abdullah Khadi* v. *Council and Commission*, 5656/02, and Cases C-402/05 P and C-415/05 P, Judgment of Grand Chamber, 3 September 2008 (Kadi I).

869 *See* Resolution 1333 (2000), allowing for a 'de-listing' of the organisations designated by the 1267 Committee (para. 3). *See also* Security Council Committee Established Pursuant to Resolution 1267 (1999), Guidelines of the Committee for the Conduct of its Work (adopted on 7 November 2002 and amended on 10 April 2003), available at: http://www.un.org/Docs/sc/committees /1267/1267_guidelines.pdf (hereinafter, '1267 Committee, Guidelines').

870 Sweden contested the US designation of three Swedish citizens of Somali origin as terrorist accomplices and two of the men were removed from the UN list in August 2002. *See* 'Human Rights Committee Takes Up Sweden's Fifth Report on Compliance with International Covenant On Civil, Political Rights,' HR/CT/616 21 March 2002.

871 2005 World Summit Outcome, *supra* note 478, para. 109.

872 On the report commissioned by the UN Office of Legal Affairs, *see* Bardo Fassender, 'Targeted Sanctions and Due Process', Study Commissioned by the United Nations Office of Legal Affairs, p. 3. It recommended that individuals be informed wherever possible, have a right to be heard by the Security Council or subsidiary body, with the right to representation, and the right to an effective remedy. *Ibid.*

873 *See*, *e.g.*, S.C. Res. 1730, Preface, U.N. Doc. S/RES/1730, 19 December 2006, paras. 1-8 which allowed in principle for challenge through a focal point process or through their state of residence or citizenship. S.C. Res. 1735, Preface, UN Doc. S/RES/1735, 22 December 2006, para. 5 required more information from states by way of a 'statement of case' for listing, provided non-exhaustive factors for the committee to consider when determining removal (para 14). S.C. Res. 1822, Preface, UN Doc. S/RES/1822, 30 June 2008 imposed basic notification procedures and annual review of names that had not been reviewed in three years or more. *Ibid.*, paras. 25-26.

requests from individuals or entities seeking to be removed from the Security Council's '1267' Al-Qaida Sanctions List.[874] The Ombudsperon interviews applicants, interacts with states and the Council and 'recommends' de-listing.[875] While her powers are limited, and she can neither compel states to share information nor the Council to delist, there are assumptions built into the process whereby her delisting recommendations will be followed automatically after 60 days unless the Committee decides otherwise. In practice, up until August 2013, 32 cases had been reviewed and 26 individuals delisted, and the Council has never refused to delist.[876] The transparency afforded is also starkly improved in contrast to previous procedures, with greater information being made available to the applicant and where possible publicly.[877]

However, the procedure has obvious limitations. An Ombudsperson undoubtedly falls far short of affording the right to a remedy or to judicial challenge required by human rights law. Moreover, in at least one case, the effectiveness of the procedure has been cynically undercut by a delisting being swiftly followed by a relisting of the individual under another listing scheme with less oversight.[878] Nonetheless, this new procedure is the most significant step yet in the process of reform, which may reflect a 'willingness by the Security Council to make incremental adjustments that allow petitioners to engage in dialogue with the Ombudsperson and possibly receive more detailed information concerning their designation'.[879] The evolving situation of listed individuals forms part of a broader debate on the need for a measure of Security Council accountability and the need to ensure recourse for individuals whose rights are directly affected by its actions.

874 The mandate was created by SC Res.1904, 17 December 2009 and extended by SC Res. 1989, 17 June 2011.

875 Under SC Res. 1904 (2009) the ombudsperson had jurisdiction with respect to Al-Qaida and the Taliban all of whom/which were in a Consolidated List, though with Resolutions 1989 (2011) and 1988 (2011) the lists were separated; she now addresses only the Al-Qaeda list.

876 On the current status of delisting, *see* http://www.un.org/sc/committees/1267/delisting.shtml.

877 *See ibid* for updated information on the exercise of the mandate.

878 Ali Ahmed Jumale (aka Ji'male) remains on the Somali list after being removed from the Al Qaida list – the delisting and listing happened on the same day. The Ombusperson's mandate is limited to 1267 and does not cover the other sanctions lists. *See* Security Council, SC/10549, Statement of 17 Feb 2012 at http://www.un.org/News/Press/docs/2012/sc10549.doc.htm

879 D. Cortright and E. de Wet, *Human Rights Standards for Targeted Sanctions*, Report by the Sanctions and Security Research Program, Policy Brief SSRP 1001-01 (2010), at 10.

7B.9 IMMIGRATION, ASYLUM AND REFUGEE EXCLUSION

Strict immigration procedures have been adopted in many states in recent years, for reasons that go beyond (but are doubtless affected by) the context of international terrorism.[880] A particularly loose approach to the 'terrorist label', and some of the most potentially serious consequences of its application, are seen in relation to immigrants, asylum-seekers and refugees. Although none of those directly involved in the September 11 attacks were refugees or asylum seekers,[881] with the London bombings as one example among many of 'home grown terrorism', unjustifiable linkages with the threat of terrorism have provided a pretext for broad-reaching measures providing for the detention, and ultimately removal, of immigrants and asylum seekers.[882]

Deportation and exclusion have been the methods of choice for governments, which do enjoy very broad (while not unlimited) discretion in the immigration context as to who should be allowed to enter and remain in their state.[883] It is perhaps unsurprising then that definitions of those suspected of being associated with terrorism for the purposes of exclusion are often far broader than for other purposes. In the US for example, reports chronicle the vast impact of deportation and exclusion on persons who have lived their lives and established their families in the US, who are not on any vetted terrorist list nor suspected of themselves having participated in terrorist (or necessarily unlawful) acts.[884] Rather they are banned on the basis of their support for or association with groups that have engaged in violence, irrespective of whether the groups may have legitimately engaged in force, consistent with IHL in an armed conflict for example, or of the nature of the support or association.

In other states, the state has assumed the power to strip individuals of their nationality on national security grounds, with sometimes devastating

880 *See*, *e.g.*, European Union 'Returns' Directive, 'Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals', 328 Official Journal of the European Union 98, 24 December 2008; *see also* 'EU rules on illegal migrants anger human rights groups', Thursday 19 June 2008, available at: http://www.euractiv.com/en/mobility/eu-rules-illegal-migrants-anger-human-rights-groups/article-173477.

881 Fitzpatrick, 'Speaking Law to Power', *supra* note 683, pp. 258-60.

882 The use of immigration laws to detain persons considered potentially dangerous has been a common feature of the human rights landscape post-9/11. For a detailed survey of the current situation in the US, *see* Human Rights First, *In Liberty's Shadow*.

883 Subject to certain parameters, including the refoulement rules set out in Part A and addressed as regards developing practice in the terrorism field below.

884 Political controversy surrounds exclusion of persons once affiliated with organisations that, *e.g.*, took up arms against the Sudanese government, Saddam Hussein's regime in Iraq or Fidel Castro's in Cuba. *See* Friends of U.S., Terrorists in Eyes of Law, September 19, 2011.

effects.[885] Reports from the UK indicate that the stripping of nationality has preceded drone strikes in one case,[886] and led to individuals being left stateless in another.[887] The UK Supreme Court has found that such an order that leaves an individual without a nationality is unlawful.[888]

The groundwork for measures that unduly impact on the rights of refugees was laid by Security Council Resolution 1373 (2001), which required states to refuse refugee status to those who have participated in or planned terrorist acts,[889] as reflected in subsequent resolutions of other bodies[890] and the EU Common Position 2001/930 which is binding on EU member states. As noted above, given the amorphous concept of terrorism, and a gung-ho approach to it that is particularly apparent post-9/11, the label can encompass serious crimes, offences of lesser gravity, and potentially conduct not criminal at all. This may mean that refugees are in effect excluded from protection in circumstances that go far beyond the serious crimes that may justify exclusion under the Refugee Convention.[891]

The risk resulting from this 'flexible' approach to excluded categories is compounded by 'truncated status determination processes',[892] leading to concern 'that persons might be excluded without reliable proof of their personal involvement in genuine exclusionary conduct'.[893] In the European 'Returns' Directive for example, the limited procedural safeguards do not apply to 'national security' cases, providing a further and troubling manifestation of the procedural exceptionalism that attends national security and terrorism matters. Particular concerns arise as to asylum seekers being returned to their country of origin in circumstances where their rights in respect of non-refoulement are not adequately protected, as discussed below.

885 *See*, *e.g.*, HR Council resolution on arbitrary deprivation of nationality, A/HRC/20/L9 (2012).

886 *See*, *e.g.*, 'Former British citizens killed by drone strikes after passports revoked', 27 Feb 2013, available at: http://www.thebureauinvestigates.com/2013/02/27/former-british-citizens-killed-by-drone-strikes-after-passports-revoked.

887 Secretary of State for the Home Department (Appellant) v. Al-Jedda (Respondent) [2013] UKSC 62 On appeal from [2012] EWCA Civ 358, 9 October 2013.

888 *Ibid*. *See also*, *e.g.*, African Commission on Human and Peoples Rights, Resolution 234 (2013) on the right to nationality and obligation to prevent statelessness.

889 SC Res. 1373, para. 3(f).

890 *See*, *e.g.*, EU Common position 2001/930 of 27 December 2001; in S. Kapferer, 'Ends and Means in Politics', at 124-5. *See also* Resolution 2003/37 of the UN Human Rights Commission, 'Human Rights and Terrorism,' 23 April 2003, UN Doc. E/CN.4/2003/L.11/Add.4. para. 8.

891 *See* Article 1F of the Convention on the Status of Refugees, which excludes person where there are serious reasons for considering that they have committed 'a crime against peace, a war crime, or a crime against humanity, ... a serious non-political crime outside the country of refuge ... acts contrary to the purposes and principles of the United Nations.'

892 Fitzpatrick, 'Speaking Law to Power', *supra* note 683, p. 259.

893 *Ibid.*

7B.10 Dispatching the Problem: Refoulement post-9/11

The deportation of individuals considered a threat to national security has been one of the most common tools in the 'war on terror'. In this context, human rights courts and mechanisms have often acknowledged that, as noted in Part A, there is no human right to enter or remain in a foreign state, and indeed that 'as part of the fight against terrorism, States must be allowed to deport non-nationals whom they consider to be threats to national security'.[894] To be lawful, however, deportation or transfer must conform with the principle of legality and be subject to certain human rights constraints, among them the non-refoulement rule which obliges states not to transfer an individual where there are real risks of rights violations in the state of transfer.[895] Perhaps more than any other issue, it is this practice of transfer of persons, in apparent disregard of the non-refoulement obligations, that has given rise to most voluminous challenges by individuals and expressions of concern by human rights bodies post-9/11.[896] Restrictions on the state's ability to deport individuals, on human rights grounds, have also been one of the most polemic issues in political discourse in a number of states.[897]

While these issues have most commonly arisen in the context of the deportation under immigration laws of persons deemed a threat to national security, serious tensions arise also in the context of extradition and inter-

894 *Othman* v. *UK*, *supra* note 296, para. 184. It continued: 'It is no part of this Court's function to review whether an individual is in fact such a threat; its only task is to consider whether that individual's deportation would be compatible with his of her rights under the Convention'.

895 Chapter A.5.10.

896 *See*, *e.g.*, Cases before the ECtHR include *Saadi* v. *Italy*; *Daoudi v France*, 3 Dec 2009; *Ismoilov and Others* v. *Russia*, No. 2947/06, §§ 96-100; 24 April 2008; *Othman* v. *UK*, para. 186-89. Before CAT *see Agiza* v. *Sweden* (comm. 233/2003, decision of 20 May 2005, *Pelit* v. *Azerbaijan*, comm. no. 281/2005 decision of 29 May 2007; *See also*, *Brada* v. *France*, CAT/C/34/D/195/2002, 24 May 2005. Before the HRC *see*, *e.g.*, M*ohammed Alzery* v. *Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006, and Concluding Observations: Sweden, UN Doc. CCPR/CO/74/SWE (2002), para. 12; Concluding Observations: New Zealand, UN Doc. CCPR/CO/75/NZL (2002), para. 11; Concluding Observations: Portugal, UN Doc. CCPR/CO/78/PRT (2003), para. 12; Concluding observations: Egypt (UN Doc. CCPR/CO/76/EGY (2002), para. 16.

897 A particularly divisive debate has unfolded in the UK on account of the length of proceedings prior to the deportation of terrorist suspects from the UK. *See*, *e.g.*, the Bill introduced by a Conservative MP to allow the UK to temporarily withdraw from the ECHR to deport Abu Qatada (subject of the Othman case) to Jordan. *see eg also* 'Withdraw from human rights law to deport Qatada, say Tory MPs', *The Telegraph*, 22 February 2012, available at: http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/9096466/Withdraw-from-human-rights-law-to-deport-Qatada-say-Tory-MPs.html.

national criminal cooperation, as discussed in Chapter 4.[898] International cooperation in criminal matters, or in the prevention of terrorism more broadly, are themselves international obligations, which pursue human rights aims. In recent years great emphasis has therefore been placed on enhancing and streamlining this cooperation in the counter-terrorism context, which has spurred important regional and international developments and substantial state practice. However the legitimacy – and arguably effectiveness – of such measures depends on them unfolding within a rule of law framework, including respect for the obligations of refoulement.[899] While the US has taken a radically restrictive view on the issue of refoulement, denying the existence of such obligations,[900] in a number of other ways, states have sought to relativize, redefine or to work around the prohibition on refoulement in the war on terror, as illustrated below.

7B.10.1 Refoulement: Absolute Ban or Balancing in the Public Interest?

State practice has occasionally sought to regress from well-established jurisprudence on the absolute nature of the prohibition on certain transfers, notably where there is a risk of torture or cruel, inhuman or degrading treatment. For example, a collection of European governments, led by the UK, argued before the ECtHR that in the context of terrorism, the obligation not to transfer to TCIDT should not be 'absolute' but a test that 'balances' the risk of transfer to the

898 *See* A.5.10. The rule of non-refoulement is are relevant to any form of transfer of persons, whether within the immigration or criminal law frameworks, or outside any legal framework as characterized by 'Extraordinary Rendition' discussed at Chapter 10. Although it has been suggested that particular 'tensions' arise in relation to extradition and that standards should be higher in these cases – *see* UK government arguments in *Ahmad* v. *UK*, para. 167, but the Court found that 'whether there is a real risk of treatment contrary to Article 3 in another State cannot depend on the legal basis for removal to that State. The Court's own case-law has shown that, in practice, there may be little difference between extradition and other removals.' (para 168).

899 While this section focuses on non-refoulement, note that other cooperation- related concerns arise from *e.g.*, cooperation with drone strikes in violation of the right to life (*see*, *e.g.*, 'Drone Strike Prompts Suit, Raising Fears for U.S. Allies', R. Somaiya, *NY Times*, 30 Jan 2013), or in relation to unlawful and excessive surveillance practices and the exchange of personal data (B.11).

900 The US denies that its nonrefoulement obligations arise under the Conventions, despite contrary jurisprudence. *See* the US's Second and Third Periodic Reports to HRC; and the US' Fourth Periodic Report to HRC. For the Committee's response, *see* UN Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: United States of America, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 Dec. 2006. UN Human Rights Comm., Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee, UN Doc. CCPR/C/USA/CO/3/REV.1/ADD.1, 2 Feb. 2008.

individual against the national security risk.[901] However, consistent with the duty of non-refoulement as linked to the nature of the protected rights themselves,[902] the ECtHR has reaffirmed the absolute nature of the ban on transfer where there is a risk of absolute rights being violated.[903] This approach has held fast in relation to transfer to proceedings that would rely on torture evidence, and those that would amount to a 'flagrant denial of justice', in line with the non-derogable nature of the safeguards against torture, or of core fair trial guarantees.[904]

Attempts to 'balance' in this way were followed by attempts to argue that while the ban on *torture* may be absolute, not so in relation to cruel, inhuman or degrading treatment, where broader 'policy objectives' could be taken into consideration.[905] These arguments too were ultimately rejected, with the ECtHR upholding an 'indivisible' approach to the ban on torture and cruel or inhuman treatment,[906] in line with the approach of other international bodies.[907] While the question of whether the minimum threshold of TCIDT has been met in all the circumstances is the difficult one, it has been reaffirmed that, where it is met, the ban on transfer is absolute.[908]

7B.10.2 'Diplomatic Assurances'

One of the most uncertain areas of practice in relation to the transfer of persons in the terrorism context relates to the practice of seeking 'diplomatic assurances' from states that they would not violate the rights of those returned to them.[909] A range of states, including the US, UK, Germany and Sweden have negotiated assurances or 'memoranda of understanding', at times with

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901 *See* Chapter 11 'Litigating the War on Terror' on the development of *Ramzy* v. *the Netherlands* and *Saadi* v. *Italy*.

902 Part B.9.

903 *See Saadi* v. *Italy*, *supra* note 262.

904 *See Othman* v. *UK*, *supra* note 297.

905 *Ahmad* v. *UK*, *supra* note 418, para. 162 on the UK arguments that: '… in the extradition context, a distinction had to be drawn between torture and other forms of ill-treatment... it was legitimate to consider the policy objectives pursued by extradition in determining whether the ill-treatment reached the minimum level of severity required by Article 3…'.

906 'The Court therefore concludes that the *Chahal* ruling ... should apply without distinction between the various forms of ill-treatment which are proscribed by Article 3. *Ahmad* v. *UK*, ibid, para. 176.

907 *See*, *e.g.*, Committee's General Comment No. 20, which makes clear that Article 7 prevents *refoulement* to a real risk of torture or other forms of ill-treatment; Article 19 of the Charter on Fundamental Rights of the European Union, cited in *Ahmad*, *supra* note 418, para. 167.

908 *See*, *e.g.*, conditions of detention which in some cases are found to meet the threshold and in others not. This is a case-by-case determination. *See*, *e.g.*, *Ahmad* v. *UK*, regarding the high threshold for Article 3 in transfer cases – in that case transfer to a US supermax prison conditions did not meet the threshold.

909 *See* discussion in C. Wouters, 'Reconciling National Security and Non-refoulement', p. 580.

states known for their poor human rights records, which have then been relied upon in court as a justification for transfers that would otherwise be unlawful.[910]

As the practice has grown so too have expressions of wide-reaching scepticism as to whether assurances can effectively alleviate risk in the way they purport to.[911] The UK House of Lords encapsulated some of this criticism as 'the "Catch 22" proposition that if you need to ask for assurances you cannot rely on them. If a State is unwilling or unable to comply with the obligations of international law in relation to the avoidance and prevention of inhuman treatment, how can it be trusted to be willing or able to give effect to an undertaking that an individual deportee will not be subject to such treatment?'[912] Monitoring reports by NGOs have fuelled concerns regarding ineffectiveness, by pointing out cases where risks have became realities post-transfer, despite assurances to the contrary.[913] Likewise, concern was expressed by a former Special Rapporteur on Torture who noted that 'diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated ...' while 'post-return monitoring mechanisms have proven to be no guarantee.'[914]

Despite this, a range of national, international and regional courts have shown increasing willingness to have regard to such assurances in making

910 See *e.g.* Letter to German Government regarding Diplomatci Assurances, available at: http://www.hrw.org/news/2009/07/21/letter-german-government-regarding-diplomatic-assurances; Joint report of Amnesty International, Human Rights Watch and the International Commission of Jurists, 2 December 2005, vol 1, pp. 179-223; Human Rights Watch, 'Not the Way Forward: the UK's Dangerous Reliance on Diplomatic Assurances', October 2008, available at: http://www.hrw.org/sites/default/files /reports/uk1008web.pdf; and 'Empty Promises enabling torture', 6 October 2011, available at: http://www.hrw.org/news/2011/10/06/diplomatic-assurances-empty-promises-enabling-torture.

911 *Ibid*. *See also*, *e.g.*, 'Viewpoint' of 27 June 2006 of the Council of Europe Commissioner for Human Rights, Thomas Hammarberg; Special Rapportuer on Turure, below, the United Kingdom Parliament's Joint Committee on Human Rights Report of 18 May 2006 and the House of Commons Select Committee on Foreign Affairs report of 20 July 2008; *Othman* v. *UK*, *supra* note 297, para. 145; *Cf.* respected British human rights lawyer Lord Anthony Lester defends the courts' regard to such agreements: *see* 'Letter from Lord Lester', *The Guardian*, 20 February 2009, available at: http://www.guardian.co.uk/world/2009/feb/20/abu-qatada-jordan.

912 The House of Lords in *Qatada*, *supra* note 341, para 15.

913 HRW, 'Empty Promises enabling torture', *supra* note 911; HRW, 'Not the Way Forward', *supra* note 911.

914 Report to the UN General Assembly of the UN Special Rapporteur on Torture (UN Document A/59/324), 1 September 2004. The paragraph continues: 'The Special Rapporteur is therefore of the opinion that States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.'

factual evaluations of risk.[915] Over time, courts have looked more closely at the assurances, discarding some as inherently unreliable, while affording some weight to others in differing circumstances.[916] It was in the *Othman* case that the ECHR set down in detail factors relevant to assessing whether assurances should be considered of 'practical application', as well as the weight to be afforded to assurances in the particular case.[917] These included whether they are specific, binding, by whom they are issued, if the court has seen them, the record of the state, whether the conduct is illegal in the receiving state, and whether there are effective systems both for monitoring and for rights protection more broadly.[918] Where the state is a systematic violator, human rights practice certainly suggests that assurances should rarely, if ever, be admitted.[919]

Where assurances are taken into consideration, they are not a panacea, but 'a further relevant factor' in an overall assessment of the real risk in a particular case.[920] The question therefore remains one of fact as to whether, in light of all the facts and circumstances, including the situation in the state and the circumstances of the applicant, there is a real and reasonably foreseeable risk in the receiving state.[921] It remains to be seen whether some factors that have been given particular emphasis by courts and bodies in other cases, such as whether there will be follow-up and monitoring, can really be made effective,[922] or whether assurances will essentially constitute a judicially

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915 ECtHR – *Ismoilov and Others* v. *Russia*, no. 2947/06, §§ 96-100; 24 April 2008; *Othman* v. *UK*, para. 186-89. CAT – *Agiza* v. *Sweden* (comm.. 233/2003, decision of 20 May 2005, *Pelit* v. *Azerbaijan*, comm. no. 281/2005 decision of 29 May 2007); HRC – M*ohammed Alzery* v. *Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006. Examples from the national level include *Mahjoub* v. *Canada (Minister of Citizenship and Immigration)* 2006 FC 1503, *Suresh* v. *Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, the Supreme Court of Canada.

916 *See*, *e.g.*, *Othman* v. *UK*, para. 187. The assurances have no legal effect and do not themselves remove risk but are a factor in its evaluation.

917 *Ibid.*

918 *Ibid*. at para. 189.

919 *Othman* v. *UK*, para. 188. 'A preliminary question is whether the general human rights situation in the receiving State excludes accepting any assurances whatsoever.'

920 *Ibid.* at para. 187; *see also Mohammed Alzery* v. *Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006, para. 11.3:the HRC found 'The existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists.').

921 On the standards for evaluating risk, *see* A.5.10 in this chapter.

922 The Human Rights Committee has suggested that any reliance on assurances depends on 'serious efforts to monitor the implementation of those guarantees' and 'institute credible mechanisms for ensuring compliance of the receiving State with these assurances from the moment of expulsion'. Concluding observations of the Human Rights Committee: Sweden, UN Doc. CCPR/CO/74/SWE (2002), para. 12. *See also* Concluding observations of the Human Rights Committee: New Zealand, Un Doc. CCPR/CO/75/NZL (2002), para. 11. Others question whether such transnational monitoring mechanisms are inherently

endorsed way in which states can, in practice, circumvent their responsibilities in respect of non-refoulement.

7B.10.3 The Scope of Affected Rights and Refoulement: Wavering Standards in Instruments and Jurisprudence

As noted in Chapter 4, international standards elaborated since 9/11 have not always been clear or consistent as regards the duty to cooperate and to refrain from cooperating in accordance with the obligation on non-refoulement.[923] Specifically, degree of confusion and inconsistency has attended the scope of the non-refoulement obligation: risks to which rights in the receiving state give rise to the obligation of non-refoulement?[924] An early example of a selective approach was the Protocol to the European Convention against Terrorism of 2003[925] which excluded the obligation to extradite where there are substantial grounds for believing that the person would be subjected to torture or the death penalty[926] but omitted reference to refusal to cooperate where there were risks of inhuman and degrading treatment, denial of fundamental principles of justice, enforced disappearance or extra-judicial execution, for example, where human rights law would also require states to refuse to extradite.[927] Indeed, the Protocol fell short of the Council of Europe's own guidelines passed only months before,[928] leading to fumbling attempts to

ineffective or insufficient. *See*, *e.g.*, HRW, 'Not the Way Forward', *supra* note 1006.

923 On SC Res. 1373 *see* B.2 above; *see* Chapter 4 on the fitful evolution of extradition law and its relationship with human rights exceptions.

924 Inconsistencies are not new, reflecting the piecemeal development of the law. However the concerted focus on these issues post-9/11 provided an opportunity to introduce greater coherence in the approach to standard setting; as indicated in the European example, that opportunity may have been missed: *see* Chapter 4 B.

925 Protocol amending the European Convention on the Suppression of Terrorism, Strasbourg, 15 May 2003, ETS, No. 190 Article 4 (hereinafter 'Protocol amending the European Convention against Terrorism);' *see also* Council of Europe Resolution 1271 (2002), para. 8.

926 Article 4(2) and (3), Protocol amending the European Convention against Terrorism. It includes where the law of the requested State does not allow for life imprisonment.

927 *See* this chapter, section A. *See also* Art. 16 Convention on Enforced Disappearnace; and Principle 5 of the 'Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions', Recommended by ECOSOC Res. 1989/65 of 24 May 1989, U.N. Doc. E/1989/89.

928 The Council of Europe 'Guidelines on Human Rights and the Fight against Terrorism' adopted by the Committee of Ministers on 11 July 2002, ('Council of Europe Guidelines on Human Rights and Terrorism') do not cover the full range of Convention rights either, but go beyond the Terrorism Convention and Protocol in covering, *e.g.*, the right to fair trial. Subsequent cases, *e.g.*, *Othman* v. *UK*, may have clarified the legal position however.

remove apparent inconsistencies, clarifying that 'Article 5 … is not, however, intended to be exhaustive as to the possible grounds for refusal'.[929]

Considerable practice has unfolded since then in the context of particular terrorism cases, as a result of which the body of applied law has been developed considerably in recent years. While written standard setting documents tend to refer to torture or ill-treatment and limited additional criteria, jurisprudence has evolved considerably, indicating that for example, flagrant violations of fair trial rights, or arbitrary detention, or potentially other serious violations that affect the essence of the enjoyment of a broader range of rights, may preclude the lawful transfer of an individual.[930] While decisions as to whether there is such a risk in particular cases and whether the individual should be transferred have often provoked controversy, the increasing acceptance and consolidation of the scope of the non-refoulement principle as going beyond a few core human rights, is an important development of principle to have emerged from the war on terror.[931]

7B.10.4 Undermining Procedural Safeguards

In practice, the role of the judiciary in protecting against refoulement has been limited in various ways in recent years.[932] The most notorious example is of course the complete sidestepping of judicial review through practices such as extraordinary rendition of persons, in some cases despite extradition proceedings being pending or having been dismissed.[933] Alongside such crude examples of circumvention are other developments, purportedly designed to enhance international cooperation in the fight against terrorism, that limit the ability of individuals to challenge the basis for the extradition request, or the existence of underlying evidence.[934] These moves to 'streamline' the extra-

929 Para. 32, Draft Explanatory Report on the European Convention on Terrorism, text available at: http://conventions.coe.int/Treaty/en/Reports/Html/090-rev.htm, para. 69, noting 'this article is not intended to be exhaustive with regard to the circumstances in which extradition may be refused.'

930 *See*, *e.g.*, *Othman* v. *UK*, Report of the Working Group on Arbitrary Detention and other sources in A.5.10.

931 *See*, *e.g.*, *Special Adjudicator ex parte Ullah, House of Lords*, (2004) UKHL 26; *Othman* v. *UK*.

932 *See*, *e.g.*, in this chapter, Part B.8 and Chapter 4, Part. B.2.

933 *See* cases concerning cooperation between Bosnia and the US, and Malawi and the US, where despite extradition cases having been dismissed and pending (respectively), the executive reportedly interfered to transfer the individuals in question to the US, discussed in Chapter 4, Part B.2.3.3.

934 *See* Chapter 4, Part B.2.3.3, noting that measures such as the European arrest warrant or bilateral extradition treaties restricts judicial involvement in transfer decisions, *e.g.*, limiting the extent to which judges can look behind the extradition request and asses human rights concerns that may arise from its nature, motivation or effect, eroding the 'double criminality' principle and lowering normal requirements regarding exchange of evidence. The European Council Framework Decision on the European Arrest Warrant and the Surrender Procedure

dition procedure – towards a more speedy, or some would say perfunctory, procedure – risk undermining the essential judicial safeguard against violation of human rights and jeopardising the principle of non-refoulement.

Procedural concerns arise most acutely however in relation to deportations on national security grounds. One example of controversial expedited procedures appears in the French system, which provides expedited procedures intended for emergency deportations where there is a real risk to national security (but which are allegedly used more broadly).[935] Among the problems with the system, which have been roundly criticised, including by the ECtHR[936] and CAT,[937] is the refusal to suspend deportation pending the outcome of appeal proceedings. While the right to a meaningful opportunity to challenge transfer is recognised in human rights law, there is a risk that expedited or summary procedures that lack normal fair trial protections or effective appeal may render this right, and the protection against refoulement, illusory. As noted in Part A, the legal framework would benefit from greater clarity, and consistency across human rights bodies, as regards the nature of applicable due process rights to transfer cases;[938] this may with time be provided as practice of transfers and challenges in the field of counter-terrorism continue to unfold.[939]

In conclusion, increased resort to unlawful transfer, attempts to erode standards of protection and to minimise if not entirely bypass judicial scrutiny, have been central matters of concern for human rights and the rule of law in the counter-terrorism context. Even in areas where the legal obligations were previously uncontroversial – notably in respect of the transfer to states where there was a risk of torture – states have argued explicitly for an exception to the continued application of the principle in the terrorism context. However, courts and treaty bodies have reasserted the core principles, and had some

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between Member States, 13 June 2002 (2002/584/JHA), OJ L 190/5, 18 July 2002 (hereinafter 'European Arrest Warrant') has drawn particular criticism in this respect. *See* Article 8 'European Arrest Warrant' and Article 8(3)(c) US-UK Extradition Treaty between the Government of the UK and Northern Ireland and the Government of the USA (Washington, 31 March 2003).

935 *See*, *e.g.*, Human Rights Watch, 'In the Name of Prevention,' 2008, available at: http://www.hrw.org/en/reports/2007/06/05/name-prevention on French 'national security exceptions to the legal protections against forced removal.'

936 *See*, *e.g.*, *Affaire Gebremedhin* v. *France*, no. 25389/05, available at: www.echr.coe.int, paras. 65-66; *see also Conka* v. *Belgium*, no. 51564/99, ECHR 2002-I, available at: www.echr.coe.int, paras. 82-83, in which the EctHR found that Belgium had violated Article 13 of the Convention because national law allowed authorities to carry out an expulsion while an appeal was pending. *See also*, *ibid.*

937 UN Committee Against Torture, Decision: *Brada* v. *France*, CAT/C/34/D/195/2002, 24 May 2005, available at: http://www1.umn.edu/humanrts/cat/decisions/195-2002.html.

938 Part A.5.10, above. Questions on which approach of various courts and bodies is less consistent include whether such review must always be judicial, and as to the applicability of the range of fair trial guarantees to this process.

939 Part A.5.10, above.

effect in precluding unlawful transfer, such that these features of practice are unlikely to have changed the legal landscape as such. Several governments have sought to use diplomatic assurances on a scale hitherto unknown to provide a 'veneer of legality' to transfers that would otherwise be unlawful, though over time these too have found a greater level of judicial scrutiny. Indeed through case-by-case practice, as the principle has come to be analysed and applied, there has been broader application of the principle than previously, with the prohibition on transfer being applied also to flagrant denials of justice that are a regrettable part of the counter-terrorism landscape in recent years.

7B.11 Proscribing dissent and Controlling Opinion

Since September 11 legislative measures have conferred wide-ranging powers on the executive to control information and act preventively against emerging threats in a manner that has serious implications for rights such as freedom of thought, expression, association, assembly and political participation.[940]

The terrorism label has been used to justify crackdowns on political opponents in diverse contexts and many ways post 9/11, just as it has throughout history where political opponents have been labelled 'terrorist' in the effort to de-legitimise them.[941] A flagrant attempt to invoke the terrorism label to justify the legally unjustifiable arose in the context of the Syrian conflict, where violent crackdowns by the Syrian authorities against protesters, lawyers, human rights defenders, opposition members and activists resulting in hundreds of deaths, disappearances and arbitrary detentions were dismissed by the government as 'a legitimate counter-terrorism campaign'.[942] While readily dismissible, such claims are a reminder of the currency that has been afforded the terrorism label that is persistently invoked, and that blatantly unlawful crackdowns on political opposition have come to be attributed to a global counter-terrorism effort.

Several examples of prosecutions for expressions of opinions supportive of terrorism, by way of 'glorification of terrorism', 'apology for terrorism' or other provisions, discussed in Chapter 4, bring into sharp focus how the

940 In addition to the examples below, *see*, *e.g.*, Concluding Observations of the Human Rights Committee: Russian Federation, UN Doc. CCPR/CO/79/RUS (2003), para. 19: 'The Committee is concerned that the proposed amendments to the law "On Mass Media" and the law "On Combating Terrorism", adopted by the State Duma in 2001 in the aftermath of September 11, are incompatible with article 19 of the Covenant.'.

941 *See* The Terrorism Label' 7B.4 and Chapter 4 on criminalisation of terrorist organisations, noting that Mandela, Arafat and the current president of the Maldives were all accused of terrorism.

942 Syria: Abusive crackdown of protesters continues on pretext of terrorism, Amnesty International Report, 2012, available at: http://www.amnesty.org/en/region/syria/report-2012.

legitimate desire to prevent terrorism, by acting before violence occurs, can curtail freedom of expression. In this context, allegations of prosecutions of political opponents on terrorism grounds have arisen commonly.[943] The silencing of a broader range of political opposition, through bans on expression of support or apology for terrorism or dissolution of political parties, have also been criticised by human rights bodies.[944]

Journalists, and the public interest role they perform, are particularly vulnerable where laws prohibit or criminalise publishing information deemed to promote terrorism; practice is replete with examples of journalists prosecuted under anti-terrorism legislation, including across several parts of Europe.[945] An extreme example may be found in the Ugandan Anti-Terrorism Act of 2002, which provides for the death penalty for journalists found guilty of this offence.[946]

Many examples have also emerged of 'terrorism' prosecutions that appear on their face to be prosecutions of human rights activists, adding a further dimension to the impact of such prosecutions on human rights protection around the world. In Bahrain for example the trials of human rights defenders as 'terrorists' under broad reaching terrorism legislation have provoked wide-reaching concern.[947] This is, however, only one example among many. In a range of states, civil society groups – women's rights groups,[948] labour

943 *See*, *e.g.*, the multiple cases concerning publication of statements by PKK leaders which, as the Court emphasized, did not incite violence and could not be justified as necessary and proportionate: *e.g.*, *Falakaoglu and Saygili* v. *Turkey, 2006; Gozel and* Ozur v *Turkey, 2010, and Belek &* Ozkurt v. *Turkey*, Appl. 1544/0 (ECtHR, 13 July 2013). Cf no violation was found for cartoonist prosecuted for complicity in Leroy v. *France (2008)*, in light of modest fine imposed.

944 *Ibid.*; Turkish cases thwarting publication of dissenting voices. Courts have considered the nature of the speech, or the political party, and found, *e.g.*, in cases including *Batasuna & Batasuna* v. *Spain*, 30 June 2009, there was no violation on free association by banning organsiations found to represent a threat to Spanish democracy.

945 *See*, *e.g.*, D. Banisar, 'Speaking of terror: a survey of the effects of counter-terrorism legislation on freedom of the media in Europe', 2008, available at: *at: htt*p://www.coe.int/t/dghl/standardsetting/media/Doc/SpeakingOfTerror-en.pdf; *see also* Terrorism and Legality, above.

946 D.O. Balikowa, 'The Anti-Terrorism Act 2002: the Media and Free Speech', 8.1 (2003) *The Defender*, 6.

947 For example, thirteen political activists and human rights defenders, including Abdulhadi Al-Khawaja, were convicted by a military court in 2011. *See* ICJ Bulletin on Terrorism and Human Rights, September 2012, available at: http://www.icj.org/september-icj-e-bulletin-on-counter-terrorism-and-human-rights-no-65. *See also* Amnesty International, 'Bahrain must free prisoners of conscience after "travesty of justice"', 9 August 2012, available at: http://www.amnesty.org/en/news/bahrain-must-free-prisoners-conscience-after-travesty-justice-2012-08-09.

948 M. Scheinin, Special Rapporteur's report on the Gender Perspective when countering Terrorism, at A/64/211, paras. 18-54.

activists[949] and indigenous organisations – have had their work stymied, or indeed have also been prosecuted, under counter-terrorism legislation. Prosecutions in Chile of indigenous leaders under anti-terrorism laws has been criticised by the Inter-American Commission both for breadth of the laws (and their incompatibility with the principle of legality), and the failure of the authorities to distinguish legitimate revindication of concerns (even if involving acts of violence of a small minority) from terrorism.[950] Other reports suggest similar use of terrorism laws in this way elsewhere in Latin America.[951]

Prosecution for mere possession of information – such as in the case of the so-called 'lyrical terrorist' in the UK where the fact of downloading al-Qaeda manual from internet and writing poetry was considered supportive of terrorism – have raised questions as to whether the line between thought and action really is thin enough to justify the intervention of the criminal law in these circumstances.[952]

While the principal source of the threat to the rights to express legitimate dissent may be broad-reaching 'terrorism' and 'security' laws, another is found in the entrenchment of the notion of 'patriotism' and 'national unity'. The best-known example may be the United States Patriot Act of 2001,[953,954] or another the Jordanian decree proscribing the publication of 'information that can undermine national unity or the country's reputation' or 'undermine the

949 *See*, *e.g.*, Guzman, *supra* note 472, pp. 62-3, noting the tension between the Algiers Terrorism Convention which includes 'disturbances at public utilities' within the definition of terrorism and restrictions on legitimate trade union activity.

950 IACHR Report 176/2010, *see*, *e.g.*, para 5.

951 Amnesty International, '"So that no one can demand anything"; Criminalising the right to protest in Ecuador?', 17 July 2012, available at: http://www.amnesty.org/en/library/asset/AMR28/002/2012/en/0861616e-16e7-47a8-9c05-db5661e4fa6d/amr280022012en.pdf (detailing the criminal prosecution of 24 indigenous leaders for their role in public protests in 2009 and 2010, and a total of twenty charges of terrorism, many of them ultimately dismissed by the courts as groundless).

952 On, *e.g.*, the prosecution of Samina Malik in the UK in 2007 s*ee*, *e.g.*, I. Bunglawala, 'Don't even think about it', *The Guardian*, 6 December 2007, available at: http://www.guardian.co.uk/commentisfree/2007/dec/06/donteventhinkaboutit; S. Dent, *The Times*, 6 December 2007 who notes: '... no plot revealed. No terrorist network uncovered. Just some embarrass ing and juvenile fantasies about jihad and beheadings, laid bare to the world ... nihilism isn't a crime and there's a lot of it about nowadays – not just among wannabe jihadists. .... In all of this we are being sold the lie that there's a thin line between thought and action. It's a thick line … To lock her up because you don't like what she thinks and says ... is an affront to society.' The accused was ultimately convicted and given a suspended sentence of 9 months, though the act allowed for up to 10 years imprisonment; *see* Sec. 58 of the UK Terrorism Act 2000.

953 *See* www.epic.org/privacy/terrorism/hr3162.html. On 26 May, President Barack Obama signed into law the PATRIOT Sunsets Extension Act of 2011, which extends the validity of some provisions of the *PATRIOT Act* until 1 June 2015

954 *See* Patriot Act 2001, Substitute B, Sec. 411(bb); T. Mendel, 'Consequences for Freedom of Statement of the Terrorist Attacks of September 11', paper presented at the Symposium on Terrorism and Human Rights, Cairo, 26-28 January 2002.

king's dignity'.[955] In this context, the global 'counter-terrorism' focus is being taken advantage of to repress free speech and stifle pluralism, while embracing opinions or activities with no apparent linkage to even broad notions of 'terrorism.'[956]

As the framework above indicates, human rights provisions relating to the rights to free expression or association explicitly allow for the rights to be restricted for the protection of certain aims, such as national security or public order.[957] It does however depend on the restriction being provided for in clear and accessible law, and necessary and proportionate to the particular 'legitimate aim' that it purports to serve. In respect of the examples given, and countless others, doubts emerge recurrently as to the clarity and scope of the prohibitions and the legitimacy of their objectives, and the necessity and proportionality of these measures as a vehicle to address any genuine security concerns.[958] While laws restricting free speech are hardly new, and have long been the hallmark of autocratic regimes around the world, an international landscape in which thought, expression, association or peaceful protest are increasingly met with the imposition of the 'terrorism' label may threaten to legitimise such restrictions.

7B.12 PROFILING, EQUALITY AND ANTI-DISCRIMINATION

Discrimination on a range of grounds (and often on multiple intersecting grounds) – including race, ethnicity,[959] religion,[960] nationality[961] or gender[962] – has been a common feature of policy, practice and discourse post-' policies, many more have been prejudiced by the racial and religious tensions

955 The law grants the government sweeping powers to close down publishing houses that contravene the ban. *See* amendment to the Jordanian Penal Code and Press Law, issued October 2001, reported in J. Stork, 'The Human Rights Crisis in the Middle East in the Aftermath of 11 September', Symposium on Terrorism and Human Rights, Cairo, 26-28 January 2002, available at: www.cihrs.org.

956 *See* Chapter 4, and example of the *Kenneth Good v Botswana* case in Chapter 11.

957 *See* A.3 on the Flexibility of IHRL

958 Necessity has often been the key question in determining that terrorism measures fall foul of the human rights framework in respect of freedom of expression or political participation: *see, e.g.* the Turkish ECHR cases above, or

959 *See*, *e.g.*, Profiling in this section.

960 *See*, *e.g.*, T. Choudhury, 'Impact of Counter-Terrorism on Communities: UK Background Report', Institute for Strategic Dialogue, highlighting measures including stop and search, border control, surveillance, policing operations, detention, preventative or control measures, investigation and others, their impact on religious minorities and the construction of 'suspect communities'. Available at: http://www.strategicdialogue.org/UK_paper_SF_FINAL.pdf.

961 *See infra*, but *see also* 7B7 and 9.

962 Equality issues arising in less obvious ways include the gender dimension of counter-terrorism; see eg. Report of the Special Rapporteur on the Gender Perspective when countering Terrorism, *supra* note 951.

that have erupted or been fuelled in the context of terrorism and counter-terrorism in many parts of the world since 2001. This has demonstrated the fragility of respect for equality in practice, but also served to clarify the importance and nature of states' international equality obligations. For example, the Human Rights Committee has addressed the positive obligations of states in respect of countering intolerance and discrimination by private actors.[963] The steps states have been found obliged to take include for example 'an educational campaign through the media to protect persons of foreign extraction, in particular Arabs and Muslims, from stereotypes associating them with terrorism, extremism and fanaticism'.[964]

The increasingly widespread practice of 'profiling' individuals as inherently suspicious raises some of the greatest concerns regarding compatibility with the 'absolute prohibition on discrimination'.[965] 'Profiling' describes the use of race, ethnicity, religion, or national origin, rather than individual behaviour, as the basis for identifying individuals, for purposes ranging from data mining to 'stop and search[966]' operations. Profiling policies and practices may identify and target particular groups directly, or they may very often be facially 'random' yet in practice have a vastly disproportionate impact on particular groups, and amount to 'indirect discrimination'.[967]

Many reports document the indirect impact of profiling on particular ethnic and religious groups and communities in various parts of the world since

963 On positive measures to eliminate discrimination by private actors see A.A4, and Convention on the Elimination of All Forms of Racial Discrimination (CERD), New York, 21 December 1965, 660 UNTS 195, Article 2(1)(d) and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), New York, 18 December 1979, 1249 UNTS 13, Article 2(e). *See*, in general, HRC General Comment 18: Non-discrimination [1989], UN Doc. HRI/GEN/1/Rev.6 (2003) at 146.

964 Human Rights Committee, Concluding observations: Sweden, UN Doc. CCPR/CO/74/SWE (2002), para. 12.

965 *See* Report of the Committee on the Elimination of Racial Discrimination, GAOR Fifty-seventh session, Supp. 18 (UN Doc. A/57/18), paras. 429 and 338; analysis of law and practice by the Special Rapporteur on Terrorism and Human Rights at A/HRC/4/26, 29 January 2007, paras. 32-62, 83-89; European Commission against Racism and Intolerance, "General policy recommendation N° 8 on combating racism while fighting terrorism" (CRI (2004) 26).

966 On the lawfulness of 'stop and search' operations more broadly, and the requirements that the restriction on private life be justified by clear powers, sufficiently circumscribed and subject to legal safeguards, *see Gillan and Quinton* v. *UK*, 4158/05 [2010] ECHR 28, 12 January 2010.

967 For more detail, *see generally*, D. Moeckli, 'Anti-Terrorism Laws, Terrorist Profiling, and the Right to Non-Discrimination', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), Ch. 23.

9/11.[968] Examples include Germany, where the state authorised a programme of massive data collection based on young Muslim men from certain nationalities,[969] or the UK where reports indicate that the use of the police's general 'stop and search' powers against Asian people rose in the two years following 9/11 by a striking 302 percent.[970]

While the importance of equality as a cornerstone right under IHRL is clear, the application of the non-discrimination rule in practice is not always straightforward. Certain distinctions – for example identifying membership of organisations as relevant criteria for further investigation – are an expected part of an investigative strategy. However, the law requires that any such distinctions must have a real, objective justification, that measures taken must be proportionate to it, and accompanied by adequate safeguards. It has been suggested that reliance on race, religion or nationality alone as a basis of suspicion cannot be objectively justifiable. Rather, where support for a particular ideology may in certain exceptional circumstances constitute a rational basis for identifying persons as worthy of further investigation, taking particular measures against such persons, such as detention for example, is likely to fall foul of the proportionality rule.[971]

The extent to which practices post-9/11violate this legal framework is apparent from the work of courts and monitoring bodies, including the Committee on Racial Discrimination.[972] The effects of profiling have also been found unconstitutional by the German courts, which found that while profiling could be used in the face of a 'concrete' identifiable risk to particular rights, it could not be used to avert a general threat of terrorism.[973] The programme in question involved the collection of records from databases in respect of

968 *See*, *e.g.*, Addressing Ethnic Profiling by Police, OSJI, 2009, onpractices in Bulgaria Hungary and Spain;. S. Ellmann, 'Racial Profiling and Terrorism', 46 (2002-03) *New York Law School Law Review* 675 and P. L. Hoffman, 'Civil Liberties in the United States after September 11', available at: http://www.frontlinedefenders.com/en/papersweb/p3en.doc, 5 December 2012, at p. 11 on US practices; *see* more broadly, Special Rapporteur on Terrorism and Human Rights at A/HRC/4/26 (29 January 2007), *ibid*, paras. 32-62, 83-89.

969 The Rasterfahndung programme is discussed in Scheinin, 'Terrorism', *supra* note 160 at p. 595.

970 Report of the Special Rapporteur on Terrorism, UN Doc. A/HRC/4/26, 29 January 2007, para 37.

971 *See* IBA Task Force Report 2003, *supra* note 760, pp. 114-15, para. 4.4.2.

972 *See*, *e.g.*, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Moldova, UN Doc. CERD/C/60/Misc.29.Rev.3 (2002), para. 15, where the Committee expressed concern that inquiries into potential terrorist activities of students of Arabic origins might raise 'suspicion of an attempt at racial profiling'. *See also* Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada, UN Doc. CERD/C/61/CO/3 (2002), para. 24; Concluding Observations of the Committee on the Elimination of Racial Discrimination: Russian Federation, UN Doc. CERD/C/62/CO/7 (2003), para. 24, and the analysis of law and practice by the Special Rapporteur , *ibid*. paras. 32-62, 83-89.

973 Bundessverfassungsgericht, 1BvR 518/02, 4 April 2006.

millions of people; with approximately 32,000 more considered as deserving further investigation, yet which lead to not a single prosecution.[974]

Experiences of this nature have prompted the suggestion that profiling is not only incompatible with non-discrimination principles, it is also ineffective, and may indeed be counter-productive.[975] Concerns include the extent to which discrimination, and the perception of discrimination, spawn alienation and run counter to effective prevention of terrorism and other criminal activity, as well as that they distract law enforcement officials from more effective investigative techniques.[976] Strengthening the hand of law enforcement officials to investigate and combat international terrorism is an important rule of law imperative. The role of profiling within it will not disappear, but it may be that its true utility, and the requirements for compatibility with the basic rule of non-discrimination, will continue to be given perspective and clarified through practice.

The political attention that has surrounded nationality as a criteria for targeting individuals – from the furore around drone killing of US nationals, to detention policies focused only on non-nationals or defensive protestations that mass surveillance was only targeting foreigners – have no basis in IHRL and threaten the universality of rights protection.[977] In this context, such policies have on occasion been found by courts and bodies to constitute discrimination.[978]

Analysis of the evolving nature of the terrorist threat, as deriving increasingly from home-grown terrorism and not from non-nationals as has perhaps often been assumed in the war on terror, underscores the lack of the 'objective justification' for discrimination on nationality grounds.[979] It has been noted that 'we are all foreigners somewhere, but we are human beings everywhere …'[980] Yet the basic principles of non-discrimination and universality of

974 *Ibid.*; Scheinin, 'Terrorism', *supra* note 160.

975 Scheinin, 'Terrorism', *supra* note 160, p. 595.

976 *See*, *e.g.*, Open Society Justice Initiative report on Profiling in Europe May 2009 available at http://www.opensocietyfoundations.org/reports/ethnic-profiling-european-union-pervasive-ineffective-and-discriminatory, p 16; Scheinin, 'Terrorism', *supra* note 192, p. 595-96.

977 Chapters 6 and 8 on US drone strikes and detentions. *See also*, *e.g.*, reassurance by Presidetn Obama that the massive foreign surveillance programme PRISM only targets non-nationals: Obama Administration On PRISM Program: 'Only Non-U.S. Persons Outside The U.S. Are Targeted,', *Huffington Post*, 6 June 2013

978 *See*, *e.g.*, *A and Ors.* v. *Secretary of State for the Home Department*; *X and another* v. *Secretary of State for the Home Department* [2004] UKHL 56 (A & Ors (Derogation)). *See* IACommHR *Precautionary Measures in Guantanamo Bay*, *supra* note 81.

979 *See*, *e.g.*, President Obama's references to home grown terrorism in 'Remarks by the President at the National Defense University', 23 May 2013. The London bombings of 2007 attacks were also all conducted by UK residents.

980 Statement by I. Sankey of the UK NGO Liberty, on the surveillance, at http://www.liberty-human-rights.org.uk/news/2013/a-breach-of-trust-on-the-grandest-scale.php.

human rights protections have been rendered elusive in the practice of counter-terrorism post-9/11.

7B.13 Restricting Privacy

In the immediate aftermath of 9/11, it seemed almost petty to talk about the right to privacy. In the slew of counter-terrorism measures that spilled across the globe since, states have increased their powers and their reach in the gathering, retention and sharing of personal information, often establishing new entities charged with information gathering on terrorism and associated activities (with the now familiar breadth and ambiguity as regards the scope of these terms). There can certainly be little doubt that some encroachment into privacy rights, to meet the challenges of counter-terrorism, is appropriate if not essential. But over time, analyses of the extent of information gathering and data retention in the name of counter-terrorism have led to serious concerns as regards compatibility with legal requirements.[981] These have included revelations of massive surveillance programmes operated by the US, both at home[982] and abroad,[983] and qualitatively if not quantitatively comparable programmes – as well as active cooperation – by other states.[984]

Absent derogation (and very few states have ever derogated from their rights in this respect), the legal framework requires that particular measures that infringe on privacy must be provided for by law, necessary and proportionate to the legitimate aim that they pursue, and that there are attendant safeguards. The sheer scale of reported surveillance practices suggest a broad reaching as opposed to targeted approach, at odds with the necessity and proportionality test. Meanwhile, safeguards have not kept pace with the accumulation of information-gathering powers. In some cases it has become clear that the normally applicable legal framework and judicial review function has been cut back for terrorism-related information. An example is the US Terrorist Surveillance Program under the National Security Agency, which permits surveillance of al-Qaeda and affiliated organisations outside the US

981 *See* Report of the Special Rapporteur on Terrorism on Privacy, *ibid.* paras. 11-74, on the applicable test and the nature of concerns emerging in practice.

982 *See*, *e.g.*, 'As US cities step up surveillance, privacy fears increase,' *NY Times*, 13 Oct 2013.

983 *See*, *e.g.*, U.S. Confirms That It Gathers Online Data Overseas, *NY Times*, 6 June 2013; 'Ex-Worker at C.I.A. Says He Leaked Data on Surveillance', *NY Times*, 9 June 2013; *see also* I. Sankey, A Breach of Trust, *Liberty*, available at http://www.liberty-human-rights.org.uk/news/2013/a-breach-of-trust-on-the-grandest-scale.php.

984 *See*, *e.g* France: 'Revelations on the French Big Brother', Le Monde, 4 July 2013, and ICJ bulletin July-August 2013. UK: 'GCHQ taps fibre-optic cables for secret access to world's communications', *The Guardian*, 21 June 2013; and I. Shankey, *supra* note 983.

without a warrant.[985] Numerous other states that are reported to have introduced similar powers also have limited judicial supervision domestically.[986]

The increased sharing of information between states raises many questions around the right to privacy, and ultimately the infringements of other rights of individuals flowing from the gathering and sharing of information that maybe of doubtful veracity and which the individual may never be aware of, still less have the right to challenge. The challenge of securing the accountability of the multiple states cooperating in this massive industry is obvious.[987] The limited territorial scope of privacy protections increases the importance of ensuring that the international legal framework applies to states' actions abroad.

The necessity of data retention in the terrorism context has also been questioned.[988] For example, when a working group of the German Parliament considered the 'Compatibility of the EU Data Retention Directive with the EU Charter of Fundamental Rights',[989] it opined that the EU Data Retention Directive measures are disproportionate to the pursued aim and difficult to reconcile with the EU Charter of Fundamental Rights.[990] This reflects growing readiness to question, and perhaps to doubt, the extent to which such data retention is in fact justified by security objectives,[991] and underscored the

985 ICJ Eminent Jurists Report, *supra* note 757, p. 69 noting that if one end of the communication is outside the US no warrant is required, and FISA legislation 2008 makes clear that the previous requirement of judicial oversight does not apply.

986 *Ibid.* refers to laws and practices in the Russian Federation, Bangladesh, Egypt and Sweden, p. 69. The Special Rapporteur cites to the Swedish Government's bill on adjusted defence intelligence operations, adopted in June 2008, p. 83.

987 Difficult issues arise as to the individual's right to a remedy, which depends on a certain level of information which s/he cannot be provided with consistent with the objectives of the surveillance operation but when the operation ends it has been suggested that s/he should be informed. ICJ Eminent Jurists Report, *supra* note 757, p. 72. On intelligence cooperation and issues arising *see* Chapter 10, 'Extraordinary Rendition'.

988 Data protection is covered by the right to privacy: see HRC General Comment16, and the Special Rapporteur on Terrorism's report on privacy suggesting it is also emerging as a distinct human right, para. 13.

989 On 26 April 2011, the Working Group on Data Retention published an opinion prepared in February 2011 by the Legal Services of the German Parliament. 'Germany: Parliamentary Committee criticises EU Data Retention Directive', ICJ E-Bulletin on Counter-Terrorism and Human Rights – May 2011.

990 The Working Group expressed concerns and issued recommendations that the governments and parliaments of Austria, Germany, Romania, Sweden and the Czech Republic refrain from imposing or permitting the indiscriminate collection of information on telephone calls, text messages, e-mails and internet communications. ICJ Bulletin, *ibid.*

991 For example, within the EU a 2011 paper on 'emerging themes and next steps' in reforming the Data Retention Directive noted that 'strong qualitative evidence of the value of historic communications data in specific cases of terrorism, serious crime and crimes using the internet or by telephone' had been received from only 11 of 27 Member States; s*ee* http://www.statewatch.org/news/2012/aug/04eu-mand-ret.htm.

need to curtail the use of data for purposes other than that for which it is initially retained.[992]

7.B.14 Justice, Accountability and Reparations – *for Terrorism and Counter-Terrorism*

Investigating and securing justice and accountability for serious rights violations are human rights obligations in themselves, and they safeguard the protection of other human rights.[993] An enormous amount of normative and political attention, as well as resources, have been dedicated to combating impunity in recent decades, on the basis of a shared international commitment to the view that how states respond to violations of the past is critical, not only to victims of the crimes but to deterrence for the future and the restoration of the rule of law.[994] What role then has there been for criminal accountability and for justice for victims in the war on terror?

7B.14.1 Investigation and Criminal Accountability - for Terrorism and Security-related offences

At the early stages of the war on terror in particular, there was a sense that the criminal process was neglected as a response to 9/11 itself, as discussed in Chapter 4B. While questions still arise regarding the priority afforded to criminal law, in so far as some states invoke the use of lethal force, detention or terrorists lists as if interchangeable policy 'alternatives' to the criminal process for example, undoubtedly in recent years there has been a boom in recourse to criminal law.[995] The challenge – which has often not been met in practice – is to ensure that these investigations and prosecutions unfold within the rule of law framework (as set out in Chapter 4), including by respecting legality and certainty, fair trial and other rights.[996] Additional challenges arise from the fact that policies and practices that violate human

992 *See* proposals for reform in the Data Retention Directive, *ibid*.

993 Chapter 7A.4.1 'Protecting human security: positive human rights obligations'.

994 *See*, *e.g* , 7A.4.1 and the development of international criminal law Chapter 4.

995 Chapter 4 B notes how expansive criminal laws have been drafted to respond to and notably to prevent terrorism, and practice shows many prosecutions for a broad range of terrorist and associated offences.

996 Challenges flagged in Chapter 4 include ensuring that courts meet the essential requirements of independence and impartiality (special courts and security or military commissions raising serious doubts in this respect), respect for criminal law principles (such as presumption of innocence and that responsibility must be individual strained by criminal law developments) and that due process guarantees are met including prompt access to a lawyer, time and facilities for preparation of defence and access to sufficient evidence to know the charges being defended against. *See also* A.5.4, A.5.5 and Chapter 8.

rights at preliminary stages may themselves impede the criminal process. Terrorism prosecutions post-9/11 have commonly given rise to challenges to the admissibility of evidence allegedly obtained through torture or ill-treatment, increasingly to 'abuse of process' objections to the legitimacy of the process itself, and they have encountered obstacles to securing extradition, cooperation and evidence from abroad as a result of human rights concerns.[997]

These features combine with at times excessive – and sometimes mandatory – penalties for terrorism in disproportion to the gravity of the individual's conduct.[998] Alongside prosecutions of terrorism that raise doubts as regards respect for the legal framework are what have been deemed excessive responses and unduly onerous penalties imposed on 'whistleblowers' or persons who have leaked information, including concerning human rights violations, in the war on terror.[999] Where the process of criminal investigation, trial and punishment does unfold within the rule of law framework, it may serve to discharge states' obligations to investigate, prosecute and hold to account those responsible for serious violations by non-state actors. It may make an important contribution to meeting the rights of victims of terrorism,[1000] and – in stark contrast to the 'alternatives' of choice involving arbitrary detention, targeted killings or listing for example – the rights of the accused, providing the opportunity to refute, accept or explain allegations, as borne out by the unusual step of Guantánamo detainees begging to be criminally prosecuted.[1001] The increased reliance on the criminal process in the years that have unfolded since 9/11 has the potential to contribute directly and indirectly to meeting the state's human rights obligations, to prevent and respond to terrorism, and to uphold the rule of law more broadly.

997 *See* B.9 regarding refoulement, and Chapter 4B4 on the impact of violations on the criminal process.

998 See A.

999 *See*, *e.g.*, on 28 August 2013, Bradley Manning who leaked military and diplomatic details of allegedly unlawful conduct in Iraq was sentenced to 35 years; prosecutors sought a 60-year sentence. His treatment has given rise to considerable international concern; *see* ICJ Bulletin on Terrorism and Human rights, August 2013. Edward Snowden who leaked information regarding the extent of NSA surveillance is in hiding in Russia at time of writing.

1000 *See* further *infra* in this section.

1001 *See*, *e.g.*, Op-ed by US legal counsel for Abu Zubaydah calling for trial – even by military commission – as the lesser evil for a client held in indefinite detention in the Guantánamo detention facility. J. Margulies, 'Abu Zubaydah, the man justice has forgotten', *L.A. Times*, 16 May 2012, available at: http://articles.latimes.com/2012/may/16/opinion/la-oe-margulies-guantanamo-torture-zubaydah-20120516.

7B.14.2 Investigation and Criminal Accountability – for Counter-Terrorism

The reinvigorated role of criminal law in preventing and responding to terrorism contrasts strikingly with the dearth of criminal justice responses to acts carried out in the name of counter-terrorism. It is beyond reasonable dispute that some of the measures taken in the name of the GWOT or counter-terrorism discussed in this and other chapters amount the most serious violations of human rights and humanitarian law, among other norms, and also to crimes under international law.[1002]

The duty to conduct an investigation that is prompt, thorough, independent and effective in response to plausible allegations of serious human rights violations and, where appropriate, to prosecute, is set out in detail in human rights law.[1003] Facts in the public domain on a range of allegations of torture, inhumane treatment, disappearance, prolonged arbitrary detention, unlawful killing, and others involving criminal activity, more than meet the threshold triggering these obligations. While inevitably prosecutorial choices must be made, as regards who to prosecute and for what, in principle where the investigation reveals criminal activity prosecutions should proceed, including of those at the higher echelons of power, and appropriate punishment imposed.[1004]

The US' obligations to investigate and prosecute are clearly engaged by the nature and extent of allegations of criminality in the war on terror,[1005] and US courts provide the natural forum for investigation and accountability in respect of the conduct of its officials and agents. Yet, despite evidence of criminal responsibility of many up to highest levels of government, there have been almost no investigations or prosecutions for torture or other crimes committed in the war on terror. Nor has commitment been expressed by successive US administrations to investigate or to ensure justice or accountability. The most promising sign was perhaps the commitment in the immediate aftermath of the Abu Ghraib scandal that 'wrongdoers will be brought to justice'.[1006] No less than seven investigations were conducted, with various degrees of independence, rigour and effectiveness,[1007] and several individuals were convicted by courts-martial.[1008] Notably, those pros-

1002 Chapter 4B.
1003 *See* 7A.4.2 above.
1004 *Ibid.*
1005 *See* Chapter 4 on Criminal Justice and Chapter 10 on Extraordinary Rendition.
1006 Statement by President Bush following the disclosure of the Abu Ghraib torture, in R. Brody, The Road to Abu Ghraib, in 'Torture,' New Press 2005, p. 150.
1007 Brody, *ibid*, p. 151.
1008 *See generally*, 'Introduction: The Abu Ghraib files', *Salon*, available at: http://www.salon.com/2006/03/14/introduction_2/. 11 members of the military police were convicted and discharged. Among them was Private First Class Lynndie England who was charged with of one count of conspiracy, four counts of maltreating detainees and one count of com-

ecuted were of relatively low military rank,[1009] and the investigation did not appear to embrace the possibility of prosecuting those at higher ranks or addressing broader questions of institutional policy.[1010] Ironically perhaps (when contrasted to the prosecution of terrorist suspects tortured for years then put on trial),[1011] charges against the highest-ranking official were dropped as he was not read his rights before being questioned about prisoner mistreatment in Abu Ghraib.[1012] In the context of military operations in Afghanistan, the US was criticised for its reluctance to investigate and to provide information to those affected by its policies, which a UN Special Rapporteur has described as a 'public relations disaster'[1013] as well as a violation of obligations under IHRL and IHL.[1014] It has since responded with some, albeit selective, investigations into allegations of unlawful activity in Afghanistan – generally focusing on isolated (albeit serious) cases where individuals were believed to have acted without authority rather than allega-

mitting an indecent act. She was sentenced to three years confinement, forfeiture of pay and allowances, a dishonorable discharge, and a reduction in rank. 'Abu Ghraib soldier sentenced to three years in jail' *The Guardian*, 28 September 2005, available at: http://www.guardian.co.uk/world/2005/sep/28/iraq.usa. She served 1.5 years before being released on parole. 'What happens in war happens', *The Guardian*, 3 January 2009, available at: http://www.guardian.co.uk/world/2009/jan/03/abu-ghraib-lynndie-england-interview.

1009 *Ibid.* Their ranks varied, but none were high-ranking.

1010 While the investigations found evidence that the incidents were 'not limited' but derived from 'pressure for additional intelligence' and linked to policies elaborated at high levels, did not order investigation however. Brody, p. 152. For a discussion of the disparity between punitive measures against soldiers who are subject to court-martial, and impunity for officers who are involved in acts of misconduct either as principals, accessories, or through the doctrine of command responsibility, who are allowed to either retire, resign their commissions, or receive administrative reprimands, *see* Smith III, 'A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System', *supra* note 736, p. 671.

1011 *See*, *e.g.*, Chapter 4B and Chapter 8, 'Trial by Military Commission.'.

1012 Lieutenant Colonel Steven Jordan. C. Flaherty, 'Abu Ghraib officer acquitted of not controlling soldiers', *JURIST*, 28 August 2011, available at: http://jurist.org/thisday/2011/08/abu-ghraib-officer-acquitted-of-not-controlling-soldiers.php.

1013 P. Alston, 'Press Statement', UNAMA Press Conference, Kabul, Afghanistan, 15 May 2008, available at: http://unama.unmissions. org/Default.aspx?ctl=Details&tabid=1761&mid=1892&ItemID=3132.

1014 On interplay between IHLR and IHL as regards the duty to investigate and provide a remedy in the context of armed conflict, *see* B3 'War and Human Rights' above and Duffy, 'Harmony or Conflict?', *supra* note 164.

tions of systematic abuse.[1015] No known convictions have been secured despite details of egregious cases of prisoners being tortured to death.[1016]

Beyond the genuine armed conflict situations of Iraq and Afghanistan, however, even this thin veneer of accountability disappears. In 2009, President Obama famously pledged to 'look forward as opposed to looking backwards',[1017] though he left open the possibility that prosecutions would proceed if there were evidence that laws had been broken.[1018] Since then there have been no criminal investigations or indictments in response to the information that has come to light concerning, for example, the extraordinary rendition programme, allegations of torture in other contexts, or indeed prolonged arbitrary detention at Guantánamo or arbitrary killings. A number of 'preliminary reviews'[1019] and 'probes'[1020] into crimes committed by CIA officials have been conducted, but closed without being made public.[1021] In August 2012, the Justice Department confirmed that the only two cases that had proceeded to formal criminal investigation in respect of CIA detention and

1015 *See*, *e.g.*, 'Ringleader of US army "kill team" sentenced to life for murder of Afghans', *The Telegraph*, 11 November 2011, available at: http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8883384/Ringleader-of-US-army-kill-team-sentenced-to-life-for-murder-of-Afghans.html; 'Military prosecution faces major hurdles in massacre case', *CNN* News, 23 March 2012, available at: http://edition.cnn.com/2012/03/23/justice/afghanistan-legal-hurdles/index.html 5 (concerning Staff Sgt. Robert Bales, charged with 17 counts of homicide in Afghanistan for a shooting spree against civilians); 'US troops escape criminal charges for incidents that outraged Afghanistan', *The Guardian*, 28 August 2012, available at: http://www.guardian.co.uk/world/2012/aug/28/us-troops-burning-qurans-urinating-on-corpses (concerning US troops who urinated on corpses and burned Korans).

1016 *See*, *e.g.*, the notorious case of two individuals tortured to death in Bagram, one of whom was a 22 year old taxi driver reportedly not believed to be under any suspicion, but there for intelligence gathering purposes. 'U.S. Army Inquiry Implicates 28 Soldiers in Deaths of 2 Afghan Detainees', *NY Times*, 15 October 2004, available at: http://www.nytimes.com/2004/10/15/politics/15abuse.html.

1017 D. Johnston and C. Savage, 'Obama Reluctant to Look Into Bush Programs', *NY Times*, 11 January 2009, available at: http://www.nytimes.com/2009/01/12/us/politics/12inquire.html.

1018 *Ibid.*

1019 'The Justice Department has initiated a "preliminary review" of certain cases of detainee abuse by the CIA, but years after its initiation, the exact scope of that investigation remains unclear.' ACLU, available at: http://www.aclu.org/national-security/torture.

1020 C. Strohm, 'Holder: Justice to Drop Investigations Into CIA Officials Involved in Torture', *National Journal*, 30 June 2011, available at: http://www.nationaljournal.com/holder-justice-to-drop-investigations-into-cia-officials-involved-in-torture-20110630.

1021 The CIA cites a 'variety of grounds for keeping all 12 of them secret, including that they are classified on national security grounds, that their disclosure will expose CIA intelligence-gathering techniques, and that disclosure could expose confidential sources.' J. Gerstein, 'Detainee deaths prosecutor backs secrecy of CIA files', *POLITICO*, 3 July 2012, available at: http://www.politico.com/blogs/under-the-radar/2012/03/detainee-abuse-prosecutor-backs-secrecy-of-cia-files-116732.html.

torture would be closed without prosecutions.[1022] This was criticised, *inter alia*, as the completion of the 'full-scale whitewashing of the "war on terror" crimes'.[1023] Notably, there is no apparent commitment to changing course, or to recognition of the anti-impunity principles that have been for so long, and continue to be, espoused by the US in other contexts.

Beyond the US, pressure has been growing for investigation and prosecutions, both in relation to violations by US officials and those of other states. That practice is highlighted in the chapters dealing with extraordinary rendition (Chapter 10) and Guantánamo Bay (Chapter 8). They include investigations opened in France, Spain and Finland, for example, into the alleged torture and/or illegal detention of prisoners either in Guantánamo or CIA detention around the world,[1024] and the convictions of CIA officials in Italy.[1025] While challenges abound, there may be a shift afoot internationally to hold US officials to account abroad, at least for as long as they are not being held to account at home.[1026]

The pressure continues to grow for the investigation of alleged crimes committed in the war on terror by the officials of other states, or on other states' territories, many of which are also discussed in the case studies on Rendition or Guantánamo in subsequent chapters.[1027] Beyond these scenarios, in the UK for example, the government has launched multiple enquiries and investigations into a range of allegations: the torture and death in custody of Baha Mousa and others in a UK prison in Iraq,[1028] Iraqi civilians unlawfully killed at another British army base in Iraq,[1029] and more broadly into the growing numbers of allegations of prisoner abuse and civilian killings in

1022 *See* Chapter 10 on Extraordinary Rendition. Two of 101 cases of suspected detainee abuse proceeded to criminal investigation but were dropped; *see*, *e.g.*, 'US justice department rules out prosecutions over CIA prison deaths', 31 August 2012, *The Guardian*, available at: http://www.guardian.co.uk/world/2012/aug/31/us-cia-detainee-prison-deaths.

1023 G. Greenwald, 'Obama's justice department grants final immunity to Bush's CIA torturers', *The Guardian*, 31 August 2012, available at: http://www.guardian.co.uk/commentisfree/2012 /aug/31/obama-justice-department-immunity-bush-cia-torturer. The ACLU stated it was 'nothing short of a scandal'. 'US justice department rules out prosecutions over CIA prison deaths', 31 August 2012, *The Guardian*, available at: http://www.guardian.co.uk/world/2012/aug/31/us-cia-detainee-prison-deaths.

1024 *See*, *e.g.*, two sets of investigations were opened in Spain; one deferred to US for investigation while the other is is pending considerations, in Chapter 10.

1025 *Ibid*. These have resulted in convictions in absentia in Italy with further prosecutions pending: see Chapter 10.

1026 Where the US takes the lead, other states are likely to defer: *see* the Spanish cases in Chapter 10.

1027 *See* in Chapter 10 including the inadequacies of national investigations that led to litigation before the ECHR; *see*, *e.g.*, *Abu* Zubaydah v. *Poland* and *al Nashiri* v. *Poland*.

1028 The Baha Mousa Public Inquiry Report, 31 December 2011, available at: http://webarchive.nationalarchives.gov.uk.

1029 The Al-Sweady Public Inquiry, ongoing, details available at: http://www.alsweadyinquiry.org.

Iraq.[1030] Similar allegations, and some investigations, are also underway in respect of the conduct of British troops in Afghanistan.[1031] Inquiries addressing the role of the intelligence agencies have, however, had less traction. One such inquiry considered M16's role in interrogating a detainee within the CIA led Rendition programme,[1032] and at Bagram,[1033] but both concluded that there was insufficient evidence to pursue criminal charges.[1034] The potentially broader inquiry into the UK's role in the 'improper treatment of detainees' post-9/11 has repeatedly been suspended.[1035]

The enquiries sought to respond to pressure and legal challenges demanding that the state meet its human rights obligation to investigate.[1036] Public enquiries perform a useful informative function and if properly independent and effective can constitute a critical first step towards meeting the procedural obligations incumbent on a state in face of serious allegations. But they are unlikely to be sufficient in themselves, particularly in face of serious criminality that has characterised much of the practice in question. In practice, proceeding from inquiry, or even criminal investigation, to prosecution has been stymied in all but very exceptional cases. The Baha Mousa inquiry which

1030 On the IHAT ('Historical Allegations') investigation *see* 'UK investigations into torture and rendition – a guide' (hereinafter 'UK investigations guide'), *The Guardian*, 13 February 2012, available at: http://www.guardian.co.uk/world/2012/feb/13/uk-investigations-torture-rendition-guide. 169 other men who allege they were tortured or mistreated while detained in Iraq by British forces: 'Royal Military Police removed from Iraq prisoner abuse inquiry', *The Guardian*, 26 March 2012, available at: http://www.guardian.co.uk/uk/2012/mar/26/royal-military-police-removed-iraq-inquiry.

1031 'Afghanistan: list of investigations and prosecutions of British troops', *The Guardian*, 29 March 2012, available at: http://www.guardian.co.uk/news/datablog/2012/mar/29/afghanistan-british-army-crimes, which describes 'at least 126 investigations.'

1032 On the interrogation of Binyam Mohamad and Operation Hinton, *see*, 'UK investigations guide', *supra* note 1030, After an investigation of two and a half years, during which detectives attempted to trace responsibility for Witness B's actions up the chain of command, the Crown Prosecution Service concluded there was insufficient evidence to press charges.

1033 *See*, 'UK investigations guide', *supra* note 1030, for details on Operation Iden. MI6 itself referred one of its officers to the attorney general and US intelligence officers who were present reportedly refused to give statements. Police were criticised for not taking other steps, *e.g.*, interviewing Guantánamo detainee eye witnesses. The investigation concluded there was insufficient evidence to proceed to charge.

1034 *See*, 'UK investigations guide', *supra* note 1030.

1035 In July 2010, Prime Minister David Cameron announced an inquiry to 'look at whether Britain was implicated in the improper treatment of detainees, held by other countries, that may have occurred in the aftermath of 9/11'; available at: http://www.detainee inquiry.org.uk/. It was criticized by NGOs for its lack of independence and secrecy, and ultimately suspended pending the inquiry and Scotland Yard police investigations into UK-led rendition of individuals and their families to Libya.

1036 *See*, *e.g.*, 'High Court Challenge over Iraqi Civilian Deaths', *The Guardian*, 28 July 2004, available at: http://www.guardian.co.uk/Iraq/Story/0,2763,1270930,00.html, reporting the case brought by the families of Iraqi civilians allegedly killed by British troops, challenging the UK Government's refusal to order independent inquiries.

addressed the notorious death in custody by UK troops in Iraq concluded that Mousa had been beaten and tortured to death, which it found was not an 'isolated' event.[1037] While Court Martial proceedings were brought against several soldiers,[1038] with charges ranging from negligently performing a duty to inhuman treatment of a person protected under the Fourth Geneva Convention,[1039] charges against four of them were dismissed and two others were found not guilty.[1040] Only one Corporal who pleaded guilty to the charge of inhumane treatment at the outset of the trial was convicted, and he was sentenced to one-year imprisonment.[1041] While the cases are a reminder of the challenges in ensuring accountability in this field, practice continues to unfold in many states and the extent and scope of investigations and justice remains undetermined. International oversight by human rights bodies continue and the possibility remains of ICC engagement should the state ultimately prove unwilling or unable to act.

Questions also arise as regards impediments to effective prosecution, including immunity, prescription or the application of defences that afford impunity to those responsible, which are impermissible under human rights law in respect of serious violations of human rights.[1042] Despite this, an early executive branch report suggested, for example, that 'the defense of superior orders will generally be available for US Armed Forces personnel engaged in exceptional interrogations except where the conduct goes so far as to be patently unlawful'.[1043] Likewise, the grant of wide 'immunities' to foreign personnel – including private contractors – in Afghanistan and in particular Iraq purport to protect from legal action even those responsible for serious rights violations.[1044] Concerns have been expressed regarding the invocation

1037 Nor did it 'amount to an entrenched culture of violence.' W. Gage, 'The Baha Mousa Public Inquiry Report: Volume I', London: The Stationery Office, 8 September 2011, available at: http://www.bahamousainquiry.org, para. 1.29.

1038 *Ibid.*

1039 *Ibid.*

1040 *Ibid.* at para. 1.30.

1041 *Ibid.* Charges were brought for war crimes under the International Criminal Court Act (ICCA) 2001, the first time the Act has been used.

1042 *See* 7.A. 4.

1043 *See* Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, 4 April 2003, available at: http://www.washingtonpost.com/wp-srv/nation/documents/040403.pdf.

1044 *See, e.g.*, the June 2003 Order of the Coalition Provisional Authority, available at: http://www.cnn. com/2004/LAW/06/17/mariner.contractors. *See also* Marie Woolf, 'Legality of Iraq Occupation "Flawed"', *Independent*, 5 May 2004, citing former senior UK civil servant Elizabeth Wilmshurst's criticism of the unprecedented breadth of immunities granted to US and British civilians by the occupying powers.

of such immunities in relation to the rendition programme and beyond.[1045] Questions regarding the compatibility of immunity and other measures with the human rights framework may well become critical if attempts to ensure accountability at the highest levels gather momentum.

The dearth of accountability in relation to war on terror crimes has been identified increasingly as a growing matter of international concern.[1046] The elaboration by the Special Rapporteur on Terrorism and Human Rights of 'Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives,' for example, provides an important reminder of states' obligations in the face of crimes committed in the name of the war on terror, the gulf between law and practice in this area.[1047]

7B.14.3 Reparations – for Victims of Terrorism

Victims of terrorism have often been referred to in public statements by UN entities, states and others. Unfortunately, as has been noted, this has more often been in the context of justifying human rights restrictive measures against terrorism suspects, than addressing the rights and the needs of victims of terrorism as such.[1048] Surprisingly little attention was in fact paid internationally to terrorism victims' rights as human rights in the early years of the war on terror.

1045 *See* Chapter 10. The impact of immunity on impunity was addressed in the Secretary-General of the Council of Europe's investigation on secret detention and rendition. Secretary-General, 'Follow-Up to the Secretary General's reports under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies', (SG/Inf (2006)5 and SG/Inf(2006)13) at para. 17. It calls for the adoption of an instrument which establishes 'clear exceptions to State immunity in cases of serious human rights abuses'. *See also*, *e.g.*, Greenwald, 'Obama's justice department grants final immunity to Bush's CIA torturers', *The Guardian*, 31 August 2012, available at: http://www.guardian.co.uk/commentisfree/2012/aug/31/obama-justice-department-immunity-bush-cia-torturer. However, when immunities were invoked in the Abu Omar case, they were rejected by Italian cases. *See* Chapter 10.

1046 UN Doc. A/HRC/22/52; the focus of the CTITF Working Group on Protecting Human Rights while Countering Terrorism on implementing the right to truth and the principle of accountability for human rights violations in the counter-terrorism context in meber states (para 51);

1047 Framework Principles for accountability, UN Doc. A/HRC/22/52, 1 March 2013.

1048 M. Scheinin, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', UN Doc. No. A/HRC/10/3, 4 February 2009, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/106/25/PDF/G0910625.pdf. *See, e.g.* 'Ban urges world to recall terrorism's victims in wake of Osama bin Laden's death', 2 May 2011, available at: http://www.un.org/apps/news/story.asp? NewsID=38245#.UIiQQPkiH_Q.

There may, however, have been a very significant shift in this respect. First the World Summit Outcome and then the UN Global Counter-Terrorism Strategy recognised the 'importance of assisting victims of terrorism'[1049] and of 'international solidarity in support of victims',[1050] respectively. More substantively, two Special Rapporteurs on Terrorism dedicated reports to bringing the matter to prominence and to giving content to those exhortations.[1051] These have built on existing international standards on reparation and treatment of victims of crime,[1052] and regional Guidelines drawn up by the Council of Europe on the rights of victims of terrorism.[1053] They embrace the rights to emergency and continuing assistance, investigation, prosecution and access to justice, compensation, protection and information as aspects of victims' rights. Among the victims' rights given emphasis there, and across these initiatives, are truth, justice and accountability – linking directly to the obligations discussed in the previous section. An OSCE handbook on Terrorism notes that 'from the perspective of victims' rights, therefore, impunity is a key issue,' and describes impunity for those alleged to have committed serious violations of human rights standards as 'an affront to the victims of those violations'.[1054] The renewed focus on the rights of victims of terrorism is an important step towards a rights focused and rule of law compatible approach to the fight against international terrorism.

7B.14.4 Reparation and Remedy for Victims of Counter-Terrorism

The slew of attention, at least on paper, that has been directed to recognising the legal rights of victims of terrorism in recent years provides another point of stark contrast to the approach to victims of counter-terrorism. Perhaps the

1049 2005 World Summit Outcome, *supra* note 478, para. 89.

1050 UN Action to Counter Terrorism, 'The United Nations Global Counter-Terrorism Strategy', March 2009, available at: http://www.un.org/terrorism/pdfs/CT_Background_March_2009_terrorism2.pdf.

1051 *See* Scheinin, 'Terrorism', *supra* note 160; and first Report of Ben Emmerson, 11 August 2011, UN Doc. A/66/310, available at: http://www.unhcr.org/refworld/pdfid/4ea143f12.pdf.

1052 UN GA Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, available at: http://www.un.org/documents/ga/res/40/a40r034.htm; Basic Principles on the Right to a Remedy and Reparation, *supra* note 174.

1053 The Council of Europe Guidelines, 'Human rights and the fight against terrorism', March 2005, available at: http://www.echr.coe.int/NR/rdonlyres/176C046F-C0E6-423C-A039-F66D90CC6031/0 /LignesDirectrices_EN.pdf. call for: emergency assistance; continuing assistance; investigation and prosecution; effective access to the law and to justice; administration of justice; compensation; protection of the private and family life of victims; protection of the dignity and security of victims; information for victims; and specific training for those responsible for assisting victims of terrorism.

1054 OSCE Handbook on Terrorism, Chapter 2, p. 27 et seq.

first step towards remedy and reparation is simple recognition, yet there has been scarce willingness to recognise those subject to torture, disappearance, secret and arbitrary detention as bearers of rights and 'victims' of violations. Even where facts around mistaken identities and erroneous assessments having led to their rendition are known, the picture on acknowledgement of wrongdoing and reparation remains bare.[1055] The notable exception is Maher Arar,[1056] a Canadian who was publicly exonerated by his government, received a government apology, compensation and commitment to implementation of reform to ensure non-repetition. In some other cases, payments which might be seen as 'compensation' have occurred, but have not been accompanied by any sort of recognition or acknowledgement of responsibility, still less any apology.[1057]

The same provisions requiring investigation, prosecution and remedy, and the same rule of law perspective that demands satisfaction of the rights of victims of terrorism, applies to violations in the name of counter-terrorism. The extreme selectivity in the approach to victimisation in the war on terror is a reminder of how elusive, in the context of counter-terrorism, are the basic notions of equality before law and the universality of rights protection, whereby no one is above, or beneath, the law.

In face of a lack of political remedies or criminal prosecutions, victims have sought to pursue civil remedies, but have encountered legal, practical and political obstacles as discussed elsewhere.[1058] An extreme and explicit example is the Russian Federation's law 'on countering terrorism' which exempts law enforcement and military personnel from liability for harm caused during counter-terrorist operations.[1059] In the US, despite the obligation to

1055 *See* discussion in Chapter 10 on the treatment of rendition victims; their right to reparation is clear yet its neglect is stark.

1056 As discussed in Chapter 10, the Canadian and Syrian national was detained at JFK on transit on way home from holiday, interrogated by US authorities for one week and rendered to torture in Syria.

1057 Mamdouh Habib, an Australian national, was reportedly paid an *ex gratia* award on condition that he did not bring legal action against the government, with no recognition of responsibility. P. Karvelas, 'Mamdouh Habib to drop case against Canberra', *The Telegraph*, 8 January 2011, available at: http://www.dailytelegraph.com.au/archive/national-old/mamdouh-habib-to-drop-case-against-canberra/story-e6freuzr-1225984020294. Binyam Mohamad, the UK resident allegedly tortured in Pakistan with the UK having provided information and facilitated interviews was paid compensation by the UK, which did not accept responsibility or apologise. P. Wintour, 'Guantánamo Bay detainees to be paid compensation by UK government', *The Guardian*, 16 November 2012, available at: http://www.guardian.co.uk/world/2010/nov/16 /guantanamo-bay-compensation-claim.

1058 *See*, *e.g.*, Chapters 8 and 10.

1059 Concluding observations of the Human Rights Committee: Russian Federation, UN Doc. CCPR/CO/79/RUS (2003), para. 13.

'allow victims to follow suit' for damages,[1060] the record of remedy is as poor as that of criminal accountability. Chapter 8 records the legislative and political obstacles facing Guantánamo detainees, who have had no right of access to US courts in respect of their damages claims concerning torture or other illegal acts. Chapter 10 notes that when released victims of extraordinary rendition have sought to bring action, these have been thrown out by courts, for example on the basis of the state secrets doctrine,[1061] or invocation of broad immunities,[1062] with the effect of entirely precluding access to justice. Victims of abuse in Iraq and Afghanistan have also failed to secure justice through US courts.[1063] While in some cases damages claims by US nationals or on US soil have at least resulted in settlements,[1064] there has been no such movement for those victimised abroad. This has been described as giving rise to a 'harsh rule' whereby 'citizens and US resident aliens get damages from someone at some level, [a]liens abroad – even though they may have suffered appalling deprivations of liberty and egregious affronts to their human dignity – get nothing'.[1065]

Obstacles encountered in national level litigation[1066] underline the importance of international and regional remedies, which are currently being pursued in a number of regional and international fora as discussed in Chapter 11.[1067] While those processes bring their own challenges and limitations, it may be hoped that they can afford some measure of recognition and perhaps compensation, while catalysing more effective domestic investigation, prosecution and reparation by offending states.

1060 UN Human Rights Committee, Concluding observations on United States of America, CCPR/C/USA/CO/3/Rev/1, 18 December 2006, para. 16, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf. '[The Committee's] concern is deepened by the so far successful invocation of State secrecy in cases where the victims of these practices have sought a remedy before the State party's courts (e.g.: the cases of *Maher Arar* v. *Ashcroft* (2006) and *Khaled Al-Masri* v. *Tenet* (2006)).'

1061 *See, e.g., El-Masri* v. *Tenet* 437 F.Supp.2d 530, 532-4 (Eastern District of Virginia, 2006), in Chapter 10.

1062 *Rasul*, in Chapter 10; *in re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 91 (D.D.C. 2007), *aff'd sub nom.*; *Ali* v. *Rumsfeld*, No. 07-5178 (D.C. Cir. 21 June 2011). *See* E. Wilson, '"Damages or Nothing": The Post-Boumediene Constitution and Compensation for Human Rights Violations After 9/11', 41 *Seton Hall Law Review* 4, 1491-1517 (hereinafter 'Damages or Nothing').

1063 Wilson, 'Damages or Nothing', *supra* note 1062.

1064 For example, Al-Kidd and Iqbal settled their claims against lower-level officials, and claims against cabinet-level officials were ultimately dismissed. *Ibid* at pp. 1502-03, 1506-07, and Elmaghraby's case at p. 1514.

1065 *Ibid.* at p. 1516.

1066 Efforts to pursue justice beyond US shores have met the additional obstacle of failure of cooperation: Chapter 4.

1067 There has been a wave of transnational and international justice initiatives in foreign and international courts by victims of rendition, arbitrary detention and other war on terror crimes, as noted in Chapters 8,10 and11.

In conclusion, recent practice illustrates the challenges to securing justice for crimes committed in the name of counter-terrorism, whether in the form of remedy or reparation for victims or criminal accountability. It highlights also the persistence of the demand for justice and growing momentum in its direction. While there is little palpable commitment to accountability in the US, and many obstacles in its way, prosecutions underway at the time of writing for crimes committed in Argentina, Guatemala and Cambodia in the seventies and eighties are reminders of the persistence of demands for justice and the long arm of the law. The pursuit of justice elsewhere for many of these crimes, themselves catalysts to justice at home, also serve as a reminder of the alternatives that may exist to ensure accountability where the offending state does not assume this responsibility.[1068] It remains to be seen where the justice and accountability initiatives are underway will ultimately lead, and whether they can contribute to a measure of truth and justice for victims and a lasting reassertion of the much-neglected human rights principles of remedy and accountability.

7B.15 Conclusion

Part A of this chapter explored the legal framework of IHRL that governs states' responses to international terrorism. While there are areas where the law may be less clear and others where it is developing, there is a detailed legal framework, elaborated through long experience of addressing the challenges of terrorism and counter-terrorism both before 9/11 and since, with the flexibility to continue to respond to new challenges and situations.

As the war on terror post-9/11 has unfolded, that framework has been challenged and strained in many ways. The plethora of specific questions regarding compliance with human rights obligations, of which the foregoing is a selection, have led to questions of a more general nature relating to human rights law post-9/11. Have the events of September 11, as Egypt's President Mubarak suggested shortly thereafter, 'created a new concept of democracy that differs from the concept that western states defended before these events, especially in regard to the freedom of the individual?'[1069] Are human rights marginalised, or just plain out of date? Has the clock been turned back sixty years to before human rights were matters of concern for the international community?[1070] Have we witnessed a subordination of human rights law to security imperatives or to the inter-state relationships?

1068 *See* Chapters 8 and (in particular) 10 for more detail.

1069 Statement by President Mubarak of Egypt, in Stork, 'Human Rights Crisis in the Middle East'.

1070 Scheinin, 'Terrorism', *supra* note 160, p. 600.

There is much in post-9/11 practice to tempt us to such a conclusion. In various ways, the state practice explored in Part B questions *whether* the human rights framework is applicable at all – rather than *how* it applies – to certain classes of individuals or offshore locations in a 'war' on terror, or in security challenged situations more broadly. This exceptionalist approach, questioning the 'applicability' of the human rights framework, has challenged fundamental premises of the universality of human rights law. The notion that some people are beyond the protection of the law has been described as an attempt to turn the clock back not sixty but two hundred years, to a pre-Kantian era[1071] when the human person could be used as a means to an end, not treated 'always as an end' in his or her own right.[1072]

The dominance of the security agenda to the neglect of the human rights framework, and a touting of the inevitability of human rights violations in the face of state of emergency, have at times – particularly in the first few years following 9/11- juxtaposed human rights and security as irreconcilable alternatives, sacrificing the former at the altar of the latter.[1073] The myopic approach of the Security Council at an early stage sent a message regarding the marginalisation of human rights, which was rolled out through regions and states.[1074] Questions asked as to whether certain acts such as torture can be 'justified' are not really a debate as to the lawfulness of particular acts in particular situations (as the unqualified prohibition on torture is legally incontrovertible at this stage), but as to whether the rule of law should be applied at all.[1075]

Likewise, the pervasiveness of the 'war' paradigm has purported to displace human rights, in clear disregard for the normative framework governing that interrelationship between IHL and IHRL in armed conflict. The gradual seepage of the mentality of war into our human rights analysis has pervasive effects,

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1071 E. Kant, *Fondements de la métaphysique des moeurs* (1785), Paris, Libr. Delagrave, 1999, stating that human beings '*existe comme fin en soi*, et *non pas simplement comme moyen* dont telle ou telle volonté puisse user à son gré; dans toutes ses actions, aussi bien dans celles qui le concernent lui-même que dans celles qui concernent d'autres êtres raisonnables, il doit toujours être considéré *en même temps comme fin* ...', p. 148.

1072 Scheinin, 'Terrorism', *supra* note 160, p. 600.

1073 Such an approach is illustrated throughout the war on terror. *See, e.g.* declaration by the CIA agent, questioned on the allegations of ill-treatment of terrorist suspects by US officials: 'If you don't violate someone's human rights some of the time, you probably aren't doing your job'. *See* Priest and Gellman, 'U.S. Decries Abuse but Defends Interrogations', *supra* note 471.

1074 *See* UN and human rights *supra* including discussion of SC Res 1373 as the clearest example: unlike earlier (and later) resolutions on terrorism, it notoriously omitted any reference to human rights.

1075 *See*, *e.g.*, Dershowitz, The Case for Torture Warrants, *supra* note 790, or 'Is Torture Ever Justified?', *The Economist*, 11-17 January 2003, Vol. 366. As a matter of law, as noted above the prohibition is clear and incontrovertible, and permits of no exception or excuse.

and has paved the way to the justification of a policy of widespread targeted killings as a lawful response to acts of terrorism.

While practices such as targeted killings of terrorist suspects perhaps provide the clearest current illustrations of complete disregard for the human rights framework, many other practices strain the framework from within. Overbroad definitions of terrorism and association with it have often provided the starting blocks from which repressive measures have sprung, affecting the full range of civil and political, as well as economic and social, rights. In addition to the direct impact on the rights of many people suspected of being associated in some way with terrorism, practice has illustrated that the indirect impact goes much further: on families and communities, ethnic or religious groups, or human rights defenders.

Some of the most notorious or flagrant violations, even if not themselves ultimately accepted or endorsed by others, create a space in which 'lesser' violations are tolerated or even assume relative respectability, and make complaints about less egregious human rights violations appear almost petty. The gradual shifting of the goalposts and erosion of rights protections that affect us all may be more difficult to discern, but no less real.

However, despite countless troubling developments, other emergent responses cast a more positive light on the perceived relevance of human rights law in this field and its future potential. As regards the inter-relationship between security and human rights, the decisive shift from the rhetoric of conflict to one of complementarity has been noted on the international and regional levels.[1076] The UN comprehensive strategy's focus on the centrality of human rights to an effective counter-terrorism strategy provides a starkly different tone and framework for cooperation in counter-terrorism thereafter. This is reflected to a large extent in domestic political discourse which has also evolved in many states over time, with few openly asserting the right to discard the human rights framework.[1077] Rejection of the dichotomy between human rights and security, in favour of the complementarity of respect for human rights and an effective counter-terrorism strategy, is now commonplace.

Likewise, there appears also to be some acknowledgement of the price that has been paid, in security as well as rule of law terms, for human rights violations. The negative impact of some serious human rights violations on, for example, terrorism recruitment, legitimacy of counter-terrorism measures,

1076 Chapter 7B.1.

1077 The centrality and urgency of the repudiation by the new US administration in 2008 and 2009 of the denial of civil liberties by the Bush administration was noteworthy in sending human rights message; however, the compatibility of policies of targeted killings, rendition and continued arbitrary detention remain difficult to reconcile with the official posture.

and on cooperation, in intelligence matters and in the criminal law context is increasingly recognised.[1078]

The extent of states' reactions in the face of violations by other states has varied. A passive approach in the years since 9/11 appears to have given way to an increasingly robust response by states, organisations, courts and others in the repudiation of violations such as torture and arbitrary detention. Notably, states have on numerous occasion indicated their unwillingness to cooperate where there were clear human rights concerns in the practice of other states,[1079] marking a shift of approach from some of the notorious examples of international cooperation in relation to rendition or Guantánamo at earlier stages.[1080] In the face of abusive practices, statements and guidelines of international bodies, like decisions of courts – national and international – may also have contributed in many areas to a reassertion and clarification of international human rights standards.[1081] These provide perhaps some hope that lessons have been learned, and that IHRL may be less likely to be discarded in the future.

At the same time, practice continues to unfold. Muted responses to the growth in targeted killings by the US, notably by European states that have long condemned such practices by other states, raise concerns regarding the impact on the practice of other states, and on international standards.[1082] The extent of these counter-reactions to reactions to terrorism may ultimately influence the extent to which the practice explored in this chapter and others will have an impact on the legal framework itself.

While violations continue and challenges remain, it may however be doubted that, viewed with some distance from the events of 9/11, there can be said to have been profound substantive changes in international human rights law, or that there has been a lasting sea change in attitude to the application of human rights law in the counter-terrorism context.

Rights cannot however be unviolated, and damage done to the culture of human rights is not readily undone. The vague anti-terror laws that spread across the globe post-Resolution 1373 cannot be unwritten and are not easily repealed. Real commitment and oversight is needed if policies and practices are to be re-directed. A rigorous approach to remedy and accountability, thus far so neglected in the war on terror, are critical to addressing effects of these

1078 *See*, *e.g.*, Chapters 7B1 and 4

1079 *See*, *e.g.*, UK 'Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees,' July 2010, and e.g.s in Chapters 8 and 10.

1080 *See* Chapters 8 and10.

1081 *See* Chapter 11 on the role of the courts and human rights litigation.

1082 *See*, *e.g.*, Drones and Targeted Killing: Defining a European Position, A Dworkin, European Council on Foreign Relations, ECFR/84, July 2013. There are also allegations surfacing of cooperation between European states and the US drone programme: see Chapter 6B2.2.1.

wrongs on individuals as well as restoring the rule of law framework and affording real priority to human rights in practice as well as on paper.

An eminent jurist's report noted how little the international community had learned from previous experiences, in treating 9/11 as entirely new threat.[1083] One of the real challenges ahead is to show that we have learned from mistakes from the war on terror. The excesses of the 'war on terror', and the readiness with which human rights standards were set aside in the name of security, may have served to highlight the importance of holding more tenaciously to legal standards in time of crisis, and perhaps in some respects to strengthening those standards. If so, the international community may emerge stronger to effectively meet dual threats of international terrorism and of the 'war on terror' which, somewhat paradoxically, has been described as the most serious threat yet to the system of human rights protection drawn up post-WWII.[1084]

The human rights framework, the extent of the violations of human rights and international reactions can be analysed in more detail by reference to the topics addressed in the case study chapters that follow. They relate to the particular situation of individuals detained in Guantánamo Bay (Chapter 8), those subject to extraordinary rendition (Chapter 9), and the killing of Osama bin Laden (Chapter 10), before an assessment of the role of the courts in the defence of human rights since 9/11 (Chapter 11).

1083 ICJ Eminent Jurists Report, *supra* note 757.
1084 *Ibid.*

PART III

8 *Case study I* – Guantanamo Bay detentions under international human rights and humanitarian law

> 'The degree of civilization in a society can be judged by entering its prisons.'[1]
>
> Fyodor Dostoyevsky

> 'To deny violent extremists one of their most potent recruitment tools, we will close the prison at Guantanamo Bay'.
>
> US National Security Strategy 2010[2]

A defining feature of practice since 2001 has been the large scale detention of persons 'for reasons related to the conflict' that the US purports to be waging against al-Qaeda and associated groups. While people have been detained in many centres across the world, by the US or by proxy, a major repository for detainees, and symbol of the 'war on terror', has been the United States Naval Base in Guantanamo Bay, Cuba. Since early January 2002, an estimated total of nearly 800 people, including nationals of at least forty states, have at some point been transferred to and held in detention facilities at Guantanamo.[3]

The location of the detention centre on Guantanamo Bay, which the United States authorities claimed was beyond US sovereign territory, was an acknowledged attempt to circumvent the application of human rights protections in the United States constitution and access to United States courts.[4] The detainees were labelled 'enemy combatants', in support of the view that normal criminal and human rights law do not apply, though the epithet was simultaneously relied upon to justify the non-application of the protective aspects

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1 Fedor Mikhailovich Dostoyevesky (1821-1881) in *Respectfully Quoted: A Dictionary of Quotations Requested from the Congressional Research Service*, ed. Suzy Platt (1989), available at http://www.bartleby.com/73/1527.html.

2 U.S. National Security Strategy, 2010, p. 2, available at: http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

3 One year after 9/11 Bush referred to 550 detainees held at Guantanamo, and at its peak it was 800. As of early 2013, 166 detainees remain in Guantanamo. *See* breakdown in Human Rights First, 'Guantanamo by the Numbers', 3 October 2012, available at: http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Gitmo-Numbers.pdf.

4 *See, e.g.*, legal arguments made in *Al Odah et al*. v. *United States*, 321 F.3d 1134 (DC Cir.-2003) hereinafter '*Al Odah*'); John Yoo Interview, *PBS*, 19 July 2005, available at: http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html.

of international humanitarian law. They came to be held in what has correspondingly been described as a 'legal black hole'[5] or 'legal limbo.'[6]

Guantanamo Bay promptly came to symbolise the war on terror and it's 'flouting of the rule of law'.[7] International condemnation was slow but gathered momentum over time, culminating in perhaps unprecedented levels of state and international criticism of US policy.[8] Superlatives abound, with the Guantanamo regime having been condemned variously as a 'shocking affront to democracy',[9] a 'stain'[10] or 'horrendous blot'[11] on the US reputation, and 'the gulag of our times'.[12]

Within the US itself, over time reflections have emerged on the implications of the camp, including that it has 'shaken the belief the world had in America's justice system.'[13] The administration has repeatedly acknowledged that it threatens national security by constituting a 'potent recruitment tool' for terrorists[14] and an obstacles to international cooperation.[15]

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5 *See* Lord J. Steyn, 'Guantánamo Bay: The Legal Black Hole' (2004) 53 International and Comparative Law Quarterly 1. See likewise, the English Court of Appeal *R (Abbasi and another)* v. *Secretary of State for Foreign and Commonwealth Affairs*, (2002) EWCA Civ. 159 (hereinafter '*Abbasi*'), para. 64.

6 L. Dembart, 'Old Laws Hard to Apply to Modern Terrorism: For Afghans in Cuba, Untested Legal Limbo', *International Herald Tribune*, 25 January 2002, available at: http://www.nytimes.com/2002/01/25/news/25iht-legal_ed3_.html. On the development of the right to habeas and its effect over time, see below.

7 'GTMO has become a symbol around the world for an America that flouts the rule of law.' B. Obama, speech at National Defense University, 23 May 2013, transcript available at: http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html.

8 Chapter 8C on responding to Guantanamo.

9 Lord Falconer in C. Dyer, 'Falconer accuses US of affront to democracy', *The Guardian*, 13 September 2006, available at: http://www.guardian.co.uk/uk/2006/sep/13/politics.usa.

10 U.S. Colonel Morris Davis, chief prosecutor of the Guantanamo military commissions who resigned in protest: 'Guantánamo is a stain on our reputation. The only way we can end that chapter is to close it'. E. Pilkington, 'Guantánamo: still a part of America's conscience, a decade on', *The Guardian*, 11 January 2012, available at: http://www.guardian.co.uk/world/2012/jan/11/guantanamo-bay-10-years-on.

11 South African Archbishop Desmond Tutu inT. Shipman, 'Blair under pressure to condemn Guantanamo camp', *Daily Mail*, 16 February 2006, available at: http://www.dailymail.co.uk/news/article-377562/Blair-pressure-condemn-Guantanamo-camp.html.

12 I. Khan, former Secretary General of Amnesty International 'Amnesty International Report 2005: The state of the world's human rights', para. 9, available at: http://www.amnesty.org/en/library/info/POL10/001/2005/en. See a more thorough discussion of the international reaction to Guantanamo 8C2 below.

13 Former US Secretary of State Colin Powell, *Meet the Press*, 10 June 2007, available at: www.msnbc.msn.com/id/19092206 and Obama, 23 May speech, note 13.

14 National Security Strategy, supra note 2, p. 22. During a press conference President Obama explained that 'the reason for wanting to close Guantanamo was because my number one priority is keeping the American people safe. One of the most powerful tools we have to keep the American people safe is not providing al Qaeda and jihadists recruiting tools for fledgling terrorists. And Guantanamo is probably the number one recruitment tool that is used by these jihadist organizations. And we see it in the websites that they put up. We

Around 2008, the tide seemed to be turning on Guantanamo. Groundbreaking US Supreme Court cases recognised the rights of detainees to challenge the legality of their detention before a neutral arbiter.[16] There were political pledges to 'clean up the mess,'[17] recognitions of the 'failure of the entire system'[18] and promises to relegate a 'sad chapter in American history' to the past.[19] Incoming President Barack Obama issued an executive order concerning the closure of Guantanamo and has reiterated his pledge many times since then;[20] as will be seen, however, deadlines have come and gone and the camp remains active, with some one hundred and sixty increasingly

see it in the messages that they're delivering.' B. Obama, 'News Conference by the President', South Court Auditorium, Eisenhower Executive Office Building, 22 December 2012, available at: http://www.whitehouse.gov/the-press-office/2010/12/22/news-conference-president. Janet Napolitano, the United States Homeland Security Chief, 'Guantanamo became a recruiting tool for terrorism: Napolitano', *AFP News*, 6 November 2009; Admiral Mike Mullen, Chairman of the Joint Chiefs that "Guantanamo … has been a symbol, and one which has been a recruiting symbol for those extremists and jihadists who would fight us,' M. Mullen, 'Military Chief: Gitmo "Needs to Be Closed"', *ABC News*, 24 May 2009, available at: http://abcnews.go.com/blogs/politics/2009/05/military-chief/; Obama's Director of National Intelligence told the Senate Committee on Intelligence in January 2009 that Guantanamo is 'a rallying cry for terrorists and harmful to our international reputation, and so closing it is important for our national security'. Nomination of Admiral Dennis Blair to be Director of National Intelligence: Hearing before Senate Committee on Intelligence, 109th Cong. 7, 22 January 2009, available at: http://www.dni.gov/files/documents/Newsroom/Testimonies/20090122_transcript.pdf.

15 In April 2013 Obama described Guantanamo as 'inefficient' and noted that 'it hurts us in terms of our international standing, it lessens co-operation with our allies on counter-terrorism efforts, it is a recruitment tool for extremists, it needs to be closed.' 'Barack Obama says Guantanamo Bay Prison must close', *BBC News*, available at: http://www.bbc.co.uk/news/world-us-canada-22358351. *See also*, Obama speech, 23 May 2013, supra note 7.

16 *See Rasul* v. *Bush*, 542 U.S. 466 (2004) (hereinafter '*Rasul*'); *Boumediene* v. *Bush*, 128 S.Ct. 2229 (2008) (hereinafter '*Boumediene*').

17 *See, e.g.*, President Barack Obama, 'Remarks by the President on National Security', 21 May 2009, available at: http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

18 Retired Admiral Dennis Blair, the former Director of the US National Intelligence, noted that it was a 'failure of the entire [political] system' that Guantanamo remained open. 'Ex US intelligence chief talks Guantanamo Bay, China, East Timor', *Radio Australia*, 9 August 2012, available at: http://www.radioaustralia.net.au/international/radio/program/connect-asia/ex-us-intelligence-chief-talks-guantanamo-bay-china-east-timor/996384.

19 President Obama's description of Guantanamo while campaigning in 2008. A. Spillius, 'Barack Obama "proposes to move terrorists suspects from Guantanamo Bay"', *The Telegraph*, 10 November 2008, available at: http://www.telegraph.co.uk/news/worldnews/northamerica/usa/3417913/Barack-Obama-proposes-to-move-terrorists-suspects-from-Guantanamo-Bay.html.

20 B. Obama, 'Executive Order 13492 – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities' (hereinafter 'Executive Order 13492'), 74 Fed. Reg. 16, 4897, 22 January 2009; 'Barack Obama says Guantanamo Bay Prison must close', supra note 15; Obama speech, 23 May 2013, supra note 7.

'desperate' inmates as at early 2013 and an administration coming to terms with the fact that some monsters, once created, are not readily slain.[21]

The facts regarding detentions at Guantanamo Bay, from the early period of the black hole epithet to the situation more than a decade later, will be sketched out in the first part of this chapter. The second part highlights the application of the legal framework of international human rights and humanitarian law to the Guantanamo detainees; while a litany of legal issues and rights violations arise, the emphasis here is on the relevant rights in relation to detention and fair trial, the denial of which, in various forms over time, has characterised the Guantanamo scheme. The third part explores the rights and duties of third party states to respond to violations such as those arising at Guantanamo, and the reaction of the international community thus far, before concluding with questions on the potential implications and repercussions of the Guantanamo Bay situation for the US, for other states, and for the rule of law more generally.

8A GUANTANAMO BAY AND ITS DETAINEES: THE BASIC FACTS

Guantanamo Bay was let to the United States by the Republic of Cuba in 1903 under an agreement that provides in relevant part:

> While on the one hand the United States recognises the continuance of the ultimate sovereignty of the Republic of Cuba over [Guantanamo Bay], on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.[22]

Guantanamo Bay occupies a substantial area of more than 45 square miles and is 'entirely self sufficient, with its own water plant, schools, transportation, and entertainment facilities'.[23] It has been described – by Legal Counsel of

21 Practical hurdles and political obstacles have impeded closure, notably congressional opposition. *See generally* C. Savage, 'Closing Guantánamo Fades as a Priority', *The New York Times*, 25 June 2010, available at: http://www.nytimes.com/2010/06/26/us/politics/26gitmo.html; International Bar Association, 'The future of Guantanamo Bay', January 2009. The ICRC is reported as having described 'unprecedented levels of desperation' at the camp in April 2013.

22 Article III, Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, 16-23 February 1903, T.S. No. 418. The lease was continued by a subsequent treaty in 1934, and the United States has indicated its intention to continue that lease indefinitely.

23 G.L. Neuman, 'Surveying Law and Borders: Anomalous Zones', 48 (1996) *Stanford L. Rev.* 1197, n. 5.

the Justice Department[24] and the United States Navy,[25] respectively – as 'under the exclusive or concurrent jurisdiction' of the United States, and as 'a Naval reservation, which, for all practical purposes, is American territory.' A US court in 1992 described it as 'a military installation that is subject to the exclusive control and jurisdiction of the United States'.[26] Despite this, the US government chose the Guantanamo site partly because of its offshore location and the avoidance of legal oversight.[27] The United States government has consistently asserted that Guantanamo lies beyond its sovereign territory, and beyond the reach of the Constitution and the jurisdictional purview of US courts.[28] Paradoxically, however, US officials argued that it is within US jurisdiction for the purposes of excluding the application of the Torture Victim Protection Act[29] which gives US courts jurisdiction over torture committed in foreign jurisdictions.

8A.1 The Detainees and their Treatment in Guantanamo Bay

At the early stages, absolute secrecy surrounded the Guantanamo detainees, and controversy and confusion has surrounded the reasons for their detention, their status, and the rights, if any, to which they are entitled.[30] At first, no information was available even as to who was detained, which was

24 Opinion of Assistant Attorney General Olsen, 29 March 1982, in 6 (1982) *Opinions of the Office of Legal Counsel of the Dept. of Just.* 236, 242.

25 The US Navy website describes 'a Naval reservation which, for all practical purposes, is American territory. Under the [Lease] agreements, the United States has for approximately [ninety] years exercised the essential elements of sovereignty over this territory, without actually owning it.' M.E. Murphy, *The History of Guantanamo Bay 1494-1964*, 5 January 1953, quoted by US Navy, available at: http://www.cnic.navy.mil/guantanamo/About/History/GuantanamoBayHistoryMurphy/Volume1/Chapter3/index.htm.

26 *Haitian Centers Council, Inc.* v. *McNary*, 969 F2d 1326, 1342 (2nd Cir.-1992).

27 John Yoo, former deputy assistant Attorney General and Justice Department's Office of Legal Counsel,was asked why the site of Guantanamo Bay was chosen. He answered that one issue 'was whether the federal courts were going to get involved in trying to manage how the facility worked. …. you don't want to have, I think, the judiciary getting involved while the war is going on …. I don't think that was the primary reason to pick Guantanamo, but certainly an ancillary reason why Guantanamo was picked'. John Yoo Interview, *PBS*, 19 July 2005, available at: http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html.

28 See e.g. positions in litigation in US courts, including in *Al Odah*, supra note 4 available at: http://ccrjustice.org/ourcases/current-cases/al-odah-v.-united-states.

29 *See, e.g.*, 'Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations', 6 March 2003, available at: http://www.npr.org/documents/dojmemo30020306.pdf.

30 *See* para. 8B.3 and 8B.4 in this chapter.

purportedly justified on national security grounds. Families were abruptly refused information about the identities of detainees.[31]

The detainees were referred to collectively as dangerous 'enemy combatants',[32] and the 'worst of the worst,'[33] but over time the secrecy has been peeled back to expose the identities and the circumstances of the human beings behind the labels.[34] It is now clear that children as young as thirteen have been among those detained and ill-treated,[35] which has prompted particularly strident condemnation[36] in light of special international legal obligations of

31 *See* blunt response in the letter from the US London Embassy to families of detainees requesting information, cited in the *Abbasi* case, supra note 5. '[W]e are not in a position to address the particular circumstances of any of the individuals detained at Guantanamo Bay'. According to a lawyer for some of the UK national detainees, in some cases journalists informed the UK families of the detentions.

32 *See Abbasi*, supra note 5, para. 9, citing a letter from the First Secretary at the US Embassy in London to solicitors acting for the claimants in the *Abbasi* case which states that 'The United States Government believes that individuals detained at Guantanamo are enemy combatants', 2 July 2002, in 'Skeleton Argument of the Claimants', para. 6, on file with author. The term was defined in 2004. *See* 'Categories of Detainees' below.

33 'Former Vice President Dick Cheney said Monday that the only alternative the Bush administration had to creating the Guantanamo Bay naval prison was to kill the terror suspects who are incarcerated there, and "we don't operate that way." The 240 prisoners left at Guantanamo, he said, are "the worst of the worst."' 'Cheney: Gitmo holds 'worst of the worst': Former vice president says killing suspects was only other option', *NBC News*, 6 January 2009, available at: http://www.msnbc.msn.com/id/31052241/ns/world_news-terrorism/t/cheney-gitmo-holds-worst-worst.

34 *See generally*, 'The Guantánmo files: Guantánamo leaks lift lid on world's most controversial prison', *The Guardian*, 25 April 2011, available at: http://www.guardian.co.uk/world/2011/apr/25/guantanamo-files-lift-lid-prison.

35 Most of the 'younger' juveniles detained in Guantanamo (i.e. those aged between 13 and 15 years) were reported to have been released in 2004. *See, e.g.*, 'Transfer of Juvenile Detainees Completed', *U.S. Dept. of Defense*, News Release No. 057-04, 29 January 2004, available at http://www.defense.gov/releases/release.aspx?releaseid=7041. However, see the three cases of Omar Khadr, Jawad Mohammed and El-Gharani highlighted in note 36.

36 *See, e.g.*, The UN Committee on the Rights of the Child report, New York, 6 June 2008, noting the cases of three detainees in Guantanamo who were apprehended as juveniles. Omar Khadr was 15 when detained, convicted by military commission and served ten years in Guantanamo before being returned to Canada in 2012 to complete his sentence. Mohammed Jawad who his lawyers say was 12 when detained though the Pentagon questions this, who a US military judge appeared to accept had been tortured, whose habeas application was successful but the US continued to detain him for years while considering criminal charges for throwing a grenade, was ordered released and returned to his family in Afghanistan in 2009. Mohammad El-Gharani was held in Guantanamo since age 15 and reportedly tried to commit suicide at least seven times.

protection.[37] Also among the detainees are elderly people as old as eighty-four and others suffering from serious mental illnesses.[38]

Despite the emphasis on the circumstances of detention being justified by the fact that 'these are bad people',[39] it is now clear, even from official statements and reports, that many of the detainees were no more than 'victims of circumstance,'[40] detained on the 'flimsiest' of pretexts.[41] Despite the enemy combatant nomenclature, reports based on the government's own documentation suggest that 92 percent of the men that have been held in Guantánamo are not in the government's view 'Al-Qaeda fighters'.[42] Most have been acknowledged, often many years after their detention, as not being enemy combatants and not having posed a threat to the United States, even according to the broad reaching approach to the definitions of these concepts in the war

37 *See, e.g.*, the special guarantees provided for juvenile defendants and detainees by e.g. Articles 10(2)(b) and 10(3) and Article 14(4) of the ICCPR; *see also* 'Convention on the Rights of the Child: Optional Protocol on the Involvement of Children in Armed Conflict', G.A. Res. 54/263, 25 May 2000, UN Doc. A/RES/54/263 (2000). The US ratified the Optional Protocol on 23 December 2002.

38 *See, e.g.*, 'IACHR Expresses Deep Concern over New Revelations about Guantanamo' (hereinafter 'IAHCR Press Release'), IAHCR Press Release No. 37/11, 29 April 2011, available at: http://www.oas.org/en/iachr/media_center/PReleases/2011/037.asp.

39 Press Conference of President Bush and British Prime Minister Tony Blair, 17 July 2003, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030717-10.html.

40 K.Q. Seelye, 'A Nation Challenged: Captives; An Uneasy Routine at Cuba Prison Camp', *The New York Times*, 16 March 2002, available at: http://www.nytimes.com/2002/03/16/world/a-nation-challenged-captives-an-uneasy-routine-at-cuba-prison-camp.html,quoting the deputy camp commander, Lt Col Bill Cline acknowledging that some were 'victims of circumstance' and probably innocent.

41 Leaked documents in April 2011 demonstrate the 'indicators' used as a basis to detain, such as wearing the same type of Casio watch used by some members of al-Qaeda, or staying in the same guesthouses as members of al-Qaeda. *See, e.g.*, 'Leaked Guantánamo files highlight need for fair trials and accountability', Amnesty International, 26 April 2011, available at: http://www.amnesty.org/en/news-and-updates/leaked-guantanamo-files-highlight-need-fair-trials-and-accountability-2011-04-26. *See also*, 'Guantánamo files: How interrogators were told to spot al-Qaida and Taliban members', *The Guardian*, 25 April 2011, available at: http://www.guardian.co.uk/world/interactive/2011/apr/25/guantanamo-files-interrogators-al-qaida-taliban. Reports describe 150 'innocent Afghans or Pakistanis, including farmers, chefs and drivers who were rounded up or even sold to US forces and transferred across the world'.

42 'Guantánamo by the Numbers: What You Should Know & Do About Guantánamo', The Center for Constitutional Rights, available at: http://ccrjustice.org/learn-more/faqs/GTMObyTheNumbers; also'ACLU Guantánamo Infographic,' 4 May 2012, available at: http://www.aclu.org/national-security/guantanamo-numbers. In several cases, official documents show there was often 'no reason recorded for transfer' to Guantanamo. C. Hope, R. Winnett, et al., 'WikiLeaks: Guantanamo Bay terrorist secrets revealed', *The Telegraph*, 25 April 2011.

on terror.[43] The vast majority have since been released, just as they were held, at the discretion of the US government.[44]

However, more than a decade after its inauguration, one hundred and sixty six men remained imprisoned at Guantánamo Bay.[45] The US government has identified forty six of them[46] as subject to on-going, potentially indefinite detention, on the grounds that they cannot be prosecuted (either for lack of evidence or because the evidence could not be admitted, for example),[47] but are considered too 'dangerous' (on unspecified grounds) to be released.[48] A striking 86 have been cleared for release,[49] yet they continue to languish in Guantanamo sometimes many years later, as the government remains unwilling or in some case unable to release them.[50] The then President of the United States stated early in the war on terror that 'to the extent appropriate and consistent with military necessity' the detainees would be treated 'in a manner consistent with the principles of the Geneva Conventions of 1949'.[51] Upon arrival at Guantanamo Bay, the detainees were initially shackled and hooded, and photographs of them were published widely around the globe.[52] Early reports by human rights groups and the press questioned

43 CCR Guantánamo by Numbers, supra note 42; ACLU Guantánamo Infographic, supra note 42. Decisions on *habeas corpus* and to a lesser extent the task force review provides insights as to the lack of a basis to detain in some cases. 'Final Report, Guantanamo Review Task Force' (hereinafter 'Guantanamo Review Task Force'), Dept. of Justice, Dept. of Defense, Dept. of State, Dept. of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff, 22 January 2010, available at: http://www.justice.gov/ag/guantanamo-review-final-report.pdf.

44 CCR Guantánamo by the Numbers, supra note 42; ACLU Guantánamo Infographic, supra note 42.

45 166 remain imprisoned as at June 2013. For updates, see CCR Guantánamo by the Numbers, supra note 42 and ACLU Guantánamo Infographic, supra note 42.

46 Ibid.

47 *See* 'Guantanamo Review Task Force', supra note 43, p. 22; 'CCR Guantánamo by the Numbers, supra note 42; ACLU Guantánamo Infographic, supra note 42.

48 Ibid.

49 CCR Guantánamo by the Numbers, supra note 42; ACLU Guantánamo Infographic, supra note 42

50 A variety of factors have been cited as preventing the release of those slated for transfer or release including inaction on the part of the Obama and Bush administrations, a moratorium placed on transfers to Yemen due to the security situation in that state generally, and restrictions placed by Congress on transfers from Guantanamo in December 2010. *Seee.g.* 'Why can't cleared prisoners leave Guantánamo Bay?', Reprieve, 10 July 2012, available at:http://reprieve.org.uk/publiceducation/2012_07_10_Guantanamo_public_education.

51 Presidential Memo, 7 February 2002 and 'Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate,' 20 September 2002.0

52 *See, e.g.*, 'Prison camp pictures spark protests', *BBC World News*, 20 January 2002, available at: http://news.bbc.co.uk/1/hi/world/americas/1771687.stm. The ICRC criticised the dissemination of these photos as violations of the duty under Article 13 of the Third Geneva Convention not to subject prisoners of war to public curiosity. *See, e.g.*, M. Meyer and K. Studds, 'Upholding Human Dignity and the Geneva Conventions: the Roles of the Media

whether conditions of detention were acceptable, signalling cramped conditions, excessive heat, poor sanitation and measures in contravention of the prisoners' religious beliefs, such as forcibly shaving prisoners' beards.[53]

It was with the release of a small group of detainees in 2003, that serious allegations of torture and ill treatment began to emerge.[54] Allegations of torture in Guantanamo have now been confirmed by multiple sources, including NGO reports,[55] the ICRC[56] and official documents.[57] Information on

in Protecting Prisoners of War and Civilian Security Internees against Insults and Public Curiosity', ICRC, 14 July 2006, p. 1, available at: http://www.icrc.org/eng/assets/files/other/amic_kevin_studds_final.pdf.

53 *See*, 'Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantanamo Bay', Amnesty International, AI Index: AMR 51/053/ 2002 15/04/2002, April 2002, p. 22, available at: http://www.amnesty.org/en/library/asset/AMR51/053/2002/en/c92423a1-d868-11dd-9df8-936c90684588/amr510532002en.pdf ; S. Left, 'Guantanamo Bay: What are the conditions at Guantanamo?', *The Guardian*, 10 October 2002, available at: http://www.guardian.co.uk/world/2002/jan/22/afghanistan.qanda.

54 *See* S. Goldenberg, 'Guantanamo abuse same as Abu Ghraib, say Britons', *The Guardian*, 14 May 2004, available at: http://www.guardian.co.uk/world/2004/may/14/iraq.guantanamo; *see also* Chapter 7B5, above.

55 Among many reports of torture and ill treatment see: L. E. Fletcher and E. Stover, 'Guantanamo and its Aftermath: U.S. detention and interrogation practices and their impact on former detainees', November 2008, available at: http://www.law.berkeley.edu/files/IHRLC/Guantanamo_and_Its_Aftermath.pdf ; 'Report on Torture and Cruel, Inhuman and Degrading Treatment of Prisoners at Guantanamo Bay, Cuba', CCR, July 2006, available at: http://ccrjustice.org/files/Report_ReportOnTorture.pdf; 'Getting Away with Torture: the Bush Administration and Mistreatment of Detainees', HRW, July 2012, available at: http://www.hrw.org/sites/default/files/reports/us0711webwcover.pdf 'The Guantanamo Testimonials Project', The Center for the Study of Human Rights in the Americas at the University of California, Davis, available at: http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-the-red-cross/icrc-analysis. On reports of forced injections *see, e.g.*, A. Worthington, 'All Guantánamo Prisoners Were Subjected to "Pharmacological Waterboarding"', 2 December 2012, available at: http://www.andyworthington.co.uk/2010/12/02/all-guantanamo-prisoners-were-subjected-to-pharmacological-waterboarding. Official reports are discussed in R. Brody, 'The Road to Abu Ghraib', HRW, June 2004, available at: http://www.hrw.org/sites/default/files/reports/usa0604.pdf.

56 'ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody', ICRC, February 2007.

57 The U.S. Government kept a log of interrogation techniques used on detainees. One log, for Detainee 063, al Qahtani, describes sleep deprivation, painful stress positions, physical and sexualabuse, physical, psychological and religious humiliation, use of dogs, sensory overstimulation and severe isolation, inter alia. 'Interrogation Log Detainee 063', U.S. Government, available at: http://wlstorage.net/file/mohamed-al-kahtani-gtmo-log-2002.pdf. On techniques approved in 2002 and 2003 by Secretary of Defense Donald Rumsfeld, see: D. Rumsfeld, 'Counter-Resistance Techniques', Office of the Secretary of Defense, 2 December 2002, made available by the National Security Archives; and Rumsfeld, 'Counter-Resistance Techniques in the War on Terrorism (S)', Office of the Secretary of Defense, 16 April 2003, made available by the National Security Archives. *See also* '[S]tudies of publicly available CSRT transcripts in e.g. 'Public Declaration of Mohammed al Qahtani' which reportedly indicate that '18 percent of the detainees alleged torture' available at: http://www.ccrjustice.org/files/Publication_DeclarationonAlQahtani.pdf.

cases at Guantanamo are coupled with information, now widely publicised, concerning the 'enhanced interrogation techniques' that were authorised for use on 'high value detainees' by the US government.[58] Information on connections between Guantanamo and other detention facilities (including the Abu Ghraib prison in Iraq[59] and various CIA 'black sites'),[60] where evidence of torture and ill treatment is now a matter of public record,[61] presents a picture of a broader policy and practice of which Guantanamo's purportedly law-free characteristics were only a part.

More recent reports would suggest that allegations of torture and ill-treatment appear to have ceased, and that although conditions of detention remain strict, the treatment of detainees has substantially improved over time.[62] Some questionable practices continue to receive attention however, notably in parts of the camp where the so-called 'high value detainees' are held, such as hooding detainees when they are transferred from the prison to meet with their lawyers or for other purposes and some areas remaining off-limits to

58 *See, e.g.*, Memorandum from Assistant Attorney General of the United States of America, Jay S. Bybee, 'Standards for Conduct of Interrogation under 18 U.S.C. Sections 2340-2340A' (hereinafter 'First Bybee Memo'), 1 August 2002; Memorandum from Assistant Attorney General of the US Jay S. Bybee, 'Interrogation of al Qaeda Operative' (hereinafter 'Second Bybee Memo'), 1 August 2002; Memorandum from the Deputy Assistant Attorney General John Yoo, 'The Torture and Military Interrogation of Alien Unlawful Combatants Held Outside the United States', 14 March 2003. The techniques are discussed in Chapter 10 on extraordinary Rendition.

59 *See, e.g.*, S. Goldenberg, 'Guantanamo Record Contradicts Claims that Prisoner Abuse was Isolated', *The Guardian*, 19 May 2004. *See also* Article 15-6 Investigation of the 800th Military Police Brigade (hereinafter 'Taguba report'), Official Military Inquiry into Abu Ghraib, May 2004, available at: http://www.npr.org/iraq/2004/prison_abuse_report.pdf. 'Administration of Torture,' ACLU, suggests that abuse of prisoners was pervasive in U.S. detention facilities in Iraq and Afghanistan.

60 *See* Chapter 10. On links between the two, *see* Goldenberg, 'Guantanamo Record', supra note 59; Taguba report, supra note 59. Detainees held in rendition sites were often flown in and out of Guantanamo at various stages. *See, e.g.*, *Abu Zubaydah* v *Lithuania* Application No. 46454/11, ECtHR, 27 October 2011 and *Abu Zubaydah v Poland* Application No. 7511/13, ECtHR, 26 March 2013. The CIA is reported to have held a separate site at Guantanamo at the early stages.

61 *See* Chapters 7B7 and 10 which explores those techniques in more detail.

62 Reports include among the conditions for some prisoners as at 2009 lack of access to natural light, fluorescent lights 24-hours-a-day, feeding through a metal slot in the door and prisoners eat alone, ban on communication and aggressive disciplinary tactics by 'immediate response teams.' 'Current Conditions of Confinement at Guantánamo: Still in Violation of the Law' (hereinafter 'CCR Current Conditions'), CCR, 23 February 2009, p. 5, available at http://ccrjustice.org/files/CCR_Report_Conditions_At_Guantanamo.pdf.

outsiders.[63] Concerns also emerged as to the forced feeding of detainees on hunger strike.[64]

Contact between detainees and the outside world has been extremely limited, and the lack of outside access to parts of the camp and to the detainees themselves has limited effective assessment of the conditions of detention.[65] For the first few years, even the ICRC was denied access,[66] while other human rights bodies initially denied any access were later granted it subject to agreeing not to communicate with detainees – conditions which have led the Inter-American Commission and Special Rapporteur on Torture to decline to visit.[67] With few exceptions, detainees continue to be denied access to their families and correspondence is heavily censored.

A particular concern arises from measures imposed specifically on high value detainees regarding the 'presumptive classification' of everything said by certain detainees, until the government decides to declassify.[68] This means that some detainees are completely precluded from communicating with the

63 *Abu Zubaydah* v *Lithuania and Poland*, supra note 60. Lawyers for some of the detainees who faced charges before the Guantánamo military commissions have been allowed inside, but only after volunteering to wear the same hoods the detainees wore. CCR Current Conditions, *ibid*. S*ee also* '"Platinum" captives held at off-limits Gitmo camp', *The Miami Herald*, 7 February 2008, available at: http://www.miamiherald.com/2008/02/07/930542/platinum-captives-held-at-off.html.

64 The ICRC considered force-feeding hunger-striking detainees as a violation of Common Article 3, which is supported by CAT and the World Medical Association (WMA). Some 100 of the 166 detainees held byApril 2013 were on hunger strike and some force fed; 'Barack Obama says Guantanamo Bay Prison must close', supra note 15. *Aamer v Obama* is a legal challenge to force feeding brought in US courts in 2013.

65 Limited access of monitoring bodies is referred to below. Counsel are also denied access to some parts of the camp, notably camp 7. *See, e.g.*, '"Platinum' captives held at off-limits Gitmo camp', supra note 63.

66 The 22 January 2009 Executive Orders issued by President Obama directed all agencies of the US Government to provide the ICRC with timely access to any individual detained by the United States in an armed conflict. B. Obama, 'Executive Order 13491 of January 22, 2009 – Ensuring Lawful Interrogations', Vol. 74 Fed. Reg. No. 16, p. 4893, 4894, Sec. 4. Since August 2009, official sources indicate that the ICRC has been notified of persons detained by the U.S military in situations of armed conflict within 14 days of their capture. Left, 'Guantanamo Bay: What are the conditions at Guantanamo?', supra note 53.

67 IAHCR Press Release, supra note 35. *See* 'UN Rapporteur Awaiting Access to Prisoners in Guantanamo', *Carribean Analysis*, 9 March 2012, available at: http://www.caribbeananalysis.com/un-rapporteur-awaiting-access-to-prisoners-in-guantanamo. Several UN independent human rights experts previously denied full access : s*ee*, 'Letter to Obama Asking for Access to Guantanamo Detention Center', 30 January 2009, Joint-Letter from ACLU, Amnesty International, HRW, and Human Rights First, available at: http://www.hrw.org/news/2009/01/30/letter-obama-asking-access-guantanamo-detention-center.

68 It applies to the defendants before the military commissions and was challenged in this context. C. Currier, 'Classified in Gitmo Trials: Detainees' Every Word', *ProPublica*, 17 July 2012, available at: http://www.propublica.org/article/classified-in-gitmo-trials-detainees-every-word. It also applies to other detainees who remain detained without charge, such as Abu Zubaydah. *See Zubaydah* v *Lithuania*, supra note 60.

outside world, and requests for declassification of even innocuous drawings, writings while in detention or simple affidavits to bring legal action are routinely refused. One such detainee is described in his application to the European Court as 'a man deprived of his voice, barred from communicating with the outside world or with this Court and from presenting evidence in support of his case'.[69]

8A.2 Overview of military procedures governing detention

Since 2004, several sets of procedures have been put in place by the US military in Guantanamo Bay that purported to provide some form of 'review' of the prisoners' detention: the Combatant Status Review Tribunals (CSRT) and the Administrative Review Boards (ARBs),[70] which in 2011 were replaced by the Periodic Review Board (PRBs).[71] Although the Department of Defense stated at various stages that these processes would, for example, 'provide an expeditious opportunity for non-citizen detainees to receive notice and an opportunity to be heard,'[72] as noted below the substantive scope of what exactly they could be heard on, and what the boards could consider, has always been very limited. The review procedures have not considered, for example, the correct legal classification of the detainee, whether there is any legal basis for his detention at all, or whether he is being afforded the rights to which he is entitled under international law.

69 *See Zubaydah* v *Lithuania*, supra note 60. The author is part of the applicant's legal team before the ECtHR. *See also* In re. Guantánamo Bay Detainee Litigation, Case no. 1:08-cv-01360, Amended Protective Order, 9 January 2009. The U.S. media organisation 'Truthout' filed an unsuccessful Mandatory Declassification Review (MDR) requesting release of Abu Zubaydah's drawings, poetry and writings in detention. 'Torture Diaries, Drawings and the Special Prosecutor', Truthout, 29 March 2010, available at: http://archive.truthout.org/torture-diaries-drawings-and-special-prosecutor58108.

70 Both sets of procedures followed challenges to the lack of judicial oversight at Guantanamo, that would ultimately lead to the Supreme Court decision in *Boumediene*, supra note 16. *See* the 'Long Quest for Habeas', below.

71 'Executive Order: Periodic Review Of Individuals Detained At Guantánamo Bay Naval Station', Office of the Press Secretary, The White House, 7 March 2011, available at: http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava.

72 'Combat Status Review Tribunals', Department of Defense Press Release, July 2004, available at: http://www.defense.gov/news/Jul2004/d20040707factsheet.pdf. *See also*, Memorandum from Deputy Secretary of Defense, 'Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba' (hereinafter 'Implementation of CSRT Procedures'), 14 July 2006, available at: http://www.defense.gov/news/Aug2006/d20060809CSRTProcedures.pdf.

The first set of procedures to be introduced were the CSRTs,[73] whereby three officers of the US armed forces were charged with determining whether particular detainees meet the US' definition of 'enemy combatant'.[74] Their decision was then approved by the CSRT Legal Advisor and the Director,[75] who notified the Tribunal and the detainee if further hearings were necessary or if the decision was final.[76] As has been acknowledged, the CSRT proceedings lacked independence and the procedural protections necessary for meaningful review,[77] including lack of access to a lawyer,[78] little or no access to evidence used against detainees,[79] and no provision for the exclusion of evidence extracted under torture or coercion.[80] Such restrictions rendered rebuttal notoriously difficult if not in some cases impossible.[81] While providing a very

73 The procedure was established by the Order of the Deputy Secretary of Defense of 7 July 2004, Deputy Secretary of Defense, available at: http://www.defenselink.mil/news/Jul2004/d20040707review.pdf. The procedure is further detailed in a memo regarding 'Implementation guidance for the Combatant Status Review Tribunal Procedures for enemy combatants at Guantanamo Bay, Cuba', Secretary of the Navy, 29 July 2004, available at: http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

74 The definition of 'enemy combatant' see Order of the Deputy Secretary of Defense of 7 July 2004, supra note 73. *See* 'Categories of Detainees', para. 8B.3 below; and Chapter 6B.1.

75 'Implementation of CSRT Procedures', supra, p. 9, (I)(7).

76 *Ibid*., (I)(10).

77 See e.g. 'Guantánamo and beyond: The continuing pursuit of unchecked executive power', Amnesty International, 13 May 2005, available at: http://www.amnesty.org/en/library/asset/AMR51/063/2005/en/0e3f8b95-d4fe-11dd-8a23-d58a49c0d652/amr510632005en.pdf; M. Denbeaux and J. Denbeaux, et al., 'No-Hearing Hearings: CSRT: The Modern Habeas Corpus? An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantánamo' (hereinafter 'Seton Hall CSRT Report'), (2006). The U.S. Supreme Court confirmed that the CSRT hearings were inadequate to protect detainees' rights to judicial review of their detention.

78 *See* 'Security Detainees/Enemy Combatants', Human Rights First, available at: http://www.humanrightsfirst.org/our-work/law-and-security/military-commissions/security-detaineesenemy-combatants. There was a non-legal appointed representative but detainee-representative communications were not in any sense confidential. *See* Seton Hall CSRT Report, ibid, p. 3.

79 Brief summaries of classified evidence were available, but they were conclusory rather than persuasive or informative. *See, e.g.*, U.S. Department of Defense, Office for the Administrative Review of the Detention of Enemy Combatants at the U.S. Naval Base Guantánamo Bay, Cuba, 'Summary of Evidence for the Combatant Status Review Tribunal – Husayn, Zayn Al Abidin Muhammad (Abu Zubaydah)', 19 March 2007, available at: http://www.defense.gov/news/ISN10016.pdf.

80 'Guantánamo and beyond', supra note 77, p. 64.

81 *See, e.g.*, House of Commons Foreign Affairs Committee, UK Parliament, 'Visit to Guantánamo Bay – Second Report of Session 2006-07', 10 January 2007, p. 31, para. 96, available at: http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/44.pdf. 'Amnesty cited a case where a detainee was informed by his Tribunal hearing that an alias allegedly used by him had been found on a computer hard drive associated with an alleged senior al Qaeda member. Neither his own alias, nor the name of the senior al Qaeda member, nor the location where the computer hard drive was found were revealed to him. He was thus unable to rebut the charge.'

slim veneer of procedural regularity, in the vast majority of cases the CSRTs confirmed the DOD's assessment.[82] The review was conducted once only, unless the individual was determined *not* to be an enemy combatant in which case the process was reportedly repeated, sometimes on several occasions.[83]

The second procedure introduced was an annual 'Administrative Review' procedure, whereby a board of military officers assesses whether the 'enemy combatant' poses a threat to the United States, or its allies, or whether there are other factors bearing on the need for continued detention, such as the 'intelligence value' of the detainee.[84] Based on that assessment, it could recommend release, transfer or continued detention, but again only rarely was a 'recommendation' made for release.[85]

In 2009, the annual Administrative Reviews were temporarily suspended[86] pending the comprehensive interagency review of the status of detainees ordered by incoming President Obama.[87] When that review was completed, in March 2011, President Obama replaced the CSRT and ARB mechanisms for review of detention authority with a new set of procedures administered by Periodic Review Boards.[88]

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82 Secretary of the Navy Gordon England, responsible for overseeing the CSRTs, emphasised that the CSRT system 'is only to determine, *again*, if you're an enemy combatant ...there's already been prior determinations... so I would expect that most would indeed be enemy combatants, just because of prior reviews'. Secretary of the Navy Gordon England, Special Defense Department Briefing, U.S. Department of Defense, 1 October 2004, transcript available at: http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2242. 59 out of 539 were found to be no longer classified as enemy combatants: 'Combatant Status Review Tribunal Summary', U.S. Department of Defense, 10 February 2009, available at: http://www.defense.gov/news/csrtsummary.pdf.

83 One U.S. Army Major who sat on 49 CSRT panels indicated in an affidavit that in six of those hearings, 'there was a *unanimous* decision that the detainee was a *Non*-Enemy Combatant (NEC). In all of those NEC cases, the Command directed that a new CSRT be held or the original CSRT was ordered reopened'. Affidavit filed in *Hamad* v. *Gates*, No. 07-1098, (D.C. Cir. 2007), declaration available at: http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-csrt-officers/testimony-of-an-army-major-in-mr-hamads-csrt.

84 *See* 'Final Administrative Review Procedures for Guantanamo Detainees', Department of Defense News, 18 May 2004, available at http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3042. The rules of procedure are outlined in 'Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba', Department of Defense, 14 September 2004, available at http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf.

85 *See* 'Combatant Status Review Tribunals/Administrative Review Boards', Department of Defense, available at http://www.defense.gov/news/combatant_Tribunals.html.

86 *See* 'Combatant Status Review Tribunal Summary', supra note 82.

87 Executive Order 13492, supra note 20.

88 Executive Order 13567, 'Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to Authorisation to Use Military Force', 76 Fed. Reg. 13277, 10 March 2011, available at: http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava.

This latest form of review appears similar to the ARBs. Although there are positive changes – the review occurs every six months and is now an inter-agency review rather than only by the Department of Defense[89] – most of the concerns that attached to the former reviews processes continue to apply. The ostensible purpose of the boards is to confirm whether continued detention 'is necessary to protect against a significant threat to the security of the United States'.[90] The PRB review process is explicitly discretionary, its purpose being to 'review on a periodic basis the executive branch's continued, discretionary exercise of existing detention authority in individual cases'.[91]

8A.3 The Long Quest for Judicial Review

Among the vast amount of litigation that has been conducted by or on behalf of Guantanamo detainees over the years were the volumes of cases asserting the right to challenge the lawfulness of detention, the right to habeas corpus, before a court. This litigation, which is discussed in more detail in Chapter 11, began with a series of cases brought during 2002 on behalf of British and Australian detainees, and on behalf of twelve Kuwaiti detainees.[92] The government moved to dismiss these actions for want of jurisdiction, given the location of the detention facilities outside United States sovereign territory, and the fact that the detainees are not US citizens.[93] The court of first instance accepted this, ruling that it had no jurisdiction to entertain claims from aliens held

89 Executive Order 13567, ibid.

90 'Executive Order: Periodic Review Of Individuals Detained At Guantánamo Bay Naval Station', Office of the Press Secretary, The White House, 7 March 2011, available at: http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava. One break from the prior ARB system is that 'potential intelligence value is not a ground for continued detention'. *See* lawfulness of detention above.

91 'This order is intended solely to establish, as a discretionary matter, a process to review on a periodic basis the executive branch's continued, discretionary exercise of existing detention authority in individual cases.' Executive Order 13567, supra note 88.

92 The first cases were *Rasul et al.* v. *George Walker Bush et al.*, No. 02-5288, 2002, a petition for a writ of *habeas corpus* filed before the District Court for the District of Columbia by the families of an Australian and two British citizens held by US forces in Guantanamo Bay, and *Al Odah* v. *United States*, No. 02-5251, 2002 brought by relatives of twelve Kuwaiti nationals detained at Camp X-Ray in Guantanamo Bay. The plaintiffs sought a declaratory judgment and injunction ordering that they be informed of any charges against them and requiring that they be permitted to consult with counsel and meet with their families. The complaints were consolidated and treated by the court as an application for *habeas corpus*.

93 *Ibid.*

outside the sovereign territory of the United States[94] and the appeal court upheld this decision.[95]

However, during 2003 the prospect of a different approach emerged. Another first instance court, hearing a similar case, found that:

> [W]e simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens including, on territory under the sole jurisdiction and control of the United States without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement.[96]

When the matter was finally before the United States Supreme Court, it was asked to determine the 'narrow but important question whether the United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba'.[97] In an historic judgment supported by six of nine judges of the Supreme Court bench in 2004,[98] the Court found that 'federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be totally innocent of wrong doing'.

In response, the US Congress passed the Detainee Treatment Act of 2005,[99] explicitly eliminating any such possibility by stating that federal courts did not have statutory jurisdiction over habeas claims by aliens challenging their detention at Guantanamo Bay. However, in the 2006 case of *Hamdan* v. *Rumsfeld*,[100] the Supreme Court interpreted the provision eliminating federal habeas jurisdiction as being inapplicable to cases that were pending at the time the DTA was enacted, thereby permitting the Court to review Hamdan's case.[101] Congress again responded, passing the Military Commissions Act of 2006,[102]

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94 The court dismissed the petition for lack of jurisdiction.

95 An appeal against the decision in *Rasul* was dismissed by the Court of Appeals for the District of Columbia on 11 March 2003. *Al Odah et al*. v. *United States*, 321 F.3d 1134 (D.C. Cir. 2003).

96 *Gherebi* v. *Bush*, 352 F. 3d 1278, 1283 (9th Cir. 2003)

97 *Certiori* was denied in *Gherebi v Bush*, above. *Rasul* v. *Bush*, *Al Odah* v. *United States* (Cases 03-334 and 03-343), Supreme Court Certiorari to the United States Court of Appeals for the District of Columbia, 28 June 2004, p. 1. On grant of *certiorari*: *Rasul* v. *Bush*, *Al Odah* v. *United States* (Cases 03-334 and 03-343), 10 November 2003, 72 USLW 3327.

98 *Rasul*, supra note 16.

99 Detainee Treatment Act 2005, P.L. 109-148, Title X; P.L. 109-163, Title XIV.

100 *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 635 (2006).

101 In addition to the habeas issue, it questioned the validity of the military commissions established pursuant to President Bush's military order (see military commission below) leading to legislation governing the commissions.

102 The Military Commissions Act of 2006, P.L. 109-366.

which eliminated court's jurisdiction over all pending and future habeas applications (or other causes of action) by detainees of the war on terror.

On 12 June, 2008, the Supreme Court, in the case of *Boumediene v. Bush*,[103] ruled that the Military Commissions Act of 2006 unconstitutionally limited detainee's access to judicial review and that detainees have the right to a '*meaningful review of both the cause for detention and the Executive's power to detain*'.[104] Since late 2008, habeas hearings have been heard in D.C. District Court. In the first few years, a striking majority of applications were granted (37 successful applications of the 57 total submitted by 2010[105]). This underscored both the importance of the habeas right, and the extent and gravity of the errors that had lead to such detentions in the first place. The black hole was finally being closed, detainee by detainee.

However, in 2010, the United States Court of Appeals for the District of Columbia Circuit reversed the first decision to grant habeas,[106] rebuking the lower court's lack of deference to the government and finding that the level of correction was 'intolerable'.[107] Since then, the standards and approach being applied by the courts, and the results, have changed sharply: between 2010 and mid-2012, only one application had been successful.[108]

103 *Boumediene*, supra note 16.

104 *Ibid*., at 2269.

105 By 2010, the majority of habeas applications were successful. *See* 'Guantanamo Habeas Score card', Center for Constitutional Rights, available at: http://ccrjustice.org/GTMOscorecard. 'Habeas Grants after Appeals Decisions: 32; Habeas Denials after Appeals (and Remand) Decisions: 27; Habeas Granted and Released: 26; Habeas Granted and Still Detained: 4; Current Guantanamo Population: 169.'

106 The process began with *Al-Adahi* v. *Obama*, 613 F.3d 1102 (D.C. Cir. 2010) wherein *Boumediene*'s promise of robust review of the legality of the Guantanamo detainees' detention is said to have been 'effectively negated': s*ee* M. Denbeaux, 'No Hearing Habeas: D.C. Circuit Restricts Meaningful Review' (hereinafter 'Seton Hall Habeas Report'), Seton Law School, 2012, p. 1, available at: http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policy research/upload/hearing-habeas.pdf, and Chapter 11.

107 The DC Circuit Court has determined that the habeas court's evaluation of the facts should be more limited and more deferential to the government's evaluation. The D.C. Circuit is said to have 'prevented district judges from closely evaluating the government's evidence but mandated that they give a presumption of accuracy to certain evidence (interrogation reports) submitted by the government, even though district courts had previously found that evidence unreliable'. *Ibid.*, p. 4.

108 *Ibid.*

8A.4 The Guantanamo Task Force Review and Continuing Indefinite Detention

The Obama administration came to office a foremost critic of Guantanamo and ordered its closure. As part of this process, it established, by Executive Order 13492, a task force to review the files of all Guantánamo prisoners.[109]

The task force issued a final report in January 2010.[110] It concluded that 156 of 240 detainees held at Guantánamo when President Obama took office were not a threat to the US and were cleared for transfer.[111] Only 36 detainees of the 240 would be referred for prosecution.[112] A further 48 detainees would be held indefinitely.[113] The reasons purporting to justify the continued and potentially indefinite detention of this 'remainder' group of detainees were various, included that they were too dangerous to transfer but not feasible for prosecution, because the US did not have evidence against them, that evidence that was available could not be admitted or they had not violated US criminal law.[114] These 48 detainees will remain in detention pursuant to the government's discretion under the AUMF.[115] While the US government has not disclosed the category to which it assigned particular individuals, it would seem that many of them have still not had the lawfulness of their detention reviewed.[116] In some cases it is known that they were subject to the gravest forms of torture with allegedly devastating effects; whether this

109 Executive Order 13492, supra note 20. It allowed counsel to make representations to the task force.

110 Where the Review Panel was not able to reach a consensus oradditional review was thought appropriate the heads of agency met to determine the proper disposition. 'Guantanamo Review Task Force', supra note 43.

111 '26 detainees were approved for transfer ... and 30 detainees from Yemen were approved for "conditional" detention based on present security conditions in Yemen.' *Ibid.*, p. 9-10.

112 *Ibid.*, p. 9.

113 *Ibid.*, p. 12. '48 detainees were unanimously approved for continued detention under the AUMF based on a finding that they pose a national security threat that could not be mitigated sufficiently at this time if they were to be transferred from U.S. custody. The Task Force concluded as to all of these detainees that prosecution is not feasible at this time in either federal court or the military commission system. At the same time, the Task Force concluded that there is a lawful basis for continuing to detain these detainees under the AUMF.'

114 *Ibid.*

115 The Detention Guidelines provided that a detainee should be considered eligible for continued detention under the AUMF if '(1) the detainee poses a national security threat that cannot be sufficiently mitigated through feasible and appropriate security measures; (2) prosecution of the detainee by the federal government is not feasible in any forum; and (3) continued detention without criminal charges is lawful'. *Ibid.*, p. 8. The import of the lawfulness restraint is questionable, and somewhat circular, as the government has been afforded complete discretion to detain.

116 *See, e.g.*, *Zubaydah* v *Lithuania and Poland*, supra note 60. Zubaydah is thought to be one of the 48.

is a factor in their continuing detention is likely to remain the subject of speculation.[117]

8A.4.1 Limbo within Limbo: Detainees 'Cleared' but Not Released

A further category of detainees is worthy of note. Many detainees at Guantanamo who have, despite the obstacles, been cleared for transfer by the government still remain in detention for prolonged periods of time.[118] For example, 59 of the 240 detainees subject to the task force review had been approved for transfer or release by the prior administration but remained at Guantanamo.[119] Twenty-nine of the detainees subject to review had been ordered released by a federal district court as the result of habeas litigation, to little effect.[120] The detention of individuals 'cleared' for transfer has been described as Guantanamo's current 'moral bankruptcy'.[121]

The reasons for such failure to release are many, including slow processes and inefficiency, resistance on the part of government,[122] and, strikingly, congressional obstacles imposed by the 2012 National Defense Authorization Act (NDAA), whereby military funds cannot be deployed to relocate Guantanamo prisoners.[123]

In respect of a number of those cleared yet still detained, there was a real risk of torture in another state. In some such cases, the US has been criticised for returning them anyway: the Courts have narrowly upheld the government's argument that the judiciary must accept the executive branch's determination as to whether it is 'more likely than not' that individuals would be tortured

117 *Ibid.*

118 *See* A. Worthington, 'Guantánamo Scandal: The 40 Prisoners Still Held But Cleared for Release At Least Five Years Ago', 6 June 2012, available at: http://www.andyworthington.co.uk/2012/06/06/exclusive-guantanamo-scandal-the-40-prisoners-still-held-but-cleared-for-release-at-least-five-years-ago/. 'One of the greatest injustices at Guantánamo is that, of the 169 prisoners still held, over half – 87 in total – were cleared for release by President Obama's interagency Guantánamo Review Task Force.'

119 *Ibid.*

120 *Ibid.*

121 Joe Margulies, counsel to Guantanamo detainee Abu Zubaydah, notes that '[w]hile the great moral bankruptcy of the base was once its conditions, today it is the shameful fact that scores of prisoners who have been cleared for transfer by two administrations remain in custody'. J. Margulies, 'Trapped in Guantanamo', *LA Times*, 29 September 2011, available at: http://articles.latimes.com/2011/sep/29/opinion/la-oe-margulies-gitmo-20110929.

122 Eg. the case of juvenile M. Jawad, note 36.

123 President Obama's power to release Guantánamo detainees is limited by the NDAA, signed in January 2012, which is described as 'amounting to an effective prohibition on the use of military funds to transfer detainees'. On limited executive exceptions, not invoked, *see* 'Why can't cleared prisoners leave Guantánamo Bay?', supra note 50.

or abused.[124] For one group of detained Uighers from China, the US accepted that they could not be returned for fear of persecution.[125] The detainees therefore asserted their right to be released into the US rather than held at Guantanamo, but the government refused, and successfully challenged the courts' power to order their release into US soil.[126] This, despite the fact that as the Supreme Court noted, 'Petitioners have been held for several years in custody at Guantanamo Bay, Cuba – a detention that the Government agrees was without lawful cause'.[127]

In addition, detainees from Yemen cleared as not posing sufficient risk to justify detention were then slated for 'conditional' detention based on the current security environment in that country.[128] Their situation was given tragic voice in September 2012 when a detainee committed suicide by hunger strike, some ten years after being detained at Guantanamo and six years after the administration reportedly acknowledged he did not pose a threat justifying continued detention.[129] On the sole basis of their nationality, not their specific conduct, these detainees continue to be held at Guantanamo.

8A.5 TRIAL BY MILITARY COMMISSION

On 13 November 2001, a Military Order was issued by the President of the United States, relating to 'Detention, treatment, and trial of certain non-citizens in the war against terrorism'.[130] It provides, *inter alia*, that the trial of any

124 *See Kiyemba* II, the decision of the District Court en banc, split six to five, confirming the earlier refusal to consider the claim of the risk of refoulement, and long dissenting decisions. There is speculation that the case will be heard before the Supreme Court but at time of writing it had not arisen. The US also relies on a more restrictive standard than the 'real and personal risk' under international law: s*ee* Ch 7A.5.10 'Refoulement.'

125 *Ibid.*

126 *Kiyemba* v. *Obama*, 555 F. 3d 102 D.C. Cir. (2009). Certiori before the Supreme Court was ultimately denied as the government was committed to finding alternative solutions to the detainees, notably relocation to Palau in the South Pacific.

127 *Kiyemba* v. *Obama*, No. 10-775, 563 U. S. ____ (2011), *cert denied*. p. 1.

128 'Guantanamo Review Task Force', supra note 43.

129 *See, e.g.*, 'Death at Guantánamo Bay', *The New York Times*, 15 September 2012, available at:http://www.nytimes.com/2012/09/16/opinion/sunday/death-at-guantanamo-bay.html. Adnan Farhan Abdul Latif, a Yemeni citizen was sent to Guantánamo Bay, Cuba, in January 2002, and died there ten years later. He was cleared but not transferred to Yemen due to the security situation in that country. He was described as 'detained for his passport not his conduct'. 'Adnan Latif – the Face of Indefinite Detention – Dies at Guantánamo', CCR, available at: http://ccrjustice.org/newsroom/press-releases/adnan-latif-face-of-indefinite-detention-dies-guantanamo.

130 'Presidential Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism', issued by President Bush, 13 November 2001, 66 Fed. Reg. 57833 (2001), (hereinafter 'Presidential Military Order').

individual subject to it,[131] will be by a military commission. The Order specifically excludes from the jurisdiction of the Commissions citizens of the United States.

Making the commissions operational has been a slow and faltering process on many levels. In July 2003 President Bush designated the first group of alleged al-Qaeda members detained at Guantanamo Bay for trial before the Military Commissions,[132] and during 2004 the first charges were brought[133] and hearings got underway.[134] But before long their legitimacy was challenged, and proceedings stalled, culminating in the Supreme Court decision in *Hamdan v. Rumsfeld,* finding that 'the military commission convened to try *Hamdan* lacks power to proceed because its structure and procedures violate both the Uniform Code of Military Justice and the Geneva Conventions'.[135] In response to the finding that the president did not have the power to establish such commissions, the Bush administration promptly announced its decision to seek Congressional approval,[136] which it obtained in the form of the Military Commissions Act.[137] The Act authorized the trial by military commission of alien unlawful enemy combatants engaged in hostilities against the US for violations of the law of war and other offenses triable by military commission. Under the 2006 Act, several detainees were tried and convicted between 2006 and 2008.[138]

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131 The Order provided that those subject to it were persons with respect to whom the President determines that there is reason to believe (1) that s/he is a member of al-Qaeda or (2) that s/he was engaged in international terrorism, or (3) that it is in the interests of the United States that s/he should be subject to the Order. *Ibid.* Sec. 2(a)(1).

132 Six detainees were so designated. 'President Determines Enemy Combatants Subject to His Military Order', Department of Defense, News Release, 3 July 2003, available at: http://www.defenselink.mil/releases/2003/nr20030703-0173.html.

133 In February 2004, the first detainees (of Yemeni and Sudanese nationality), were charged with 'violat[ing] the laws of war and engag[ing] in terrorism'. *See* N.A. Lewis, 'Qaeda suspects face first military trials', *International Herald Tribune*, 25 February 2004.

134 *See* 'First Military Commission Convened at Guantanamo Bay, Cuba', Department of Defense, News Release, 24 August 2004, available at: http://www.defenselink.mil/releases/2004/nr20040824-1164.html on 'the first U.S. military commission in more than 50 years being convened [in Guantanamo Bay] today in the case of *U.S.* vs. *Salim Achmed Hamdan* who is accused of conspiracy to commit violations of the law of war'. The second of four military commissions was convened for David Hicks, an Australian citizen, accused of conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy. *See* 'Australian Citizen is the Second Commissions Case', DoD News Release, 25 August 2004, available at http://www.defenselink.mil/releases/2004/nr20040825-1169.

135 *Hamdan v. Rumsfeld*, supra note 100, and Chapter 11.

136 'President Discusses Creation of Military Commissions to Try Suspected Terrorists', 6 September 2006, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html.

137 Military Commission Acts 2006 (HR-6166) and 2009 (HR-2647).

138 Salim Hamdan was convicted and sentenced to 66 months for material support for terrorism but acquitted of conspiracy. In November 2008 he was transferred to Yemen to serve out the remainder of his sentence and released on 8 January 2009. As noted below, his convic-

Two days after being sworn into office in 2009, President Obama issued an executive order halting the military commissions at Guantanamo, pending the work of the Guantanamo 'Task Force' which would determine *inter alia* who should face criminal prosecution.[139] Meanwhile, while keeping an open position on Military Commissions,[140] the Attorney General announced that several detainees would be transferred to the US for trial before federal courts.[141] An attempt seemed to be afoot to bring Guantanamo within the regular legal process, though enormous controversy and debate ensued.[142] The US Congress proceeded to block the possibility that Guantanamo detainees, including those responsible for the 9/11 attacks, would be tried by a US civilian

tion was quashed in 2012 as ex-post facto application of criminal laws. *Hamdan* v. *United States*, No. 11-1257, p. 26, (D.C. Cir. 2012). David Hicks pleaded guilty and was also convicted of providing material support for terrorism and sentenced to seven years confinement. Pursuant to a plea agreement, his sentence was reduced to nine months and he was transferred to his native Australia to serve his sentence. Ali Hamza Ahmad Suliman al Bahlul was convicted of solicitation, conspiracy and providing material support for terrorism and sentenced to life imprisonment.

139 Executive Order 13492, supra note 20.

140 In 2009 Obama appeared to support the commissions, though he had previously opposed: 'Military commissions have a long tradition in the United States. They are appropriate for trying enemies who violate the laws of war, provided that they are properly structured and administered'. 'Statement of President Barack Obama on Military Commissions', The White House, May 15, 2009, available at: http://www.whitehouse.gov/the-press-office/statement-president-barack-obama-military-commissions. (For later expressions, see 23 May 2013 speech, note 9.) In October 2009, the U.S. Congress passed the Military Commissions Act of 2009, 10 U.S.C. § 949a(a). The Secretary of Defense approved the 2010 Manual for Military Commissions, which implements the 2009 MCA.

141 On 9 June 2009 Ahmed Ghailani was the first non-American citizen brought to the U.S. for trial in federal court from Guantanamo. On 13 November 2009, Attorney General Eric Holder announced that the United States government will pursue prosecution in federal court in the Southern District of New York against five detainees charged in military commissions: Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali and Mustafa Ahmed Adam al Hawsawi. 'Departments of Justice and Defense Announce Forum Decisions for Ten Guantanamo Bay Detainees: Decisions on Accused 9/11 Plotters, Alleged Mastermind of USS Cole Attack & Others', Department of Justice, 13 November 2009, available at: http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html. Other individuals have been transferred from overseas directly to the US, rather than to Guantanamo as previously; e.g. Nazih Abdul-Hamed al-Ruqai captured by special forces from Libya in October 2013.

142 *See, e.g.*, 'Trial by Military Commission or Article III Court? The Debate Rages On', New York State Bar Assoication, 27 July 2010, available at: http://nysbar.com/blogs/ExecutiveDetention/2010/07/trial_by_military_commission_o.html. In March 2013, the debate remerged as al-Qeada spokesman Suleiman Abu Ghaith, reportedly one of Osama bin Laden's sons in law, was transferred to New York for trial. *See* 'Suleiman Abu Ghaith to be tried in New York', *BBC News*, available at: http://www.bbc.co.uk/news/world-us-canada-21706645 last visited 14 May 2013.

court.[143] In April 2011, Attorney General Eric Holder referred five high profile 9/11 related cases against Khalid Sheikh Mohammed and his four co-conspirators to military commission.[144] Several cases got underway in the course of 2012,[145] consolidating the role of the Commissions in American history.

The decision to submit to trial by military commission in itself, and the specific Rules of Procedure of the Commissions, have given rise to profound criticism within the United States and internationally.[146] Since the rules were first published in March 2002, they have been amended, and somewhat improved, several times.[147] Despite this, at all stages they have provoked concern 'still failing to provide many of the fundamental elements of a fair trial found in federal civilian courts and a court martial system'.[148] While concerns are many, as illustrated in relation to 'prosecution-fair trial' below, they may be encapsulated, in the words of the Chief Prosecutor of the Military Commissions, as revolving around the 'five *un*s':

> [T]hat the law of the commissions is *unsettled* because the system is new and untested; that the new rules are *unfair* because they deviate from the tried-and-true procedural protections of the courts-martial and federal courts; that the commissions are *unnecessary* because our federal courts are open and expert in handling terrorism prosecutions; that the commissions are *unknown* because they permit too much secrecy, particularly with respect to allegations of torture; and that the scope of military jurisdiction is *unbounded* in our government's claim of a geographically and temporally unconstrained conflict with al-Qaeda and undefined 'associated forces.'[149]

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143 Senate and the House of Representatives passed a Defense Spending Bill on December 22, 2010 blocking the use of funds to transfer Guantanamo detainees. National Defense Authorization Act of Fiscal Year 2011, H.R. 6523; extended for 2012 with the National Defense Authorization Act for 2012, H.R. 1540.

144 'The Guantanamo Trials', HRW, available at: http://www.hrw.org/features/Guantanamo.

145 *Ibid.* The proceedings are discussed further in relation to 'fair trial' below.

146 For a discussion of the legality of the Military Commission under IHRL and IHL, *see*, *inter alia*, H.H. Koh, 'The Case Against Military Commissions', 96 (2002) AJIL 337; R. Wedgwoood, 'Al Qaeda, Terrorism and Military Commissions', 96 (2002) AJIL 328; J. Paust, 'Antiterrorism Military Commissions: Courting Illegality', 23 (2002) *Michigan J. of Int'l Law* 1 and Chapter 4B2.3 and 7A.5.4.

147 The rules set forth in the Department of Defense Military Commission Order No. 1 were detailed by the Military Commission Instructions Nos. 1-8, issued by the Department of Defense on 30 April 2003 and on October 28, 2009, President Obama signed into law the Military Commissions Act of 2009, which was included in the National Defense Authorization Act (NDAA).

148 The MCA 2009 was the third attempt at creating a military commissions system and brings various reforms. *See, e.g.*, 'Military Commissions', Human Rights First, 2012, available at: http://www.humanrightsfirst.org/our-work/law-and-security/military-commissions.

149 A. Abso, 'Reporting from Guantánamo: The five uns', ACLU, 23 July 2012, available at: http://www.aclu.org/blog/national-security-human-rights/reporting-guantanamo-five-uns based on discussion between Brigadier General Mark Martins, the Chief Prosecutor of the military commissions, with NGO observers.

With the first military commission conviction being quashed on the basis of retroactive application of criminal law, with uncertain implications for other cases, the controversy does not look set to abate.[150]

At the same time, the impact of the commissions should be kept in perspective. Of the 800 'dangerous enemy combatants' who have been subject – in some cases for several years – to detention at Guantanamo, only 10% have even been identified as *subject* to trial by military commission, and far fewer cases have actually proceeded to prosecution in military commissions.[151] For the greater number held in indefinite detention, even the prospect of flawed criminal justice is better than no justice at all. The unusual plea from defence attorneys to submit their client (apparently slated for indefinite detention without trial) to trial by military commission epitomises the Catch 22 plight of the Guantanamo detainees.[152]

8B APPLICATION OF HUMANITARIAN AND HUMAN RIGHTS LAW TO DETAINEES IN GUANTANAMO BAY

So far as the prisoners are detained by the United States in the context of or in relation to an armed conflict, they are subject to the legal framework set out in international humanitarian law.[153] The United States is bound by IHL as a party to the armed conflict in Afghanistan, in respect of persons detained in association with that conflict. In addition, it remains bound, in the context

150 *Hamdan* v. *United States*, supra note 138. The US appeals court quashed the conviction of Osama bin Laden's former driver, who served a five-and-a-half-year prison sentence for 'material support for terrorism,' which was unanimously found not to have been a war crime under international law at the relevant time. *See* Chapter 4; *Hamdan* v. *United States*, supra note 138.

151 The Obama administration identified 36 such detainees, three of whom have already pleaded guilty. In 2010, Ibrahim Ahmed Mahmoud al Qosi pleaded guilty to providing material support for terrorism and conspiracy and was sentenced to 14 years' confinement, reduced to 2. He returned to his native Sudan on July 10, 2012. Omar Khadr pleaded guilty to various war crimes charges and was sentenced to 40 years' confinement, which pursuant to a plea agreement was reduced to 8. In 2011, Noor Uthman Mohammed pleaded guilty to conspiracy and providing material support for terrorism and was sentenced to 14 years' confinement, reduced to 34 months. In February 2012, Majid Khan pleaded guilty to various war crimes charges and been sentenced and seven convicted, several with plea agreements: 'Guantanamo Review Task Force', supra note 43, p. 13. By 2013, proceedings were pending against Khalid Sheik Mohammed, his four alleged co-conspirators in the 9/11 attacks and Abd al-Rahim al-Nashiri, the alleged orchestrator of the 2000 attack on the USS Cole off the coast of Yemen.

152 J. Margulies, et al., 'Request for Immediate Commencement of Abu Zubaydah's Military Commission Proceedings', 20 May 2012, copy available at: http://www.emptywheel.net/wp-content/uploads/2012/05/Letter-to-Convening-Authority-May-10-2012.pdf.

153 Chapter 6, including para. 6A.1 on 'Where and When IHL Applies'.

of armed conflict, by international human rights law.[154] To the extent that at least some detainees are held, not because of engagement in an armed conflict against the US but pursuant to a broader 'war on terror' which, as discussed at Chapter 6, section B, does not constitute an armed conflict in any legal sense, or if they are detained on suspicion of activities committed before the conflict or unrelated to it, then IHL does not apply. In this case, the situation is subject only to applicable rules of IHRL.

The plight of the Guantanamo detainees as highlighted by the facts above raises myriad human rights concerns, foreshadowed in the law and practice discussed in Chapter 7. Not least the torture and ill-treatment that is now known to have occurred at Guantanamo violates the most basic inviolable norms of the international legal order. A regime that applies only to non-nationals without objective justification for such a distinction is inherently discriminatory, in violation of the right to equality.[155] The right to religious freedom is plainly vitiated by some of the methods of treatment and interrogation, with obvious question arising with regard to the right to health. The rights to private and family life are eviscerated by decades of incommunicado detention and the Guantanamo regime. The right to free expression is flouted by an overreaching ban on communication that fails to carefully assess the need for restrictions in the concrete situation. Short shift is made of the essential right to a remedy, where individuals are denied access to a court and released after years of acknowledged wrongful detention with no compensation or even apology.

The Guantanamo scenario embodies a litany of violations of these and other international norms discussed throughout this book. The focus of this chapter is however on the procedural rights to detention and fair trial that would normally be afforded to persons in detention, the denial of which have characterised the Guantanamo anomaly and lead to its identification as a 'legal black hole' characterisation.

8B.1 THE FRAMEWORK AND REACH OF INTERNATIONAL HUMANITARIAN LAW

For present purposes, key provisions of IHL are those relative to the treatment of persons detained during an international armed conflict, embodied in the four Geneva Conventions of 1949 and in the First Additional Protocol to the Geneva Conventions of 1977. The United States, like Afghanistan, is party to

154 Chapter 7A3.4 on interplay between the two regimes and 7B3 on difficult issues arising in practice.

155 *See, e.g.,* Chapter 7B.12 and the *A &Ors* case in UK courts, discussed in Chapter 11, where detention of non-nationals only could not be justified and was held to be discriminatory.

the four Geneva Conventions, which are therefore binding as treaty law.[156] Treaties to which the United States is not party remain relevant so far as they reflect customary law, and the bulk of the provisions of AP I are generally recognised, by the United States and others, as so doing.[157] Specifically, Article 75 of AP I – an elaboration of the principles set forth in Common Article 3 of the Geneva Conventions, which have been described by the International Court of Justice as 'beyond doubt' customary in nature,[158] – has itself been recognised as customary law in a report prepared for the US Chiefs of Staff.[159]

As described in Chapter 6, international humanitarian law does not apply merely on the zone of battle, nor within a state's own borders.[160] In the context of prisoners of war, the ICTY has noted that 'with respect to prisoners of war, the convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities'.[161] The key question is whether persons fall under the power or control of one of the parties to the conflict – in this case whether the Guantanamo detainees are under US control, which is clearly the case.[162]

Provided the detainees are held pursuant to an armed conflict, it does not matter to the application of IHL whether such persons are held in the territory of the United States, in Afghanistan, or elsewhere. The issues in dispute regarding the territorial or sovereign status of Guantanamo Bay are therefore irrelevant to IHL obligations.

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156 The Geneva Conventions have been ratified by the US and by Afghanistan on 2 August 1955 and 26 September 1956, respectively.

157 The United States has not ratified AP I, but it signed it on 12 December 1977. On AP I as customary law, *see* T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Oxford University Press, 1991), p. 67, suggesting that the US has accepted the bulk of AP I as customary law. On the current administration's acceptance of API as custom, *see* 'Fact Sheet: New Actions on Guantánamo and Detainee Policy', The White House, 7 March 2011, available at: http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy. The ICTY has noted that 'it is not controversial that major parts of both Protocols reflect customary law'. *Prosecutor* v. *Kordic and Cerkez*, Case No. IT-95-14/2-PT, Decision on the Joint Defence Motion to Dismiss the Amended Indictment, 2 March 1999, para. 30.

158 According to the International Court of Justice, Common Article 3 reflects customary international law applicable in all situations of conflict. *See Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, ICJ Reports 1986*, pp. 14 ff., para. 218.

159 Meron, *Human Rights and Humanitarian Norms*, p. 65, refers to a study of IHL prepared for the Joint Chiefs of Staff which states that Article 75 is one of the provisions of IHL that is 'already part of customary law.' *See also* Remarks of M. J. Matheson (Deputy Legal Adviser, US Department of State) at a panel on 'The United States Position on the Relation of Customary International Law to 1977 Protocols Additional to the 1949 Geneva Conventions' at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law, 2 (1987) *Amer. Uni. J. of Int'l Law and Policy* 415, 425-6.

160 *Tadic*, Jurisdiction Decision, para. 70.

161 *Ibid*., para. 68.

162 *See* ICRC Commentary to AP I, para. 2910.

8B.2 THE FRAMEWORK AND REACH OF INTERNATIONAL HUMAN RIGHTS LAW

Although neglected in much of the official discourse, the United States is also bound to observe both human rights treaties to which it is party[163] and customary international human rights law.[164] As a State Party to the International Covenant on Civil and Political Rights,[165] this treaty provides the clearest source of human rights obligations binding upon the United States, which is bound also by for example the CAT[166] and the American Declaration on the Rights and Duties of Man.[167] It has signed (but not ratified) the American Convention on Human Rights,[168] thereby expressing its willingness to act consistently with its provisions.[169]

States can derogate from certain treaty obligations, including under the ICCPR, on the basis that they face a 'public emergency threatening the life of [the] nation'.[170] However, the United States has not chosen to avail itself of this procedure in respect of Guantanamo. In principle, the ICCPR therefore remains binding in its entirety. In any event, permissible derogation is subject to certain conditions, as explained in Chapter 7, of relevance to the Guantanamo detainees.[171] First, even in case of a valid derogation, there can be no suspension of the core 'non-derogable' human rights. Treaties explicitly include freedom from torture or ill-treatment and retroactive application of criminal law for example in the non-derogable group, while it has become well estab-

163 International Convention on Civil and Political Rights (ICCPR), adopted 16 December 1966, entered into force 23 March 1976; UN Convention against Torture (CAT), adopted 10 December 1984, entered into force 26 June 1987.

164 *See, e.g.*, 'Situation of detainees at Guantánamo Bay', Report of the Chairperson of the Working Group on Arbitrary Detention, Ms Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr Paul Hunt, 15 February 2006, UN Doc E/CN.4/2006/120 (the 'UN mandate-holders' report'). *But see*, H. Koh, Speech at Annual Meeting of the American Society of International Law, 25 March 2010, available at: http://www.state.gov/s/l/releases/remarks/139119.htm. Koh discusses detentions under the 'law of 9/11', referring only to IHL and self-defence as relevant areas of law.

165 The ICCPR was ratified by the US on 8 September 1992.

166 The United States ratified the CAT on 21 October 1994.

167 American Declaration of the Rights and Duties of Man, OAS Res. XXX, adopted in 1948 by the Ninth International Conference of American States. It is also bound by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, 23 ILM 1027, but this is not developed, given the focus of the chapter.

168 The United States signed the ACHR on 1 June 1977.

169 Article 18, VCLT 1969 provides that signatory states must not defeat the object and purpose of the treaty.

170 *See, e.g.*, Article 4 ICCPR; Article 27 ACHR and Article 15 ECHR.

171 Chapter 7A32, including Human Rights Committee, General Comment No. 31.

lished that a core of fair trial rights, and procedural rights in detention, must also be respected at all times.[172] In short, most of the key rights at issue in Guantanamo relate to rights that apply even in situations of emergency.

Additional requirements for derogation set out in Chapter 7 would also have to be met, including that derogating measures be 'strictly required by the exigencies of the situation and proportionate to it.'[173] Finally, measures of derogation must not be contrary to other obligations,[174] and they must not be discriminatory. The latter is particularly germane in a context where US citizens arrested under similar circumstances to the Guantanamo detainees are not held on Guantanamo Bay, and are subject to a different legal regime – that allows for prompt access to a court – and are specifically excluded from being subject to trial by military commission contained in the Presidential Order.[175] In all of these circumstances, it is doubtful that the US could justify the violations of the rights in question on the grounds of derogation.

In addition to its treaty obligations, the United States is also bound by customary human rights law in respect of many of the rights in issue in relation to Guantanamo Bay detainees. Moreover, certain of the norms addressed, notably the prohibition of torture or ill treatment, or prolonged arbitrary detention, are generally recognised as *jus cogens* norms of international law.[176] No circumstances (and of course no derogation), could ever justify violating rights and obligations that have attained this status.[177]

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172 While an emergency will impact upon the rights to liberty and fair trial, it does not set them aside; *see e.g. Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87 of 30 January 1987, IACtHR, *Series A*, No. 8 (1987), para. 27: 'since not all ... rights and freedoms may be suspended even temporarily, it is imperative that "the judicial guarantees essential for (their) protection" remain in force.' See also e.g. Concluding observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add.93 (1998), para. 21: '... a State party may not depart from the requirement of effective judicial review of detention..' *See* Report of the Working Group on Arbitrary Detention (hereinafter 'Arbitrary Detention Report'), 26 December 2011, A/HRC/19/57, at 63(3); UN mandate-holders' report supra note 164, para 14.

173 *E.g.*, Article 4 ICCPR.

174 Derogating measures must also be consistent with other international obligations. *See* General Comment No. 31, supra note 171.

175 *See Hamdi* v. *Donald Rumsfeld*, 316 F.3d 450 (4th Cir. 2003). *See* E. Lichtblau, 'U.S., Bowing to Court, to free "Enemy Combatant"', *The New York Times*, 23 September 2004, available at: http://www.nytimes.com/2004/09/23/politics/23hamdi.html. On the differential treatment of other states nationals, *see* para. 8C.7, 'The International Response to the Guantanamo Detentions', below.

176 *See* Chapter 7A53. Arbitrary detention is often qualified as a *jus cogens* rule, *i.e.* as a rule belonging to that very restricted set of norms from which no derogation is ever admitted under international law. *See, e.g.*, Report WGAD, supra,para. 69. It is interesting to note that the authoritative *Restatement (Third) of the Foreign Relations Law of the United States* among the authorities that support the qualification of the prohibition of arbitrary detention as a *jus cogens* rule.

177 The nature of the obligations varies in time of conflict: what amounts to arbitrary detention in international law is different in armed conflict than in time of peace, as discussed below.

While Guantanamo is in many ways an exceptional and unprecedented flouting of international legality, it is in other ways not novel. The issues raised – torture through interrogation, detention rights, fair trial rights and trial by military commissions – are issues upon which international law is developed, and which human rights courts and bodies have had to interpret and apply in countless other cases arising in relation to terrorism since before 9/11 but with greater regularity since then. There is therefore an ample body of law from which to draw, supplemented by relevant non-binding international instruments,[178] that give more detailed expression and content to treaty provisions and reflect customary law.

As regards the geographic scope of IHRL, as discussed in Chapter 7 human rights obligations apply in respect of all persons in a state's territory or subject to its jurisdiction, which may extend beyond the borders of the state where it exercises its authority or *de facto* control abroad.[179] However the US official position is to deny that human rights law applies, in part on grounds that Guantanamo lies beyond its sovereign territory.[180] Both the territory of Guantanamo Bay, and its detainees, are within the exclusive *de facto* control of the United States. In respect of any of the approaches to the standards under IHRL set out in Chapter 7, whether on the basis of effective control of territory on which individuals are present or control by US agents over the individuals themselves, the Guantanamo detentions would meet the test whereby the US' obligations apply. The location of the detention centres on land that may not be United States 'sovereign' territory is therefore of no significance for IHRL.

Confirming this, the Inter-American Commission on Human Rights, in a request to the government of the United States to take certain 'precautionary measures' to protect the detainees, noted that:

> The determination of a state's responsibility for violations of the international human rights of a particular individual turns not on that individual's nationality or presence within a particular geographic area, but rather on whether, under the specific circumstances, that person fell within the state's authority and control.[181]

178 *E.g.* The Helsinki Declaration on Minimum Humanitarian Standards, 1990, on core human rights that must be preserved in every situation and at all times. GA Res. 43/173, 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', 9 December 1988, UN Doc. A/RES/43/173 (1988).

179 The apprehension and detention of suspects plainly constitutes exercising such authority abroad: s*ee* e.g. *Reinette* v. *France* (1989) 63 DR 189 and 7B2.1.

180 *See* US official position that these obligations do not apply to the Guantanamo detainees in e.g. letter dated 31 January 2006, addressed to the Office of the High Commissioner for Human Rights, by the Permanent Representative of the United States of America to the United Nations and Other International Organizations in Geneva, *ibid*, Annex 2, 43-4.

181 Inter-American Commission on Human Rights, *Precautionary Measures in Guantanamo Bay*, Cuba, 13 March 2002.

8B.3 STATUS OF DETAINEES

The US authorities categorise the detainees, collectively, as enemy combatants:

> The United States Government believes that individuals detained at Guantanamo are enemy combatants, captured in connection with an on-going armed conflict. They are held in that capacity under the control of US military authorities. Enemy combatants pose a serious threat to the United States and its coalition partners.[182]

Although the term has been used since the beginning of detentions at Guantanamo Bay it was defined by the US Department of Defense in an order in July 2004:

> An enemy combatant ... shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[183]

As discussed in Chapter 6, as a matter of international law, this 'enemy combatant' classification does not, however, denote the legal status of prisoners.[184] In armed conflict, the particular status of persons captured by a party to the conflict, and the corresponding rights to which they are entitled, is determined by IHL. Detainees are either wounded, sick or shipwrecked armed forces (protected by the First or Second Geneva Conventions), prisoners of war (protected by the Third Geneva Convention) or civilians (protected by the Fourth Geneva Convention).

All persons subject to detention have some status under IHL. This general principle is embodied in all four Geneva Conventions, described by the authoritative ICRC Commentary on the Fourth Geneva Convention thus:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.[185]

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182 Letter from the First Secretary at the US Embassy in London to solicitors acting for the claimants in the *Abbasi* case, supra note 5, 2 July 2002, in Skeleton Argument of the Claimants, para. 6, on file with author.

183 Combatant Status Review Tribunals Order of the Deputy Secretary of Defense of 7 July 2004, available at: http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

184 'Enemy combatants' may cover privileged combatants, entitled to POW status, or other fighters who have the legal status of civilians, as discussed below and in 6A.2.1.

185 ICRC Commentary to GC IV, p. 51.

Moreover, as will be seen, residual provisions of IHL also ensure by way of safeguard that any person not afforded greater protection – under provisions applicable to the above categories of detainees – remains subject to basic minimal protections under IHL.[186]

The detainees have been described, on many occasions, as 'unlawful combatants'. While this term is not an international legal one either, and does not denote the status of persons under IHL as described above, it has some legal significance which is better captured by the alternative term 'unprivileged combatant'. Under IHL,[187] certain persons enjoy what is known as 'combatant's privilege' which entitles them to engage in hostilities and protects them from prosecution for the mere fact of participation. As opposed to these 'legal' combatants who enjoy immunity from prosecution for mere participation in hostilities, other persons who take a direct part in hostilities may be criminally prosecuted for doing so.[188] Once captured, however, such persons remain entitled to the protection of IHL as 'civilians', or at a minimum to the above-mentioned residual protection under IHL, as discussed further below.

8B.3.1 Entitlement to POW status

Early on in the life of the Guantanamo camp, one of the questions that provoked much controversy was whether detainees were entitled to POW status. Under IHL, 'combatant's privilege', mentioned above, entails three important consequences.[189] First, the privileged combatant is allowed to conduct hostilities and as such cannot be prosecuted for bearing arms or attacking enemy targets, unless the conduct amounts to a war crime.[190] Second, he or she is a legitimate target to the opposing forces. Third, in the event of capture, such combatants are afforded POW status, and a range of rights that go beyond the basic protections provided for in IHL or the core non-derogable IHRL rights.[191]

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186 This may arise because they fail to satisfy the nationality requirements of GC IV. *See* para. 8B.3.2 on civilians, below.

187 See eg Chapter 6A2.1 and 6B1.

188 *See* 'POWs', para. 8B.3.1, below. While IHL does not expressly prohibit persons from taking part in hostilities, they do not have the 'privilege' of not being prosecuted for doing so.

189 The distinction between privileged and unprivileged combatants is reflected in the US Supreme Court's distinction between lawful and unlawful combatants in the decision *ex parte Quirin* (1942) 317 US 1 at 30-1.*See* Chapter 6B.2.1 'enemy combatants'.

190 Privileged or lawful combatants are subject to capture and detention as prisoners of war, and can be prosecuted only for serious crimes such as war crimes or crimes against humanity, whereas unprivileged or unlawful combatants can, in addition, be subject to trial and punishment 'by military tribunals for acts which render their belligerency unlawful'. Letter from the US Embassy in London in *Abbasi*, supra note 5, n. 109.

191 These include the right to be 'protected, particularly against acts of violence or intimidation and against insults and public curiosity' (Article 13 GC III), to 'complete latitude in the exercise of their religious duties, including attendance at the service of their faith' (Article

The group of persons entitled to combatant's privilege, and in the event of capture to prisoner of war status, is defined in GC III, Article 4(A). Principally, these include members of the armed forces of another party, though it also includes irregulars such as members of militia or volunteer corps that fight alongside a party to the conflict, provided they satisfy four conditions: being 'commanded by a person responsible for his subordinates; having a fixed distinctive sign recognisable at a distance; carrying arms openly; and conducting operations in accordance with the laws and customs of war.'

POW status is therefore automatically due to persons who fought in the armed forces of a state – in this case as members of the Taleban armed forces. The fact that the government was not the recognised representative of the State is not relevant for present purposes, as the Taleban undoubtedly were the *de facto* government and the *de facto* armed forces of the state of Afghanistan.[192] Some of the individuals designated 'enemy combatants' by the US, which includes the Taleban, may therefore be POWs.

However, although the US recognised that the Third Geneva Convention could, in principle, apply to the members of the Taleban army,[193] it justified the continued denial of POW status across all detainees on the basis that 'Taleban combatants have not effectively distinguished themselves from the civilian population of Afghanistan' and that they are 'allied' with a terrorist group.[194] However, these criteria, set forth by Article 4 of the Third Geneva Convention, apply to irregulars that fight alongside a party to the conflict and not to the armed forces of a party to the conflict itself. The fact that armed forces may, for example, have been 'armed militants that oppressed and terrorized the people of Afghanistan', or that they did not conduct operations in accordance with the laws of war does not affect their entitlement to POW status.

The position is different as regards other 'irregulars', including al-Qaeda fighters, whose entitlement to POW status depends on their meeting the four-

34 GC III), and to be treated with due respect for rank and age, to be allowed to send and receive communications, and to keep personal property and effects (Article 18 GC III).

192 No party to the conflict denies that the Taleban were the *de facto* government of Afghanistan given that they controlled 90 per cent of the State's territory prior to the conflict.

193 'Afghanistan is a party to the Geneva Convention. Although the United States does not recognize the Taliban as a legitimate Afghani government, the President determined that the Taliban members are covered under the treaty because Afghanistan is a party to the Convention'. *See* 'Statement by the Press Secretary on the Geneva Convention', 7 May 2003, transcript available at: http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html.

194 White House Press Secretary, after having recognised the potential applicability of GC III to members of the Taleban, decided that Taliban detainees are not entitled to POW status as they failed to satisfy the 'four conditions' of Art 4 GCIII intended to determine the status of irregulars fighting alongside a party. *See also* 'Decision re application of the Geneva Convention on Prisoners of War to the conflict with Al Qaeda and the Taleban', White House, 25 January 2002, p. 3, available at: http://pegc.no-ip.info/archive/White_memo_20020125.pdf. *See ibid*.

part test in Article 4(A). With respect to those who were considered members of al-Qaeda fighting alongside the Taleban, US authorities justify the decision not to recognise them as POWs on the basis that, since 'al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention ... , its members ... are not covered by the Geneva Convention'.[195] It is a question of fact, but must be seriously doubted, whether those detainees who were considered members of al-Qaeda and not Taleban forces would meet the four-part test, by being distinguishable from the civilian population, and being capable of conducting military operations in accordance with IHL (as distinct from the question whether they have committed violations).[196] While Taleban fighters would then appear to be entitled to POW status,[197] other detainees most probably would not. As noted further below, any doubt as regards entitlement to POW status should be resolved by a competent tribunal.[198]

8B.3.2 'Civilian' detainees

If not treated as POWs, the detainees must be protected as civilians, 'who, at a given moment and in any given manner whatsoever, find themselves in case of conflict or occupation, in the hands of a Party to the conflict ... of which they are not nationals'.[199] Such persons are protected by the Fourth Geneva Convention. Following the position adopted by the authoritative ICRC Commentary to the Fourth Geneva Convention,[200] the ICTY has noted:

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195 *Ibid.*

196 It is insufficient for the detaining power to note that violations of the laws and customs of war have occurred – an allegation routinely made by one side against the other in the context of conflict.

197 *See* A. Neier, 'The Military Tribunals on Trial', *New York Review of Books*, at http://www.nybooks.com/articles/15122. Neier argues that '[i]n Afghanistan, neither Taleban fighters nor members of the Northern Alliance have worn uniforms. Therefore the requirement of a "fixed distinctive sign" can't be met literally; but since most of these combatants were not attempting to disguise themselves as civilians pretending to be other than what they were, the lack of uniforms should not prevent those captured in combat from being recognised as prisoners of war.'

198 *See* Article 5(2) GC III on the independent tribunal that must be established in case of doubt. *See also* 'determining status' below on the US refusal to concede that there was even any 'doubt' in this respect.

199 Article 4 GC IV.

200 *See* ICRC Commentary to GC IV, p. 51: 'Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.'

> there is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war or of the First or Second Convention, he or she necessarily falls within the ambit of [the Fourth Convention], provided that its Article 4 requirements are satisfied.[201]

The question arises whether persons who have taken up arms and fought with the opposing party in Afghanistan, as unprivileged or unlawful combatants, should still be entitled to civilian status upon capture. Such persons certainly lose their status as protected civilians for the purpose of conduct of hostilities law and can legitimately be targeted for as long as they take up arms.[202] However, once captured, they have 'civilian' status, and are entitled to the protections afforded to that category of detainees. The ICRC Commentary thus explicitly notes that resistance fighters, for example, who do not fall within the GC III, Article 4 criteria required for POW status, are entitled to be treated as civilians under GC IV.[203] Other commentators likewise note that unprivileged combatants are entitled to be treated as civilians upon capture, and afforded the procedural and substantive protections of GC IV.[204]

Unlike POWs, who were privileged combatants entitled to fight, those who took up arms without meeting the criteria for privileged combatant can be prosecuted for their belligerent acts.[205] They must, however, in this respect as in others, be afforded the protections of GC IV which include due process rights, discussed below. As the ICRC Commentary notes, the fact that persons may be entitled to protection as civilians 'does not mean that they cannot be punished for their acts, but the trial and sentence must take place in accordance with the provisions [on due process] of Article 64 and those that follow it.'[206]

While GC IV appears on its face to exclude 'nationals' of co-belligerent states and neutral states,[207] the ICTY Appeals Chamber has determined that, rather than imposing a strict nationality test, GC IV should be understood to protect persons 'who do not have the nationality of the belligerent in whose hands they find themselves'.[208] To the extent that persons held at Guantanamo were

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201 *Prosecutor* v. *Delalic et al.*, Case IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, para. 271.

202 *See* Chapter 6A.2.1.2 'Direct Participation in Hostilities'.

203 ICRC Commentary to GC IV, pp. 50 ff.

204 W.T. Mallison and S.V. Mallison, 'The Juridical Status of Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts', 42 (1978) *Law and Contemporary Problems* 4 at 5.

205 Some commentators refer to a duty to prosecute : *see, e.g.*, L. Vierucci, 'What judicial treatment for the Guantanamo detainees', 3 (2002) *German Law Review*, available at: http://www.germanlawjournal.com/article.php?id=190.

206 ICRC Commentary to GC IV, p. 50, and Article 126 GC IV.

207 Article 4 GC IV.

208 *See also* ICTY Appeals Chamber, *Prosecutor* v. *Delalic et al.*, Case No. IT-96-21-A, Judgment, 20 February 2001, para. 56, citing *Tadic* Appeal Judgment, para. 164, 73. *Prosecutor* v. *Dusko Tadic*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999 (hereinafter '*Tadic* Appeal Judgment'), para. 165: 'already in 1949 the legal bond of nationality was not

arrested for their allegiance, or perceived allegiance, to 'enemy' forces, and are not US nationals, they fall into the group that GC IV was intended to protect.

8B.3.3 Persons not covered by GC III or GC IV

If any of the detainees are for any reason deemed excluded from both categories protected by GC III and GC IV,[209] they are nonetheless protected by customary IHL, binding on the United States. As noted, Common Article 3 to the Geneva Conventions and Article 75 of the First Additional Protocol to the Four Geneva Conventions, 1977 (AP I) are binding in this context as customary law and provide a minimal level of protection for all persons falling into the hands of a party to the conflict.[210]

Common Article 3, which protects persons taking no part in hostilities (including persons who once did but who are *hors de combat* or have otherwise laid down their arms), articulates the core principles that are elaborated upon throughout the Geneva Conventions, and as such has been described as a 'convention in miniature'.[211] It provides a 'compulsory minimum'[212] and has been referred to by the Appeals Chamber of ICTY as the 'quintessence of the humanitarian rules found in the Geneva Conventions as a whole'.[213] It guarantees humane treatment, but also protects against, *inter alia*, 'the carrying out of sentences without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples'.

Article 75 of Additional Protocol I, entitled 'Fundamental Guarantees', applies to persons 'who do not benefit from any greater protections'. It is applicable to persons 'who are arrested, detained or interned for reasons related to the armed conflict ... until their final release, repatriation or re-establishment, even after the end of the armed conflict'.[214] As the authoritative ICRC Commentary to Additional Protocol I notes: 'there can be no doubt that Article 75 represents a *minimum* standard which does not allow for any

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regarded as crucial ... the lack of allegiance to a State ... was regarded as more important than the formal link of nationality'. The tribunal's caution – that 'an approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts' (*ibid*., para. 166) – has resonance in this context.

209 If, e.g., the nationality/allegiance requirements of GC IV were considered not met, an individual unprivileged combatant may be deemed not to fall under either GC III or GC IV. See, however, 'Civilian Detainees' above.

210 On the customary character of Common article 3 and some of the provisions of AP I, see above.

211 *See, e.g*., ICRC Commentary to CG IV, Commentary to Common Article 3, p. 48.

212 The ICRC refers to it as a minimum and an 'invitation to exceed the minimum'. *Ibid*., p. 52.

213 *Prosecutor* v. *Delalic et al*., Case No. IT-96-21-A, Judgment, 20 February 2001, para. 143.

214 *See* Article 75(1) and (6), reinforced by Article 45 AP I.

exceptions'.[215] Article 75 includes a number of safeguards specifically directed towards ensuring that detention is governed by a framework of legality, and maintaining basic due process rights, as discussed below in relation specific rights. This provision represents the most basic level of protection under IHL due to any human being detained for any reason related to the conflict.

8B.3.4 Determining Detainees 'Status' and Implications?

As discussed above, determining the status of the detainees is a process upon which the application of the correct framework of legal protection of rights depends. Status determinations are *legal* questions to be determined according to the rules of international law. Contrary to the approach manifest in relation to Guantanamo detainees, the decision to afford particular status to prisoners is not itself a matter for executive, or military, discretion: there can, of course, be no discretion to go beyond or discard the law.[216]

These determinations of status (and closely related to it, the lawfulness of detention addressed below) must be made on an *individual* case-by-case basis. As the Inter-American Commission on Human Rights emphasised, in a letter to the United States government concerning the Guantanamo detainees:

> the importance of ensuring the availability of *effective and fair mechanisms* for determining the status of individuals falling under the authority and control of a state, as it is upon the determination of this status that the rights and protections under domestic and international law to which those persons may be entitled depend.

The Commission therefore requested that the United States "take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent Tribunal."

The requirement of 'fair and effective mechanisms' to determine fundamental questions that affect individual rights is reflected throughout human rights law,[217] and manifest in IHL.[218] Of particular note in the Guantanamo context is Article 5 GC III, which provides that in case of doubt as to whether detainees might be entitled to be treated as POWs, the matter must be deter-

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215 ICRC Commentary on AP I, para. 3032 (emphasis added).

216 *See* above for a statement by the US President that 'to the extent appropriate and consistent with military necessity' the detainees would be treated 'in a manner consistent with the principles of the Geneva Conventions of 1949'. Letter to the Speaker of the House of Representatives and the President of the Senate, 20 September 2002.

217 The Commission referred to 'numerous international instruments, including Article XVIII of the American Declaration' by which the United States is bound. *See* judicial oversight, below.

218 *See* e.g. Art 5GCIII, and Arts 46 and 78 GC IV.

mined by a 'competent tribunal'. This customary principle of international law[219] has been long recognised by United States officials,[220] as well as in United States military regulations[221] and practice.[222] Yet the US position was to deny that there was any 'doubt' as to the status of detainees or the question whether any of them have been wrongfully denied POW status. Somewhat paradoxically, it supported this proposition on the basis that 'the President's determination that Taleban detainees do not qualify as POWs is conclusive ... and removes any doubt that would trigger the application of the Convention's tribunal requirement'.[223] As with any legal standard, the existence of doubt must be assessed with a degree of objectivity and not according to the exclusive determination of the potentially affected power.[224]

The widespread debate and speculation around status,[225] and conflicting views even from within the US administration itself as to POW entitlement, leaves little doubt about one thing and that it that there was, indeed, 'doubt' as to the correct status of certain detainees, which should have been resolved by a 'tribunal' in accordance with the Third Geneva Convention.[226]

While Article 5 relates only to determinations regarding prisoner of war status, it may be seen, not as a provision in a vacuum, but as a manifestation of a general principle that fair mechanisms are essential if the rights contained

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219 Most of the provisions of GC III are considered to be reflective of customary international law. *See* ICJ, Advisory Opinion on *Nuclear Weapons*, paras. 79, 82. *See also* R. Baxter, 'Multilateral Treaties as Evidence of Customary International Law', 41 (1965-66) BYIL 275, at p. 286.

220 Matheson, 'United States Position on the Relation of Customary International Law', supra note 159, p. 1.

221 Joint Service Regulation on Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1 October 1997), Chapters 1-6 (a) and (b), in *Department of the Army, the Navy, the Air Force and the Marine Corps*, Washington DC (1997) at p. 2.

222 *See* Directive Number 20-5 of 15 March 1968, 'Inspections and Investigations – Prisoners of War – Determination of Eligibility', in C. Bevans (Assistant Legal Adviser, Department of State) and Sibler J (Office of the General Counsel, Department of Defense), *Contemporary Practice of the United States Relating to International Law*, 62 (1968) AJIL 754 at 768.

223 Argument of the United States government before the Supreme Court in *Hamdi* v. *Rumsfeld* (Case 03-6696), Supreme Court Certiorari to the United States Court of Appeals for the Fourth Circuit, 28 June 2004, referred to in the partially dissenting opinion of Souter J and Ginsburg J p. 12.

224 The official US view that the question of status is not susceptible to external oversight, is inconsistent with the Supreme Court's rejection of the idea that matters which are essentially 'military' are therefore beyond supervision: 'the allowable limits of military discretion and whether or not they have been overstepped in a particular case are judicial questions'. *Hamdi* v. *Rumsfeld*, supra note 175, at 28.

225 The Inter-American Commission has referred to 'well-known ... doubts ... as to the legal status of the detainees' in its *Request for Precautionary Measures in Guantanamo Bay, Cuba*, addressed to the Government of the United States of America on 13 March 2002.

226 IHL is not prescriptive as to the precise process to be followed in determining status. A 'tribunal' implies impartial determination and unilateral executive or military determination of status is insufficient. ICRC Commentary on AP I, Part III, Section II: Combatant and prisoner-of-war status, paras. 1745-6.

in IHL are to be given meaningful practical effect.[227] Indeed, the request from the Inter-American Commission suggested that objective mechanisms should be invoked where any dispute as to status arises.[228] The Guantanamo experience may illustrate the need to clarify when such tribunals for resolving doubt should be established and how to make them effective.

By contrast, the military review mechanisms outlined above, which allow individuals limited opportunity to challenge whether they fall within the 'enemy combatant' category, have never been mechanisms to determine their correct status under international law. As a result of the amorphous scope of the enemy combatant label, covering a range of persons, some entitled to POW status and others civilians, including some who may have committed crimes for which they should lawfully be detained and prosecuted, these processes are of little legal significance.

The determination of status is important, not least as it is linked to the legal basis for detention and applicable law with significant consequences for detainees.[229] However, as the foregoing demonstrates, basic rights relating to detention and fair trial apply to the Guantanamo detainees whether they are to be considered POWs, civilians or unlawful combatants not entitled to any greater protection under IHL. POW status, while undoubtedly significant in terms of the added protections that GC III affords to individuals, is not therefore essential to the protection of the basic rights in question, such as the right to know the reasons for one's arrest, to access counsel at an early stage of detention, to have recourse to judicial oversight of the detention and ultimately the right to a fair trial. In some ways, it is perhaps surprising then that the debate on affording POW status to the majority of the detainees was considered so significant, and from a US administration point of view so potentially problematic in light of the broader objectives of the war against terror.

This emphasis may have been influenced by fears as to the denial of POW status and enhanced vulnerability of US armed forces abroad. Another appeared to be the desire to preserve 'interrogation' rights in light of special rules of

227 *See* Articles 43 and 78 GC IV (the latter applying to detentions during occupation): decisions to detain civilians for imperative security reasons must be 'made according to a regular procedure'. Such procedure 'shall include the right of appeal for the parties concerned' and 'Appeals shall be decided with the least possible delay.'

228 The right to be heard by a competent impartial tribunal where one's rights are at stake is part of international human rights law. *See* Article 14, ICCPR, Article 8 American Declaration on the Rights and Duties of Man, Article 8 American Convention on Human Rights and Article 6 ECHR.

229 Notably, if denied POW status they may be prosecuted for mere participation as opposed to only for crimes under international law. They also lose their entitlement to the enhanced rights protections due to POWs under GC III which in some respects go beyond those guaranteed by IHRL.

interrogation under GCIII.[230] However, there is no prohibition on questioning POWs *per se* or seeking to secure information from them; the prohibition is on coercing a response, prohibited under IHL and IHRL for all detainees. The rules on repatriation were also discussed as potentially relevant and limiting to the US.[231] Article 118 of GC III provides that 'POWs shall be released and repatriated without delay after the cessation of active hostilities,' though this does not apply to persons charged with or convicted of a criminal offence.[232] As one commentator noted: 'if the captives are POWs, they must eventually be returned ... the Taleban fighters may be too dangerous ever to be released ... which ... commits the US to detaining them indefinitely'.[233] Concern about affording POW status may thus have revealed an insidious assumption that if GC III does not apply there is no legal framework to limit the power to detain indefinitely. Whether or not GC III applies, at a certain point hostilities, and any conflict that is a real conflict, will cease and reasons 'related to the conflict' that may justify detention under IHL, will also cease to exist.

In conclusion, the POW debate was in some ways a distraction. Considered through a legal lens, most detainees were probably not POWs, but they were nonetheless entitled to protections under IHL and IHRL. The denial of POW status was a first step towards a selective approach that invoked a war paradigm to displace human rights protections, without accepting the IHL protections that follow. It formed part of a process of putting the detainees beyond the protection of the law and the treatment of them beyond its restraint. The failure to think of the detainees as either criminal suspects or POWs has been described by someone involved in prisoner abuse as a significant step to the way captors saw, and ultimately treated, their captives.[234]

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230 According to GC III, POWs need only provide their name, date of birth, rank and serial number, and no 'form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatsoever'. Article 17.

231 The English Court of Appeal in the *Abbasi* cases described this assumption as follows: 'Furthermore, whereas in a conventional war prisoners of war have to be released at the end of hostilities, there is the possibility that, by denying the detainees captured during the war against terrorism the status of prisoners of war, their detention may be indefinite.' *Abbasi*, supra note 5.

232 Article 119 provides an explicit exception to the duty to repatriate in these circumstances where proceedings are pending, or where the detainee has been convicted and is serving a sentence.

233 M. Dorf, 'What is an "unlawful" combatant and why does it matter?', FindLaw Forum, 23 January 2002, available at: http://www.cnn.com/2002/LAW/01/columns/fl.dorf.combatants.01.23. *See also* J. Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force' (hereinafter 'Conflict Classification'), ICRC, in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press, 2012).

234 Quoted in Brody, 'The Road to Abu Ghraib', supra note 55.

8B.4 SPECIFIC RIGHTS OF DETAINEES UNDER IHL AND IHRL

The following section explores particular rights in relation to detention and fair trial owed to the detainees under applicable IHL and IHRL. It will consider the rights that correspond to particular categories of prisoners under IHL, as well as the minimal rules of IHL applicable to all prisoners held in relation to the conflict and IHRL applicable to all prisoners, and the extent to which these rights have been respected in relation to the Guantanamo detainees.

8B.4.1 Existence of a lawful basis for detention

In accordance with the rule of law, the liberty of individuals cannot be restricted other than on grounds – and in accordance with procedure – provided for in clear and accessible law. This 'principle of legality' is explicitly provided for in applicable human rights law,[235] but it is a fundamental principle that underpins any system of law, national or international.

This principle of legality applies no less in time of armed conflict than in time of peace, although the legal justifications for detention differ. During conflict, IHL permits, for example, the detention of combatants to preclude further participation in hostilities and, in extreme circumstances, the detention of civilians where imperative reasons of security so demand.[236] In time of conflict, the prohibition on 'arbitrary detention' in human rights must be understood by reference to these permissible grounds of detention in IHL.[237]

Outside armed conflict where IIHRL is the primary source of applicable[238] law, treaties do not generally specify permissible grounds for detention (with the exception of the ECtHR[239]), but instead they prohibit 'arbitrary detention.'[240] It is clear that arbitrariness connotes substantive as well as pro-

235 *See, e.g.*, Article 9(1) ICCPR. 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'. *See also* Article V, ADRDM.

236 Although these treaty provisions apply to IACs, the ICRC has suggested that the imperative reasons of security should provide a baseline standard for any detention in any type of conflict. Moreover, Additional Protocol II explicitly mentions internment. It is generally considered that a power to detain fighting forces and where reasons of security so require, even for NIAC. See ICRC institutional position, set out in J. Pejić, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87(858) International Review of the Red Cross 375, and Pejic, 'Conflict Classification', supra note 233.

237 *See* Chapter 6B2.4 on war of detentions and 7B3 on the interplay of IHRL and IHL..

238 Preventive detention is permissible under IHRL only exceptionally and for a limited duration, and where safeguards such as judicial oversight are respected. *See* Chapter 7A5.3. *See also* UN mandate-holders' report, supra note 164.

239 Under Art. 5 ECtHR, grounds for detention are set out, which include for example the commission of crime, deportation, education of a minor, and public health reasons, but notably not 'administrative' or so-called 'security' detention or 'intelligence gathering'.

240 Art. 9 ICCPR, like the ACHR, refers instead to 'arbitrary' deprivation of liberty.

cedural elements, and not just any 'ground' enshrined in domestic law will justify detention. It is well established that in time of conflict or of peace, detentions may be justified where persons have committed a crime for which they may be punished,[241] exceptionally upon reasonable and specific suspicion that the individual involved has committed an offence,[242] and on certain other grounds such as with a view to deportation, of less immediate relevance to the present situation.[243]

Less clarity and more controversy attend the permissibility of 'security,' 'preventive' or 'administrative' detention, as alleged in relation to the Guantanamo detainees.[244] The Working Group on Arbitrary detention for example, in the context of detention by the US on the war on terror, has held that such detention cannot be justified, absent a derogation under article 9.[245] Other bodies, while not specifically endorsing its lawfulness, seem to implicitly accept that in certain circumstances such administrative or security detention does happen, and focus on clarifying the requirements that it be exceptional, legally clear and subject to strict safeguards.[246] While differences of approach appear to surround the question whether preventative detention can ever be justified, what is clearer is that if it is permissible this is only in exceptional circumstances and subject to stringent safeguards, and could certainly never be justified in the long term still less indefinitely.[247] As regards the requisite

241 As noted above, unprivileged combatants can be prosecuted for involvement in hostilities whereas privileged combatants can be prosecuted only for war crimes.

242 'The "reasonableness" of the suspicion ... presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence... [T]he exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard ... is impaired.' *Fox, Campbell and Hartley* v. *the United Kingdom*, Appl. Nos. 12244/86; 12245/86; 12383/8), Judgment of 30 August 1990, Series A, No. 182, para. 32.

243 *See, e.g.*, detention pending deportation made explicit in Art. 5 ECHR and implicit in e.g. the prohibition on arbitrary detention in Art. 9 of the ICCPR. Transfer must however be in process and reasonably imminent to justify detention; where deportation is precluded or ruled out (see, e.g. 82.4 above in relation to those subject to the moratorium), such persons cannot be held indefinitely on the basis of possible future transfer.

244 Some assert that there is no such right, others that it is limited. The ECHR itemized grounds for detention do not include 'administrative' or 'security' detention, and any such detention would at a minimum require derogation. *See* N. S. Rodley, 'Detention as a Response to Terrorism', in Salinas de Frias, White and Samuel (eds.), Counter-terrorism: International Law and Practoce (Oxford: Oxford University Press, 2012).

245 *See* 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development', Working Group on Arbitrary Detention, 2 March 2010, UN Doc. A/HRC/13/30/Add.1, para. 33. This is in line with the ECHR approach. For a parallel case under the ECHR, see *A & Ors Derogation*, (2009) 49 EHRR 29, discussed in Chapter 11.

246 Human Rights Committee Concluding Observations USA, (2006) para 17(c), HR Council, Res 6/4 'Arbitrary Detention' (28 Sept 2007) UN Doc. A/HRC/Res/6/4 para 5 (e); *See* discussion in Rodley, supra note 244, p. 472-75.

247 *Ibid.*

safeguards, the Human Rights Committee has noted: 'if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions [of Article 9, ICCPR], 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)'.[248]

There must therefore be a lawful basis for detention, whether found in IHL or consistent with the framework set down in IHRL, and this must be determined in relation to each individual at the outset of detention and on an on-going basis. If at any point in the course of detention there is no clear legal basis for the detention of any individual,[249] then that detention is not governed by the principle of legality and is arbitrary. If persons have been detained *en masse*, absent individual assessments as to the existence of a lawful basis of detention as discussed below, this detention is necessarily arbitrary.

The US position has long been based on the status of the individuals as dangerous 'enemy combatants,' though as noted above this is not a legal classification established in international law. It has been asserted that: 'The law of war allows the United States – and any other country engaged in combat – to hold enemy combatants without charges or access to counsel for the duration of hostilities.[250] While it was suggested at an early stage that most were detainees from the Afghan conflict, other accounts (including former Pakistani President Musharref's memoirs), indicate that many were detained in Pakistan,[251] and it is known that others were detained much further afield and with less plausible connections to the Afghan conflict.[252] Moreover, as noted above, more than 90% of the detainees are not, on the government's own view, opposition 'fighters' at all. IHL may provide basis for some of the

248 Human Rights Committee, General Comment No. 8: Right to liberty and security of the person (Article 9) [1982], UN Doc. HRI/GEN/1/Rev.6 (2003) at 130, para. 4.

249 As noted in Chapter 6B.2.4, if persons are detained pursuant to an international armed conflict and that conflict then ceases, or becomes a non-international conflict, the original lawful basis for detention may no longer exist. Persons must be released unless there is another lawful basis for continued detention.

250 *See, e.g.*, 'Response of the United States of America dated 21 October 2005 to Inquiry of the UNHCR; *Abu Zubaydah* v *Lithuania and Poland* brief, Chapter 10: the US continues to assert the right to detain on broad unspecified law of war grounds. See above on the 48 detainees were identified for long term detention. Special Rapporteurs dated 8 August 2005, Pertaining to Detainees at Guantánamo Bay', p. 3, available at: http://www.asil.org/pdfs/ilib0603211.pdf.

251 *See* accounts by Rumsfeld and Musharaf, *In the Line of Fire*, in Stafford Smith, Federal Courts Reject Virtually All Habeas Petitions from Gitmo: Study, 14 May 2012. http://www.reprieve.org.uk/blog/2012_05_14_federal_courts_reject_hc_petitions_gtmo/.

252 Eg *Boumediene* and *Others*, Algerians detained in Bosnia. *See* Chapter 10 – many of the rendition victims picked up around the globe ended up in Guantanamo at some point on their journeys.

battlefield detainees but the generic and broad reaching 'war on terror' makes this more difficult to assess.[253]

Various explanations have been provided by the US authorities at various stages, justifying continued detention by reference to perceived threats,[254] or as in the task force review published in 2010, explaining that certain categories of individuals could not be transferred and could not be prosecuted.[255] But none of these reasons constitute a legal basis for detention. The determination that some of the detainees are still considered 'dangerous' provides a controversial basis per se for lawful detention, and one that likely depends on derogation, and which is certainly subject to the stringent requires of temporariness and procedural safeguards (below). While it could on one view have provided justification for some detentions around the time of 9/11, it is highly questionable to what extent the case for such preventative detention can be said to be necessary now.[256] Other justifications advanced at earlier stages, for example the CSRT's findings that 'factors' such as intelligence value might justify detention, lay still less claim to legitimacy and have no support under either IHL or IHRL. Despite the flexibility afforded under the ICCPR, possible preventive effect, the potential utility in solving other crimes, or other (unspecified) factors, cannot be reconciled with the constraints of the international legal framework highlighted above, including its emphasis on clear grounds for detention prescribed in law.

Finally, it is trite to note that once individuals are cleared for release following applicable national procedures, on the basis that none of the bases in national law apply, they must be released. The continued detention of many detainees months and years after their release has been ordered or authorised may well amount to arbitrary detention.

There would appear to have been a lawful basis for detaining at least some of the Guantanamo prisoners on the bases set out above, for example as regular combatants (Taleban) detained during a real armed conflict in Afghanistan (as opposed to the metaphorical 'war on terror'), as unlawful combatants charged with unlawful conduct of hostilities, or as persons detained on reasonable suspicion of having committed a crime, properly understood as such according to criminal law applicable at the relevant time, including war crimes or crimes against humanity. However, the lack of clarity as to the law pursuant to which they are held and its application to any individual, coupled with

253 The IHL justification does not last forever. *See* 'Repatriation', below.

254 See the PRB process discussed above, and previously the broader justifications under the 'Administrative Review Implementation Directive Issued', DoD News Release, 15 September 2004 which included intelligence value.

255 As noted above the reasons were various – ranging from lack of evidence to inadmissibility of evidence (which would appear to relate in some cases to the incidence of torture in the past).

256 The onus is on the state detaining on such exceptional grounds to show that each particular detention is strictly necessary and proportionate.

the lack of procedural oversight (discussed below), is an anathema to the fundamental principle that detention can be justified only when pursuant to clear and accessible law.

8B.4.2 Information on reasons for arrest and detention

It follows from the requirement that there be clear reasons for an arrest, provided in law, and from the duty to determine the prisoners' status, that information concerning these matters should be conveyed to the prisoners themselves. Only once this has happened can they assert the precise rights that correspond to them under international law. The right to such information is enshrined as one of the minimal standards of protection due to persons in the hands of the enemy under IHL and in human rights law.[257]

Article 75(3) of AP I provides that:

> Any person arrested, detained or interned for actions related to the armed conflict shall *be informed promptly, in a language he understands, of the reasons why these measures have been taken*. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.[258]

The right to be informed promptly of the reasons for detention under IHL thus applies to persons detained for any reason related to the conflict.

There is no precise time frame associated with the requirement of 'promptness', as account must be taken of all the circumstances including (for as long as relevant) military considerations arising out of the detention of persons in the zone of battle.[259] However, as the ICRC Commentary to the Additional Protocol itself makes clear, 'even in time of armed conflict, detaining a person for longer than, say, ten days, without informing the detainee of the reasons for his detention would be contrary to this paragraph' (Article 75(3)).

Under IHRL also, all detainees must be informed promptly of the reasons for their arrest and detention, as set forth in Article 9(2) of the ICCPR.[260]The

257 Article 9(2) ICCPR.

258 Emphasis added.

259 This requirement should be interpreted in the light of human rights law; see the flexibility afforded and limits to it in e.g. *Medvedyev &Ors v France 2010,* at 7B3 and below.

260 As with the IHL protection in Article 75(3), this applies to all detainees, not only those held pursuant to the suspected commission of a criminal offence. The Human Rights Committee has noted that 'if so-called preventive detention is used ... *information of the reasons must be given*'. Article 75(3), para. 2. *See* Human Rights Committee, General Comment No. 8: Right to liberty and security of the person (Article 9) [1982], UN Doc. HRI/GEN/1/Rev.6 (2003) at 130, para. 4. The Paris Standards, for example, include the right to know the reasons for the detention within seven days as a 'minimum right' of the detainee. The UN Body of Principles similarly includes this right, as one guaranteed to persons under

detainees therefore have a right to be informed of the reasons for their arrest under the minimum rules of IHL protection applicable to all persons and under human rights law.

In Guantanamo, neither individual detainees nor their families were informed of the reasons for their detention, beyond a general statement concerning enemy combatants and dangers to the national security of the United States or its allies. The US justified this approach on grounds of security, and enquiries seeking information were met with abrupt responses to this effect.[261] Although the Combatant Status Review Tribunals were thought to be a promising step at least in this respect, as they were described by the Department of Defense as providing the detainee with 'an opportunity to review unclassified information relating to the basis for his detention', in fact the information provided was so cursory and conclusory (e.g. that detention was 'based on the US Authorisation for the Use of Military Force and informed by the laws of war'[262]) as to be meaningless.[263] Likewise, the Task Force review that has identified a group of 48 detainees for continuing detention does not indicate to the individuals into which category they fall. The failure to provide basic information as to the legal basis and reasons for detention is another manifestation of the disregard for the obligations to provide prompt, timely and adequate information concerning reasons for detention.

8B.4.3 Judicial oversight of detention

IHRL enshrines the rights to be brought promptly before a court upon arrest and to challenge the lawfulness of arrest and continued detention. Under that body of law, judicial review of all forms of detention by a judicial body is guaranteed as a fundamental right in itself, and as a safeguard against violation of other rights. The Human Rights Committee has noted accordingly that procedural protections including 'judicial guarantees'[264] and the right to 'a

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any form of detention (Principle 10). *See also* UN mandate-holders' report, supra note 164.

261 *See, e.g.*, the letter from the United States Embassy in London to solicitors acting for Abbasi, supra note 31.

262 *See* Respondent's Memo Regarding the Government's Detention Authority Relative to Detainees held at Guantanamo Bay, available at: http://www.justice.gov/opa/documents/memo-re-det-auth.pdf. Annex 4: *Husayn v. Gates*, Case no. 1:08-cv-1360, Factual Return for Abu Zubaydah (ISN 10016) (29 July 2009), pp. 1-2. 'As described below, and based on the materials submitted with this Factual Return, Abu Zubaydah [eight lines redacted] Consequently, for these and other reasons, Zubaydah is lawfully subject to detention pursuant to the Authorisation for the Use of Military Force and the laws of war.'

263 For example, indications were that the detainee is held pursuant to 'laws of war detention'.

264 General Comment No. 29, paras. 11, 13 and 15.

remedy' in respect of violations,[265] remain effective notwithstanding serious security concerns or the existence of a national emergency.[266]

The jurisprudence of the European Court of Human Rights is instructive in this respect, given its experience in considering the compatibility of counter-terrorist measures with fundamental human rights standards under the European Convention on Human Rights (which for present purposes is substantively the same as the ICCPR).[267] With regard to promptness of judicial supervision, for example, the European Court of Human Rights has shown some flexibility in allowing longer lapses of time in extreme security situations than would otherwise be permissible. In this respect battlefield logistics and the need to transfer detainees from one location to another[268] may be compelling factors contributing to delay immediately following arrest, but presumably not to the on-going denial of judicial supervision several thousand miles away and several years later.

The flexibility of the human rights framework is subject to limits and premised on the satisfaction of certain conditions. First, the state has to demonstrate valid reasons as to why it cannot 'process' suspects any earlier. Second, the permissibility of extended periods without judicial oversight a) depends on the existence of other attendant safeguards absent in the present case, and b) has never been deemed permissible for such prolonged (still less indefinite) periods of detention as are involved in the present situation.[269] There is no precise formula for the length of time as all the circumstances must be taken into account, but the question is usually whether hours or days constitute an acceptable period within which detainees must be brought before a judge.[270]

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265 Article 2(3) ICCPR.

266 UNHRC General Comment No. 29, para. 14; UN Working Group on Arbitrary Detention, Dliberation 9 on arbitrary detention under customary law, A/HRC/22/44, 24 December 2012, para. 47; *Advisory Opinion on Judicial Guarantees in Situations of Emergency*, IACtHR..

267 On several occasions it has acknowledged that 'the investigation of terrorist offences undoubtedly presents the authorities with special problems,' and as noted below affords some flexibility in this respect. *Aksoy* v. *Turkey*, Appl. No. 21987/93, Judgment of 18 December 1996, ECtHR, *Reports* 1996-VI, para. 78.

268 In *Koster* v. *The Netherlands* (Appl. No. 12843/87), Judgment of 28 November 1991, ECtHR, *Series A*, No. 221, in light of the claim that military maneuvers prevented the detainee from being brought before a military court, the Court noted that some allowance should be made for the military context; however in the circumstances of that case five days was rejected as the military court could in fact have sat sooner, if necessary on Saturday or Sunday (para. 25). *See also* J. McBride, 'Study on the principles governing the application of the ECHR during armed conflicts and internal disturbances and tensions', *Council of Europe, Steering Committee for Human Rights CDDH), Committee of Experts for the Development of Human Rights (DH-DEV)*, DH-DEV (2003)001, para. 45; *Medvedyev v France*, 2010.

269 *See, e.g.*, *Chahal* v. *United Kingdom*, Appl. No. 22414/93, Judgment of 15 November 1996, ECtHR, *Reports* 1996-V, paras. 131, 132.

270 Twelve to fourteen days and for 4 days and 6 hours have been deemed excessive. *Aksoy* v. *Turkey*, supra note 267, para. 78. *See also Sakik and Others* v. *Turkey*, Appl. Nos. 23878/94-23883/94, Judgment of 26 November 1997, ECtHR, *Reports* 1997-VIII; *Brogan* v. *United Kingdom*, Appl. No. 11209/84, Judgment of 29 November 1988, ECtHR, *Series A*, No. 145.

Where states have derogated, and afforded other safeguards (including the essential right to access counsel, discussed below),[271] flexibility for a week has been permitted for example, but in another case terrorism concerns have been found not to justify holding individuals for 20 days without judicial intervention.[272]

With regard to the right to challenge the lawfulness of arrest, or the right of *habeas corpus*, as noted above human rights jurisprudence from national and international courts and bodies confirms straightforwardly that this is a fundamental right that must be respected at all times. The English Court of Appeals noted in relation to the Guantanamo detainees, 'the recognition of this basic protection in both English and American law long pre-dates the adoption of the same principle as a fundamental part of international human rights law'.[273] The UN Human Rights Committee has clarified that 'the principles of legality and the rule of law require that ... 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 the detention must not be diminished by a State party's decision to derogate from the Covenant'.[274] As the Committee noted, it is precisely in exceptional emergency situations that judicial supervision assumes greatest importance.[275] The Inter-American Court on Human Rights has recognised that *habeas corpus* is one of 'the judicial guarantees essential for the protection of [non-derogable] rights', and as such is itself non-derogable.[276]

Prompted in part by the war on terror, and in particular by Guantanamo as the flagship of arbitrary detention, the nature of the procedural rights of detainees have been underscored and clarified through standards setting and judicial practice.[277] This includes in relation to the judicial oversight of detention specifically, and the requirements of promptness, effectiveness and

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In one case seven days was found permissible. *Brannigan and McBride* v. *United Kingdom*, Appl. Nos. 14553/89; 14554/89, Judgment of 25 May 1993, ECtHR, *Series A*, No. 258, but there was a valid derogation in force. In *Medvedyev v France 2010*, the "wholly exceptional circumstances" and 'inevitability' of the delay in bringing persons detained on the high seas before a court meant that a 13 day delay before judicial supervision was not unreasonable (para 105).

271 *Brannigan*, supra note 270.

272 *Case of Sarikaya* v. *Turkey*, Appl. No. 36115/97, 22 April 2004. *Case of Yurttas* v. *Turkey*, Appl. Nos. 25143/94 and 27098/95, 27 May 2004.

273 *Abbasi*, supra note 7, para. 63.

274 General Comment No. 29, para. 16.

275 General Comment No. 29, above, note 70, para. 12. *See* Report of the Working Group on Arbitrary Detention supra.

276 IACtHR, *Habeas Corpus in Emergency Situations*, paras. 35-6. Report of the WGAD, ibid., at 63(3)(h).

277 *See e.g., Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law (Report of the Working Group on Arbitrary Detention, A/HRC/22/44 (24 December 2012).* The jurisprudence of all human rights bodies has addressed these issues in the terrorism context; see e.g. Chapter 11.

accessibility.[278] The fact that IHL also recognises the principle of independent oversight of essential questions concerning rights protection in conflict was discussed above, in the context of the right to have one's status determined by a competent tribunal and review of administrative detention.[279] IHL does not provide a right to access *judicial* review of lawfulness of detention, and so long as the individual is detained pursuant to an international armed conflict this right does not automatically arise. In non-international conflicts, the legal situation is controversial as discussed in Chapter 7.[280] On one view, the right to habeas corpus under IHRL continues to apply in such circumstances, where there is no overriding rule of IHL.[281] The ICRC has suggested that, at a minimum, review must be independent and effective in practice.[282] It is submitted that while genuine exigencies of conflict require a flexible approach to judicial review of detention, this must be limited, and persons should be subjected to judicial review when they are removed physically and temporally from the zone of conflict and it is possible to afford judicial oversight. In any event for the vast majority whose detention was not, or is no more, pursuant to a genuine armed conflict this right to habeas corpus clearly applies.

Where there is a right to challenge, the right must be rendered effective in practice, by adequate access by the detainee to information and evidence against him and legal support. The Guantanamo detainees were for many years expressly denied the right to challenge the lawfulness of detention. The Presidential Military Order authorising their detention specifically excluded the right to judicial challenge, declaring that 'the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal'.[283] With the seminal *Boumediene* case in 2008, referred to above, the US Supreme Court judgment provided

278 *Ibid.*, at para. 63(3).

279 *See* Article 5 GC III and Articles 42 and 78 GC IV. While the 'regular procedure' for handling decisions on administrative detention involves a right to be heard, this is not necessarily by a judicial body. However the duty of periodic review and the right to appeal must be to a court or independent administrative body; *see* Gasser, 'Protection of the Civilian Population', p. 289.

280 *See* Chapter 7B3.

281 *Ibid* on the difficult issues regarding inter-relationship that arise.

282 Pejic, describing the ICRC position, states that 'mounting an effective challenge will presuppose the fulfilment of several procedural and practical steps, including: i) providing internees with sufficient evidence supporting the allegations against them, ii) ensuring that procedures are in place to enable internees to seek and obtain additional evidence, and iii) making sure that internees understand the various stages of the internment review process and the process as a whole. Where internment review is administrative rather than judicial in nature, ensuring the requisite independence and impartiality of the review body will require particular attention. Internees should also benefit from expert legal assistance in the internment review process'. Pejic, 'Conflict Classification', supra note 233.

283 Presidential Military Order, supra note 130, Sec. 7(b)(i).

a critical reassertion of the detainees' rights to habeas corpus and some hope for detainees.[284]

However, many still await their habeas proceedings years, and now in some cases more than a decade, after their detention, bringing into sharp relief the discussion above as to whether the right must be afforded within days or weeks.[285] Moreover, while early habeas reviews showed careful judicial scrutiny, and a high level of findings that there was no basis for detention,[286] more recently questions have also arisen as to how 'meaningful' the review of lawfulness of detention has become, with Courts almost always deferring to the government or being overturned on appeal.[287] Some have questioned whether the promise that *Boumediene v. Bush* provided of 'meaningful' judicial review has been 'effectively negated'.[288] The Inter-American Commission on Human Rights (IACHR) recently noted that although Guantánamo detainees have a theoretical right to judicial review of their detention 'the US courts appear consistently to defer to the Executive in a manner that renders this right illusory'.[289]

8B.4.4 Prosecution – fair trial rights

This section highlights some of the fair trial rights to which the detainees are entitled and compares briefly these standards and the military commission procedures in operation in Guantanamo Bay.

As noted above, the legal status of a prisoner impacts on the legitimacy of prosecuting that detainee for crimes related to the conflict. Specifically, if detainees were formerly privileged combatants (entitled to be treated as POWs), they may not be prosecuted for acts of war, while those unprivileged combatants, who fought absent the right to do so, may. All categories of prisoner, however, may equally be prosecuted for the commission of international crimes such as war crimes or crimes against humanity.[290] GC III provides that any POW subject to judicial proceedings is entitled to a fair trial.[291] So seriously

284 *Boumediene*, supra note 16.
285 *Abu Zubaydah* v *Lithuania and Poland*, supra note 60.
286 By 2010, 57 cases (56%) were successful, then only 1 was cleared in more than the year thereafter: Seton Hall Habeas Report, supra note 106, p. 1; Smith, 'Federal Court Rejects Virtually all Habeas Petitions', supra 251.
287 Smith, 'Federal Court Rejects Virtually all Habeas Petitions', supra 251.
288 Seton Hall Habeas Report, supra note 106, p. 1.
289 Inter-American Commission on Human Rights, Resolution No. 2/11, Regarding the Situation of the Detainees at Guantánamo Bay (hereinafter 'IACHR Report'), United States, MC 259-02, 22 July 2011, available at: http://www.cidh.org/resolutions/Resolution%202-11%20Guantanamo.pdf.
290 Indeed international law recognises the obligation on states to prosecute for such egregious crimes. *See* Chapter 4.
291 *See* Articles 82-8 and 99-107 GC III.

are these rights taken that 'wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention' is a grave breach, which states parties are obliged to prosecute.[292]

For civilians who are subject to penal sanction, GC IV requires respect for the basic 'judicial guarantees generally recognised as indispensable'[293] and notes that 'the trial and sentence must take place in accordance with the provisions [on due process] of Article 64 and those that follow it'.[294] By way of minimum standard for any person not falling into the above categories, Article 75(4) AP I provides:

> (a) ... for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence.[295]

Basic due process rights are therefore provided for under IHL for all categories of detainee. The interpretation of certain of these rights, such as the content to be associated with the right to 'all necessary rights and means of defence' should be interpreted in the light of human rights law, which provides, in greater detail, the fair trial rights to be afforded to any person who may be subject to criminal proceedings.[296]

Under IHRL, the right to a fair trial contained in the Universal Declaration of Human Rights[297] was fleshed out in notable detail by Article 14 of the International Covenant on Civil and Political Rights. Certain aspects of the right – for example the right to a 'public' trial – are explicitly subject to restriction to the extent that genuine reasons of public security or protection of witnesses so require.[298] Others – such as the right to trial without 'undue delay' – enshrine an inherent flexibility that has regard to all circumstances,

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292 Article 130 GC IV.

293 Article 72 GC IV.

294 ICRC Commentary on GC IV, p. 50, and Article 126.

295 Common Article 3 further provides that persons taking no part in hostilities (including persons who once did but who are *hors de combat*, or have otherwise laid down their arms), are 'entitled to certain judicial guarantees generally recognised as indispensable'.

296 Fair trial has been recognised as one of the areas of substantive coherence between the two bodies of law where there is no conflict between IHL and IHRL and 'harmonious interpretation' is possible. Chapter 7B3.

297 Article 10 provides that '[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of ... any criminal charge against him'.

298 The ECtHR has found that security considerations do not justify a failure to hold a trial in public, particularly as measures can be taken to accommodate security concerns, such as preventing the identity of witnesses becoming known to the public. *See, e.g.*, *Doorson* v. *Netherlands*, ECtHR judgment of 26 March 1996 and *Van Mechelen* v. *Netherlands*, ECtHR judgment of 23 April 1997.

including peculiarities of armed conflict.[299] However, the 'principles of legality and the rule of law require that *fundamental requirements of fair trial* must be respected during a state of emergency,'[300] and 'minimum due process rights' are recognised to apply at all times.[301] A plethora of issues arise regarding the compatibility of the military commissions with the requirements of IHRL, a few of which are highlighted below.[302]

8B.4.4.1 Military commissions and the right to trial before an independent and impartial tribunal

Resort to military commissions to prosecute the Guantanamo detainees has, in and of itself, raised considerable controversy, on account of apparent inconsistency with various aspects of applicable IHL and IHRL.

A preliminary issue arises under IHL emerges from the rules governing prisoners of war. According to GC III, POWs 'can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of this present chapter have been applied'. The Military Order explicitly excludes US citizens from the jurisdictional reach of the Military Commissions, and US armed forces would be subject to the Uniform Code of Military Justice, which provides in some detail for the protection of rights denied to the detainees in the current situation.[303] As controversy surrounds the status of at least certain detainees, and they are entitled as a matter of law to be presumed POWs until their status has been determined by the requisite competent tribunal,[304] it would appear that recourse to such tribunals is a violation of the GC III obligations.

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299 'The difficulty in bringing someone to trial because of conflict and disturbance would be a legitimate consideration in assessing the reasonableness of the length of any pre-trial detention but there would still be a need to demonstrate that continued efforts were being made to hold the proceedings.' Council of Europe Expert Study, para. 45. However (as discussed above), the relevance of factors such as battlefield logistics have diminished, if not vanished, years and miles from the original zone of battle.

300 *See* General Comment No. 31, supra note 171.

301 *See, e.g., Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87 of 6 October 1987, IACtHR, *Series A*, No. 9 (1987); Joint mandate Holders report, above.

302 Many other concerns have arisen over time, not addressed here, such as the right to an appeal protected in IHRL but denied in the Military Commission's earlier Rules.

303 For a comparison of the procedural guarantees in the US Uniform Code of Military Justice and by the Rules for Court-Martials with those afforded to the defendants before the first round of Military Commission established after 9/11, *see* Human Rights Watch, 'Due Process Protections Afforded Defendants: A Comparison between the Proposed U.S. Military Commissions and U.S. General Courts-Martial', 17 December 2001, available at: http://www.hrw.org/press/2001/12/miltribchart1217.htm. The current procedure is monitored and analysed by ACLU, available at: www.aclu.org.

304 Article 5(2) GC III.

The question of more broad-reaching effect is whether the Commissions are 'competent independent and impartial tribunal[s] established by law', that meet the fair trial guarantees to which all prisoners are entitled. There are examples from across international practice of military commissions being found to lack the necessary independence from the executive branch and from the military.[305] Human rights bodies have consistently found the use of military courts to try civilians in Guatemala,[306] Peru,[307] Chile,[308] Uruguay,[309] Egypt,[310] and elsewhere to violate fundamental due process rights.[311] In other contexts the US itself has criticised the use of military courts on the basis that 'they do not ensure civilian defendants due process before an independent tribunal'.[312] In addition to concerns regarding the inappropriateness of special or military jurisdictions as such, are more specific ones regarding the 'special' procedures that almost inevitably flow from resort to special jurisdictions, to the detriment of fair trial rights.[313]

305 *Ibid*. *See, e.g.*, Art. 8 (1), American Convention on Human Rights. States are not to create '[t]ribunals that do not use the duly established procedures of the legal process ... to displace the jurisdiction belonging to the ordinary courts or judicial tribunals': *Castillo Petruzzi and others* v. *Peru*, Merits, Judgment of 30 May 1999, IACtHR, *Series C*, No. 52, paras. 130-1; *see also Öcalan* v. *Turkey*, Appl. No. 46221/99, ECtHR, Merits, Judgment of 12 March 2003, para. 114. Human Rights Committee: *see e.g.*, HRC General Comment 13; Concluding Observations of the Human Rights Committee: Uzbekistan, UN Doc. CCPR/CO/71/UZB (2001), para. 15. ECtHR: *Incal* v. *Turkey*, Appl. No. 825/1031 (1998); *Ocalan* v. *Turkey*. African Commission: *see EIPR and INTERIGHTS (on behalf of Sabbeh & Ors)* v. *Egypt*, ACHPR, No 334/06 (2012).

306 *See* Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in the Republic of Guatemala* (1983), OEA/Ser.L./V/II. 61, Doc. 47, at 96.

307 Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru* (2000), OEA/Ser.L/V/II.106, Doc. 59 rev; *see also Castillo Petruzzi and others* v. *Peru*, supra note 306.

308 *See* Comision Inter-Americana de Derechos Humanos; *Segundo Informe sobre la Situacion de los Derechos Humanos en Chile* (1976), OEA/Ser.L./V/II.37, Doc. 19.

309 *See* Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Uruguay* (1978), OEA/Ser.L./V/II.43, Doc. 19; *see also* Human Rights Committee, *Moriana Hernandez Valentini de Bazzano* v. *Uruguay* , Comm. No. 5/1977, Views of 15 August 1979, UN Doc. CCPR/C/7/D/5/1977.

310 *Sabbeh & Ors*, supra note 306.

311 *See generally* F.A. Guzman, *Fuero Militar y Derecho Internacional* (International Commission of Jurists, Bogotá, 2003).

312 *See, e.g.*, the criticism of the use of military tribunals contained in the report of the State Department on the human rights record of Peru. US Department of State, Bureau of Democracy, Human Rights, and Labor, *1999 Country Reports on Human Rights Practices*, 25 February 2000.

313 The Working Group on Arbitrary Detention for example has expressed concern that 'virtually none of them respects the guarantees of a fair trial'. UN Doc. E/N.4/1996/40, p. 107. *See also* HRC GC 13.

In the context of the Guantanamo detainees, various independent intergovernmental experts and bodies,[314] academic commentators[315] and NGOs[316] have expressed concern that use of military commissions jeopardises essential fair trial rights under human rights law. In the words of British law lord, Lord Steyn: 'The military will act as interrogators, prosecutors, defence counsel, judges, and when death sentences are imposed, as executioners', a situation he described as a 'monstrous failure of justice'.[317]

8B.4.4.2 Scope of Crimes Prosecuted

Some of the questions that have generated controversy relate not to the commissions or their process as such, but to the substantive scope of their jurisdiction. Consistent with the principle of legality, individuals can only be prosecuted for acts that constituted, at the time of their commission, crimes clearly defined in law.[318] The jurisdiction of the military commissions, by contrast, has been criticised for its breadth and uncertainty in several respects. Firstly, the Commissions are prosecuting 'war crimes', despite serious doubts as to the 'armed conflict' threshold having been met.[319] Moreover, the jurisdiction over 'material support for terrorism' provided for in the Military Commission Act 2006, despite such a crime not having formed part of international law at the time of the commission of the alleged offences, highlighted the additional questions regarding retroactivity of criminal law, as discussed in Chapter 4. On this basis, in 2012 US courts quashed an early military commission conviction for 'material support' on the basis that it did not amount to a war crime at the relevant time.[320]

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314 *See, e.g* UN mandate-holders' report, supra note 164; IACHR Report, supra note 290; Special Rapporteur on the independence of judges and lawyers, letter dated 16 November 2001 to the United States, available at: http://www.unog.ch/ unog01/files/002_media/f2_cmq.html.

315 *See* R. Goldman and D. Orentlicher, 'When Justice goes to War, Prosecuting Persons before Military Commissions', 25 *Harvard J. of Law and Pub. Policy* 653, 659, concluding that '[b]y their very nature, military commissions do not satisfy this basic test', at 659-60.

316 Reports and commentary have been issued by ACLU, CRR, HRW, AI, and Human Rights First.

317 Steyn, 'Guantanamo Bay: The Legal Black Hole', supra note 5.

318 *See, e.g.*, Art. 15 ICCPR and Chapter 7A.5.5.

319 *See* Chapter 6B.1.1. Even on the US expansive view of the global conflict, the Commission's jurisdiction has been criticised as 'overbroad' and as lowering the threshold of armed conflict to cover isolated incidents: *see* 'Trials Under Military Order', Human Rights First, updated August 2004, p. 2, available at: http://www.humanrightsfirst.org/wp-content/uploads/pdf/trials_under_order0604.pdf. Note also the potential scope of crimes such as 'aiding the enemy', charged in the case of Australian David Hicks. p.13.

320 The US Appeals Court found that '[t]here is no international-law proscription of material support for terrorism'. *Hamdan* v. *United States*, supra note 138, at 22.

8B.4.4.3 Right to Access Evidence and Present a Defence

The minimal IHL standard set out in Article 75(4) provides that an accused shall: '(a) ... to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence'.[321] The ICCPR provides for the right to 'have adequate time and facilities for the preparation of his defence …. to defend himself in person or through legal assistance … and to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.[322] One constant source of concern has been, perhaps unsurprisingly, the use of secret evidence and the very limited access by the accused to information and evidence against him. There can be little doubt that, as human rights courts have recognised, 'there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person'.[323] A key baseline question is however whether 'sufficient information' is available to enable the accused to know the nature of the evidence and to defend himself fully, and whether any prejudice is 'counterbalanced' by safeguards to ensure fair trial.[324]

The right of Guantanamo detainees to access 'relevant and material' evidence has been recognised by US courts in habeas proceedings.[325] Particular care is due in the context of criminal trials where the standards are higher than for certain other types of civil proceedings where secret evidence has been considered,[326] and all the more so where the death penalty is considered. Counsel engaged in the military commission process and comment-

321 Article 75(4).

322 Article 14, ICCPR.

323 *A & Ors Derogation*, supra note 245; *Botmeh and Alami* v. *the United Kingdom*, No. 15187/03, Judgment, 7 June 2007, sec. 37.

324 *See, e.g.*, 'The Use of Secret Evidence in Judicial Proceedings: A Comparative Survey' (hereinafter 'Oxford Study'), Research Paper prepared for the Joint Committee on Human Rights, October 2011, University of Oxford, available at: http://denning.law.ox.ac.uk/news/events_files/Secret_Evidence_JCHR_27_October_ 2011_final.pdf. An evaluation of sufficiency involves numerous factors, including the significance of the evidence to the accused's case: *Edwards and Lewis v. the United Kingdom* [GC], Nos. 39647/98 and 40461/98, §§ 46-48, ECHR 2004-X.

325 Eg *Al Odah* v. *United States*, 559 F.3d 539 (D.C. Cir. 2009).The Court found that individuals had the right to access 'relevant and material' secret evidence. The Court of Appeals left open the possibility that 'alternatives to disclosure' might 'effectively substitute for unredacted access.' *Ibid.*, at 547.

326 See discussion of e.g. UK closed material proceedings in Chapter 7B7.3.

ators criticise the extent of the government's reliance on secret evidence,[327] the lack of a right to full access to exculpatory evidence,[328] and the lack of resources enabling the accused to himself gather and present evidence in his defence.[329] Particular procedural requirements, such as seeking the prosecution's approval for the presentation of witnesses, are seen to belie respect for the 'equality of arms' principle.[330]

In addition, specific rules of evidence, while they have improved over time, continue to pose challenges to the right to fair trial. Notable among them is the admissibility in certain circumstances of coerced statements and evidence derived from cruel, inhumane, and degrading treatment.[331] A strident attack on the system by the Commissions' former chief prosecutor, who accused his superiors of pressing ahead with politically motivated trials, singled out the use of evidence obtained through torture as destroying the trials' credibility.[332] The reliance in legal proceedings of such evidence falls foul of the well-established prohibition, explicit in Article 15 of CAT and implicit in the prohibition against torture across international law, as discussed in Chapter 7.[333]

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327 Evidence may be shared with counsel but withheld from the accused: *see, e.g.*, *US* v. *Omar Khadr*, details available at: http://www.defense.gov/news/commissionsKhadr.html ; Oxford Study, supra note 325; A. Worthington, The Guantanamo Files: Stories of the 774 Detainees in America's Illegal Prison (Ann Arbor: Pluto Press, 2007).

328 *See* 'Fact Sheet: Military Commissions' CCR, available at: http://ccrjustice.org/learn-more/faqs/factsheet:-military-commissions.

329 *Ibid*.

330 *Ibid*. '[T]he prosecutor can unilaterally veto a defense attorney's decision to call a witness. A defense lawyer who wishes to summon a witness must first get the prosecutor's consent. If the prosecutor says no, the lawyer must argue its merits with the prosecutor in front of the judge. This unfair allocation of power between prosecution and defense directly violates an essential fair trial principle, known as "equality of arms", and locks in a prosecutorial advantage that undercuts a vigorous and effective defense.' R. Dicker, 'Guantánamo's perversion of justice,' *The Guardian*, 3 September 2012, available at: http://www.guardian.co.uk/commentisfree/2012/sep/03/guantanamo-perversion-justice.

331 Such evidence can be admitted if 'use of such evidence would otherwise be consistent with the interests of justice'. 2010 Manual for Military Commissions, supra note 140, Rule 304 (a)(5)(A)(ii).

332 Col. Morris Davis, 'Guantánamo Exclusive: Former Chief Prosecutor, Ex-Prisoner Call on Obama to Close Prison', *Democracy Now*, 10 January 2012, available at: http://www.democracynow.org/2012/1/10/guantnamo_exclusive_former_prisoner_chief_prosecutor[sic].

333 Evidence obtained through torture or inhuman treatment is inadmissible in all circumstances. Whereas, for example, evidence obtained in breach of other rights to respect for private life under Article 8 may still be used in a prosecution so long as, in all the circumstances, this would not make the trial unfair. *See e.g.*, *Singharasa* v. *Sri Lanka*, Communication No. 1033/2001, Human Rights Committee, Views of 23/08/2004, UN Doc. CCPR/C/81/D/1033/2001; *A & Ors*, supra note 245; *Sabbeh & Ors*, supra note 306.

8B.4.4.4 Access to Counsel

The assistance of a defence lawyer is a primary means of ensuring the protection of the fundamental rights of people suspected or accused of criminal offences, protected both under IHL and IHRL. IHL provides, explicitly and implicitly, for access to counsel for persons suspected of having committed a criminal offence, irrespective of their status as POWs, civilians or persons entitled to the basic minima of human rights protection. The detailed rights afforded to POWs under GC III include the right to legal representation.[334] Likewise, among the due process rights afforded to civilians protected by GC IV is the right 'to be *assisted by a qualified advocate or counsel* of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence'.[335]The ICRC Commentary to AP I notes that the right in Art 75(4) API to 'all necessary means of defence' must be interpreted to include the right to communicate with a 'qualified defence lawyer'.[336] The right to 'all necessary rights and means of defence' provision explicitly applies 'before and during ... trial', and should be interpreted in the light of human rights law which, as explained below, includes access to counsel from the early stages of detention as one of the core protections against abuse and arbitrariness.

The right to consult counsel is explicit in the fair trial provisions of Article 14(d) ICCPR. The Human Rights Committee, like other human rights courts and bodies applying other international instruments, has recognized that the right operates from the earliest stages of detention and is a particularly important at the time of interrogation.[337] The right under human rights law, reflected in some of the IHL provisions, is to counsel of choice,[338] safeguarding the essential relationship of trust between lawyer and client. There is no objection in principle to restrictions requiring for example security clearance for lawyers providing advice and representation, provided their independence

334 Article 84 GC III.

335 Article 72 GC IV.

336 '[H]e must be able to understand the assistance given by a qualified defence lawyer. If these conditions were not fulfilled, the defendant would not have the benefit of all necessary rights of defence.' ICRC Commentary on AP I, para. 3096.

337 The Human Rights Committee has stated that 'all persons who are arrested must immediately have access to counsel'. *See* Concluding observations of the Human Rights Committee: Georgia, UN Doc. CCPR/C/79/Add.74 (1997), para. 28; *Brannigan*, supra note 270, paras. 62, 64 (notwithstanding the declared state of emergency in that case); *Sabbeh & Ors*, supra note 306. Article 5. *Paris Standards* Principle 11. *UN Body of Principles.*

338 Article 14(3)(d) ICCPR. *See also* Principle 1 of the Basic Principles on the Role of Lawyers; Article 8(2)(d) of the ACHR; Article 6(3)(c) of the ECHR; Article 7(1)(c) of the ACHPR, Article 21(4)(d) of the ICTY Statute; Article 20(4)(d) of the ICTR Statute, Article 67(1)(d) of the ICC Statute. Under IHL, the right to choose one's defence lawyer is guaranteed by Article 105 GC III.

is not compromised and the right to a lawyer of choice is not entirely undermined, for example by exclusive use of lawyers from the armed forces.[339]

The determination to deny access to counsel was apparent from the outset and integral to the decision to house detainees in Guantanamo. The Guantanamo experience testifies to the importance of such access, as a safeguard against torture and exorbitant public allegations, such as those levelled against 'high value detainees'[340] but dropped once detainees had access to counsel and were able to challenge.[341]

There has been little or no right to consult or be represented by a lawyer as part of the 'review mechanisms' at Guantanamo..[342] While there is access to counsel for habeas proceedings and the military commission trials,[343] the government has sought to restrict access to counsel in 2012, arguing that once habeas petitions are filed, it should control subsequent access to counsel.[344]

The effective implementation of the right to consult counsel requires that counsel can 'communicate with the accused in conditions giving full respect

339 *See Chahal* v. *United Kingdom*, supra note 269, p. 3.

340 *See, e.g.*, the case of Abu Zubaydah publicly proclaimed by President Bush and others to be in al Qaeda's 'top three'. President Bush, 'Remarks by the President at Thaddeus McCotter for Congress Dinner' 14 October 2002, available at: http://georgewbush-whitehouse.archives.gov/news/releases/ 2002/10/20021014-3.html ; President Bush, 'Remarks by the President at Connecticut Republican Committee Luncheon' 9 April 2002, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2002/04/20020409-8.html ; President Bush, 'Remarks by the President in Address to the Nation' 6 June 2002, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020606-8.html (describing him as 'al Qaeda's chief of operations'). *See, e.g.*, S. Benen, 'Another Al Qaeda Number 3', Guest Posting, *The Washington Monthly*, 31 January 2008, available at: http://www.washingtonmonthly.com/archives/individual/2008_01/013025.php.

341 When he obtained access to lawyers and prepared to challenge his detention, after more than 6 years of incommunicado detention, these allegations were withdrawn. The U.S. no longer alleges he was a member of al Qaeda, Osama bin Laden's senior lieutenant, or had any role in any al Qaeda operation – including 9/11. Annex 3: Respondent's Memorandum of Points and Authorities in Opposition to Petitioner's Motion for Discovery and Petitioner's Motion for Sanctions, *Husayn v. Gates*, (D.D.C. Oct. 27, 2009) (No. 08-1360). *See also Zubaydah* v *Lithuania*, supra note 60.

342 See Chapter 8A2 supra. *See, e.g.*, B. Mears, 'Military limiting Guantanamo detainee access to lawyers', 7 August 2012, available at: http://security.blogs.cnn.com/2012/08/07/military-limiting-guantanamo-detainee-access-to-lawyers. 'Executive Order 13,567 does not provide detainees who undergo PRB review with a judicially enforceable right to counsel, or any justification for asking the Court to impose a counsel-access regime on the PRB process other than the one developed, per the Order's direction, by the Secretary of Defense'.

343 The rules of procedure provide that every accused shall be assigned a defence counsel, chosen by the Chief Defense Officer among the Judges Advocate of the United States Armed Forces. *See* Military Commission Instruction No. 4, 'Responsibilities of the Chief Defense Counsel, Deputy Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel', Department of Defense, 15 April 2004, Sec. 3, available at: http://www.mc.mil/Portals/0/milcominstno4.pdf.

344 *Ibid.*

for the confidentiality of their communications'.[345] Confidential consultation with his or her defence lawyers is as an essential aspect of the right of every defendant and integral to the preparation of a defence.[346] Yet Military Commission Order No. 3 of 5 February 2004 provided explicitly for the regulation and monitoring of lawyer-client communications.[347] Persistent concerns have since been expressed by attorneys before the military commissions as to the lack of confidentiality of lawyer-client communications, with a senior military defence lawyer reportedly stating that attorneys were 'ethically obliged' not to follow the rules.[348]

8B.4.4.5 Transparency and Public Trial

The right to a public trial is protected in human rights law, though it is not an absolute right and the right to close proceedings temporarily to protect national security is well recognised. Limitations on the right to be present at parts of the accused's own trial have been a feature of the military commission's proceedings from the start. The exclusion of the accused was criticised during the earlier proceedings,[349] and the MCA continues to allow a trial to continue in the absence of the accused in certain circumstances.[350]

Controversy also surrounds the extent of the exclusion of the public. Measures have been taken in Guantanamo to ensure that public can monitor the trials, a time lapse enables court to ensure that no statements that may jeopardise security can be released. This may an example of a measure that provide a balance between open justice and protection of national security in exceptional situations, but concerns have been expressed as overuse of the mechanism. Notably the protection of information concerning allegations of torture or ill-treatment by US personnel is reportedly a common feature of

345 Human Rights Committee, General Comment 13, para. 9.

346 *See, e.g.*, Article 8(2)(d) ACHR, Article 67(1)(b) of the ICC Statute; Principles 22 and 8 of the Basic Principles on the Role of Lawyers, Principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

347 Military Commissions Order No. 3, Department of Defense, 5 February 2004, on 'Special Administrative Measures for Certain Communications Subject to Monitoring', available at: http://www.mc.mil/Portals/0/milcomord3.pdf.

348 Marine Col. J.P. Colwell, the chief military defense counsel for the commissions, is reported to have written to all military commission defense lawyers hat that they were ethically obligated to refuse to follow rules which required screening by the dept of defence of all communication from lawyer to client. 'Guantánamo Chief Military Defense Lawyer Orders His Attorneys Not to Agree to Communication Monitoring', ACLU, 11 January 2012, available at: http://www.aclu.org/national-security/guantanamo-chief-military-defense-lawyer-orders-his-attorneys-not-agree.

349 Secret evidence can be employed, during which time the accused cannot attend his trial, though his military lawyer may do so. *See* Military Commission Instruction No. 1, 'Military Commission Instructions', Department of Defense, 30 April 2003, Sec. 7 (B), available at: http://www.mc.mil/Portals/0/milcominstno1.pdf.

350 MCA 2009, H. R. 2647-397, § 949d.

commission's proceedings,[351] and serves no apparent legitimate purpose. This feeds broader allegations that "the commissions are best understood not as a legitimate forum for trying war crimes, but as an avenue for short-circuiting legal processes that might hold us accountable for our wrongs."[352]

8B.4.4.6 When Fair trial is a Matter of Life or Death

Finally, it is recalled that the military commissions may impose the death penalty, which has in fact been sought in relation to proceedings which are pending at time of writing. The death penalty, while not illegal per se under international law, is strictly regulated by it, as set out in Chapter 7. Under IHL, persons subjected to criminal proceedings during any type of armed conflict may not be sentenced to death except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. Under IHRL, it can only be applied to the most serious crimes and cases, taking into account all mitigating personal circumstances. As recognized in IHL and IHRL, it should not be applied to minors or the elderly.[353] Critically, a trial that leads to the death penalty must meet the highest standards of fair trial under IHRL[354] or constitute an arbitrary deprivation of the right to life. As the Inter-American Court noted:

> 'Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result.'[355]

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351 *Ibid*. '[I]f the 9/11 defendants speak up about torture in custody, or their lawyers try to, the audio feed from the courtroom is immediately cut off and the information will never appear in the public record.' Dicker, 'Guantánamo's perversion of justice', supra note 330.

352 D. Cole, 'Military Commissions and the Paradigm of Prevention', in O. Gross, and F. Ni Aolain (eds.), *Guantanamo and Beyond: Exceptional Courts and Military Commissions and Policy Perspectives* (Cambridge: Cambridge University, 2013).

353 'Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights)', Advisory Opinion OC-3/83, 8 September 1983, IACHPR, (Ser. A) No. 3 (1983), para. 93.

354 This true under the American Declaration (binding on the US). *See* IACHR Terrorism Report, OEA/Ser.L/V/116, Doc. 5, Rev. 1, para. 94. *See generally Juan Raul Garza*, Report No. 52/01, IACHR, Case 12.243, 4 April 2001, paras. 88-96, citing Report No. 57/96, *Andrews* v. *United States*, Annual Report of the IACHR 1998, paras. 175-77, and I/A Comm. H.R., *James Terry Roach and Jay Pinkerton* v. *United States*, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, paras. 46-49.

355 The Right to Information on Consular Assistance, in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1 October 1999, IACtHR, *Series A*, No. 16, para. 136. *See also* Restrictions to the Death Penalty (Article 4.2 and 4.4 of the American Convention of Human Rights), Advisory Opinion OC-3/83, 8 September 1983, IACtHR, *Series A*, No. 3 and the decision of the ECtHR in *Öcalan* v. *Turkey*, supra note 305. In these circumstances, the death penalty may also amount to cruel or inhuman treatment. *See, e.g., Egyptian Initiative for Personal Rights and Interights* v. *Arab Republic of Egypt*,

If the death penalty is applied, as provided for in the Military Order, a violation of fair trial rights may also give rise to a violation of the detainee's right to life.[356]

8C RESPONDING TO GUANTANAMO

8C.1 THE OBLIGATIONS OF OTHER STATES

This chapter has focused on the obligations of the United States, as the detaining power, under IHL and IHRL. It is pertinent to reflect however on the obligations incumbent on other states to respond in the face of flagrant violations as in the situation at hand.

As we have seen in Chapter 6, under IHL, states parties to the Geneva Conventions have positive obligations to *ensure* respect for the Conventions, described as meaning that they should 'do everything in their power' to ensure that they are respected universally.[357] Several points are worthy of emphasis in the context of the on-going Guantanamo experience. First, states are not simply *entitled*, but are *obliged*, to take measures to respond to violations of IHL, and as authoritative commentary has noted, the proper working of the system under the Geneva Conventions demands that they do so.[358] Secondly, the obligation is both a negative and a positive one. It requires states to refrain from committing violations, facilitating violations or cooperating with an offending state, for example by arresting and transferring detainees to a power that is believed to be violating the rights of those prisoners under IHL. It also involves positive measures of prevention, without prescribing what measures the state may deem necessary or effective.[359]

The action that states should take is not prescribed, and available options may include invoking the under-utilised inter-state judicial mechanisms that

Communication 334/06, Judgment, African Commission, 13 February 2012, (hereinafter 'Taba case').

356 Article 6(1) ICCPR prohibits the arbitrary deprivation of life and Article 6(2) explicitly requires that any imposition of the death penalty is subject to certain requirements, *inter alia*, that it is imposed by a competent court in a manner that is 'not contrary to the provisions of the present Covenant'. See Chapter 7A5.1. It may also amount to inhuman or degrading treatment. *See Öcalan* v. *Turkey*, supra note 305.

357 Article 1(1) of AP I paraphrases this positive obligation set forth in Article 1 of the 1949 Conventions. See Chapters 3.1.2 and 6.A.2.7

358 ICRC Commentary GC I, p. 18.

359 *See* Chapter 6, IHL, references to Common Article 1 of the Geneva Conventions; *see also Nicaragua*, paras. 220 and 255 and Articles 40 and 41 of the ILC's Articles on State Responsibility.

exist,[360] or, at a minimum, it may be expected that states would make meaningful diplomatic representations that the violations should stop. As 'observance of humanitarian law transcends the sphere of interest of any individual state',[361] representations should not be limited to the protection of nationals of the state but reflect the role of states parties to the Geneva Convention system as guardians of the protections contained therein.

Finally, a specific positive obligation under IHL is the obligation, in the event of grave breaches of the Conventions – such as wilfully depriving prisoners of war of the rights of defence – to seek out and prosecute those individuals responsible.[362] The obligations of individual accountability referred to above (and the rights of individuals to redress) thus coincides with states' obligations under IHL.

The obligations of states under human rights law are cast differently, and while there is a duty to 'ensure' that the right of those within the state's control are respected, there is no general duty to ensure that *other* states refrain from violations. However, as discussed in Chapter 7, where the state itself exercises its authority or control abroad, IHRL is invoked. Moreover, under IHRL states may not transfer persons within their jurisdiction to another state where there is a significant risk of rights violations in the other state, such as torture or inhuman treatment, or a 'flagrant denial of justice', which may be implicated if states were asked to extradite or transfer persons to Guantanamo Bay for detention and/or prosecution.[363] Finally, the basic obligations to give effect to the object and purpose of a treaty to which a state is party, in good faith, presumably generally precludes facilitating or encouraging other states to commit violations of it. In this respect, questions arise as to whether other forms of state cooperation with the process of Guantanamo detentions or the trials by military commission, such as through intelligence sharing or evidence gathering,[364] would breach the spirit, if not the letter, of IHRL.

Developments in relation to state responsibility are also relevant to this assessment of the interests and obligations of third states in face of the sort

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360 Recourse to the ICJ is available between states, and although rarely utilised in practice, human rights bodies such as the Human Rights Committee under the ICCPR are available and could be invoked by one state against another.

361 H.P. Gasser, 'International Humanitarian Law, an Introduction', in H. Haug (ed.), *Humanity for All*: *the International Red Cross and Red Crescent Movement* (ICRC, Geneva, Haupt 1993), p. 22.

362 *See* 'Grave Breaches', Chapter 6.

363 See *Inter-American Convention to Prevent and Punish Torture* which precludes extradition wherethere are 'grounds to believe' that, among other things, the person 'will be tried by special or *ad hoc* courts in the requesting state'. Article 13, Inter-American Convention to Prevent and Punish Torture, Cartagena de Indias, 9 December 1985, in force 28 February 1987, *OAS Treaty Series* No. 67. See Chapter 7A.5.10.

364 See discussion of evolving understanding of obligations of non-cooperation, beyond in cases of extradition in Chapters 4 and 7.

of basic violations of human rights and IHL that Guantanamo Bay epitomises.[365] States may incur responsibility where they aid and assist other states in the commission of international wrongs such as those arising at Guantanamo.[366] The prohibition on arbitrary detention and denial of basic fair trial guarantees, as well as torture, have been authoritatively described as peremptory norms of international law;[367] as the International Law Commission has indicated, where such obligations are breached, any state has an interest in acting to invoke the responsibility of the offending state, stopping the violation and ensuring that the wrong is put right.[368] Moreover, gross or systematic breaches of such norms arise, which is likely to be met in the Guantanamo scheme, the ILC Articles shift from permissive to mandatory language, requiring that states 'shall' cooperate to end the breach.[369] In an interesting endorsement of these rules and their potential relevance in this context, the Parliamentary Assembly of the Council of Europe resolution on Guantanamo calls on states 'to respect the *erga omnes* nature of human rights by taking all possible measures to persuade the United States authorities to respect fully the rights under international law of all Guantánamo Bay detainees'.[370]

In short, the obligations to ensure respect for IHL, the more contained obligations of IHRL and developments in relation to state responsibility in international law together reflect an important principle that certain egregious violations are not matters for the state itself, but for the international community as a whole. The legal imperative for states to take action to address the Guantanamo situation is plain, even if they are left considerable scope to decide how best to do so. They should not take steps, whether in military or criminal matters, that directly or indirectly facilitate or contribute to the violation and they should invoke effective means, through diplomatic or other channels, to end the violations of rights of all detainees and restore the rule of law.

365 *See* Chapters 3 and 7.

366 Art. 16 ILC Articles.

367 *See*, e.g. General Comment 29, para. 11 and ILC Commentaries to Articles on State Responsibility, Introductory Commentary to Part Two, Chapter 3. Commentators include human rights, from the non-derogable rights common to the 'three major human rights treaties' to longer lists. *See* Chapter 7A., 'International Human Rights Law', Framework.

368 Article 48, ILC's Articles on State Responsibility.

369 *Ibid.,* Art. 41.

370 Resolution 1433 (2005), Lawfulness of detentions by the United States in Guantánamo Bay, Parliamentary Assembly Council of Europe.

8C.2 THE INTERNATIONAL RESPONSE TO THE GUANTANAMO DETENTIONS

The situation of the Guantanamo detainees has provoked an unusual level of condemnation of the international community. Serious concerns expressed by international human rights mechanisms and non-governmental organisations were perhaps predictable.[371] But opponents have been vociferous, coordinated and diverse, illustrated by an unusually vocal statement of concern from the ICRC[372] and strident criticism being levelled not only from NGOs and international human rights bodies, but also from quarters not usually associated with international human rights advocacy. Examples from the UK, the US's foremost ally in the 'war on terror', may illustrate the point. The UK Court of Appeal took the unusual step of commenting on what it viewed as the 'objectionable' lack of oversight by another country's courts.[373] Breaking with the convention that Law Lords do not speak out on politically sensitive issues, still less criticise another state's government, a distinguished English Law Lord condemned publicly the 'monstrous failure of justice', describing the military commissions as 'kangaroo courts' which 'convey the idea of a pre-ordained arbitrary rush to judgment by an irregular tribunal which makes a mockery of justice'.[374] A total of 175 members of both houses of the UK parliament, crossing party lines, took the unprecedented step of lodging an amicus brief with the US Supreme Court, adding to the many other briefs submitted to the Court.[375] The media have been similarly critical, including those otherwise sympathetic to controversial aspects of the 'war on terror'.[376]

Official inter-state reactions, for their part, are generally less transparent and more difficult to measure meaningfully. As regards the protection of nationals, initially, protracted negotiations between the US and certain governments (notably the UK and Australia) were widely reported, but apparently focused on the situation in respect of their own nationals detained in Guanta-

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371 International organisations having criticised the situation include the Working Group on Arbitrary Detention and the Inter-American Commission on Human Rights. *See* Report of WGAD, supra. Reports of the HR Committee, HR Council, UN mandate-holders' report, IACHR and Council of Europe Parliamentary Assembly are among those to criticise Guatanamo.

372 *See, e.g.*, 'Guantanamo Bay: Overview of the ICRC's work for Detainees', ICRC, 30 January 2004, available at: http://www.icrc.org/eng/resources/documents/misc/5qrc5v.htm.

373 *See Abbasi*, supra note 5.

374 Steyn, 'Guantanamo Bay: The Legal Black Hole', supra note 5. Lord Steyn declared also that the trials before the military commissions would be 'a stain on United States justice'.

375 Many other briefs were filed from jurists and organisations around the world. They can be found at www.ccr-ny.org.

376 *See, e.g.*, 'Unjust, Unwise, Unamerican: America's plans to set up military commissions for the trials of terrorist suspects is a big mistake', *The Economist*, 12 July 2003, which notes the support offered by that publication to military action in Iraq and Afghanistan, while condemning the proposed military commissions as 'illiberal, unjust and likely to be counter-productive'.

namo.[377] Presumably as a result of this quiet diplomacy, a few of the detainees were returned to their country of origin, while in respect of others special arrangements were made for the application of better standards than those applicable to detainees of other nations, including undertakings that the death penalty would not be applied.[378] This is exemplified by the case against David Hicks, the Australian national who is one of the first four detainees to be tried by military commission, but on the basis of different arrangements than apply to the other accused of Yemeni and Sudanese nationality.[379]As regards UK nationals remaining in Guantanamo, the UK Foreign Secretary stated that 'our position remains that the detainees should either be tried in accordance with international standards or they should be returned to the UK.'[380] Ultimately, their return to Britain was formally requested by the government on this basis,[381] and almost all have been returned.[382]

Over time, public condemnation emerged at governmental level. It was 2006 when German Chancellor Angela Merkel was clear, if restrained, in stating that 'an institution like Guantanamo in its present form cannot and must not exist in the long term'.[383] In the U.K. the Attorney General for England and Wales described the camp's existence was 'unacceptable'[384] and 'not meeting acceptable fair trial standards,'[385] while the Lord Chancellor

377 See e.g.'Guantanamo deal for Australia duo', *BBC on-line*, 26 November 2003, available at: http://news.bbc.co.uk/1/hi/world/asia-pacific/3238302.stm. Reports of the British government negotiating agreements with the Pentagon so that British prisoners would not receive the death penalty have been criticised: 'This gives a new dimension to the concept of 'most-favoured nation' treatment in international law. How could it be morally defensible to discriminate in this way?' Steyn, 'Guantanamo Bay: The Legal Black Hole', supra note 5.

378 *Ibid*.

379 *See* 'Guantanamo Detainee Charged', Department of Defense News Release, 10 June 2004, available at: http://www.defenselink.mil/releases/2004/nr20040610-0893.html. on special protections afforded to David Hicks.

380 'Foreign Secretary statement on return of British detainees', 19 February 2004, available at: http://www.pm.gov.uk/output/page5381.asp.

381 *See* J. Lovell, 'Blair asks Bush to return Guantanamo detainees', *Reuters AlertNet*, 26 June 2004, available at: http://www.alertnet.org/thenews/newsdesk/L26579540.htm.

382 As at September 2013, only one British resident, Shaker Aamer, remains in Guantanamo.

383 Angela Merkel, interview on September 1, 2006, available at: http://www.spiegel.de/international/spiegel-interview-merkel-guantanamo-mustn-t-exist-in-long-term-a-394180.html.

384 Attorney General for England and Wales, Lord Goldsmith added that '[t]he historic tradition of the United States as a beacon of freedom, liberty and of justice deserves the removal of this symbol'. 'UK told US won't shut Guantanamo', *BBC News*, 11 May 2006, available at: http://news.bbc.co.uk/2/hi/uk_news/politics/4760365.stm.

385 At a speech to the International Criminal Law Association annual conference, 'Terrorism and the rule of law' in London on 25 June 2004, Lord Goldsmith stated: 'While we must be flexible and be prepared to countenance some limitation of fundamental rights if properly justified and proportionate, there are certain principles on which there can be no compromise. Fair trial is one of those – which is the reason we in the UK have been unable to accept that the US military tribunals proposed for those detained at Guantanamo Bay offer sufficient guarantees of a fair trial in accordance with international standards.' *See*

condemned it as 'shocking affront to democracy'.[386] The Council of Europe Parliamentary Assembly's resolution statement that 'the United States Government has betrayed its own highest principles in the zeal with which it has attempted to pursue the "war on terror". These errors have perhaps been most manifest in relation to Guantánamo Bay'[387] is one example among others of criticism at the regional level.[388]

Less clear, however, has been the willingness of states to bring their full weight to bear, individually and collectively, beyond the protection of their own nationals.[389] Indeed questions remain as to the extent of state cooperation with the Guantanamo regime. While governments appeared publicly to be agitating on behalf of their nationals, allegations of collusion with the Guantanamo system of detention continue to emerge.[390] The Special Rapporteur on Terrorism and Human Rights has reported that '[m]any countries (Bahrain, Canada, China, France, Germany, Italy, Jordan, Libya, Morocco, Pakistan, Saudi Arabia, Spain, Tajikistan, Tunisia, Turkey, United Kingdom, Uzbekistan) have sent interrogators to Guantanamo Bay'.[391]

One way in which states have however become more robust, beyond public criticism, is in relation to international cooperation. As discussed in Chapter 4B, there have been growing indications by states as to their unwillingness

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M. Tempest, '"No compromise" on Guantánamo trials', *The Guardian*, 25 June 2004, available at: http://www.guardian.co.uk/world/2004/jun/25/september11.usa.

386 Lord Chancellor Lord Falconer stated Guantanamo is a 'shocking affront to democracy'. 'Top-level plea for detainees', *The Argus*, 14 September 2006, available at: http://www.theargus.co.uk/news/indepth/justiceforomar/justiceforomar/922087.toplevel_plea_for_detainees/.

387 Resolution 1433 (2005), Lawfulness of detentions by the United States in Guantánamo Bay, Parliamentary Assembly Council of Europe.

388 *See also* Resolution 1340 (2003), Rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay, Parliamentary Assembly Council of Europe; and Resolution 1539 (2007), The United States of America and international law, Parliamentary Assembly Council of Europe.

389 Doubts also arise as to the sufficiency of interventions on behalf of nationals. Eg. on German government interventions and criticism *see, e.g.,* interview with Interior Minister Otto Shilly. *Süddeutschen Zeitung*, March 2004, available at: www.sueddeutsche.de/deutschland/artikel/764/28736/; cf *see* M. Kreickenbaum, 'German resident incarcerated in Guantanamo Bay for two-and-a-half years: The case of Murat Kurnaz', 28 May 2004, available at: http://www.wsws.org/articles/2004/may2004/gua1-m28.shtml. The UK has been criticised for failing to do enough for the one remaining UK resident in 2013, Shaker Aamer.

390 MI5 and MI6 officers carried out around 100 interrogations at the US prison on Cuba between 2002 and 2004. This account suggests that in secret memos, UK ministers said in early 2002 that their 'preferred option' for British nationals was to transfer them to Guantánamo Bay, rather than to secret detention. I. Cobain, *Cruel Britannia: A Secret History of Torture*, (Portobello Books Ltd., 2012).

391 *See* M. Scheinin, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', U.N. Doc. No. A/HRC/10/3, 4 February 2009, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/106/25/PDF/G0910625.pdf, p. 19. Legal issues arising from cooperation of this type are touched upon in Chapter 10.

(or inability, given the constraints of IHRL) to cooperate with the US in respect of Guantanamo detentions, and specifically a military commission process that may lead to the death penalty, unfair trial, or other serious violations of human rights. In this respect, the Council of Europe Parliamentary Assembly (PACE) resolution is pertinent in quite explicitly calling on member states to: '… refuse to comply with United States' requests for extradition of terrorist suspects liable to detention at Guantánamo Bay; vi. to refuse to comply with United States' requests for mutual legal assistance in relation to Guantánamo Bay detainees, other than by providing exculpatory evidence, or unless in connection with legal proceedings before a regularly constituted court…'.[392] In a case concerning extradition to face terrorism trials and detention on US soil, it is noteworthy that both the UK government (arguing that there was no impediment to extradition) and the ECHR (in agreeing and allowing extradition) noted that there was no prospect of the individual being transferred to Guantanamo or subjected to military commission, in which case transfer would by implication have been problematic.[393] Indeed within the US, the US president, and the Guantanamo task force, have explicitly recognised the impediment to international cooperation that Guantanamo and the commissions process entailed.[394]

Thus, criticism has been voiced by states, representations have been made and non-cooperation has been threatened. While practice may develop as the military tribunal process unfolds, potentially into death penalty, the focus of concerted state action has to date been on the protection of the state's own nationals. Perhaps as a result all Western detainees have now left Guantanamo.[395] While defence of a state's nationals is wholly appropriate, by so limiting interventions the approach has been to rely on different rather than equal treatment in respect of the protection of universally applicable human rights standards. This falls considerably short of the requirements of international law referred to in the previous section. Interestingly, the Council of Europe resolution on Guantanamo alludes to this obligation when it calls on all states 'to respect the *erga omnes* nature of human rights by taking all possible measures to persuade the United States authorities to respect fully the rights under international law of all Guantánamo Bay detainees'.[396]

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392 Resolution 1433 (2005), Lawfulness of detentions by the United States in Guantánamo Bay, Parliamentary Assembly Council of Europe.

393 *Ahmad & Ors* v. *United Kingdom*, Appl. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09 (2012).

394 'Guantanamo Review Task Force', supra note 43. Obama 23 May 2013 speech, note 9, where he states categorically that partners will not cooperate with Guantanamo.

395 Juvenile Canadian detainee Khadr was reportedly the last Western detainee to leave Guantanamo.

396 Resolution 1433 (2005), Lawfulness of detentions by the United States in Guantánamo Bay, Parliamentary Assembly Council of Europe.

8C.3 SEEKING JUSTICE FOR GUANTANAMO?

Of the hundreds of individuals who have been detained on dubious legal bases in Guantanamo, some have been released, some slated for indefinite detention, others for trial by military commission and some for release – but held in the limbo within a limbo[397] pending release. One thing they have in common is that none have been afforded compensation. And no one has been investigated and held to account for crimes committed against them at Guantanamo Bay. The lack of accountability for 'war on terror' crimes described elsewhere in this study applies with equal force to the allegations of torture or other crimes having been committed in Guantanamo. As US governments have changed and attitudes on key issues related to Guantanamo shifted, one description is of a 'legacy of torture' giving way to a 'legacy of impunity'.[398]

In the absence of a political solution, detainees have inevitably sought legal and judicial solutions, in the US and elsewhere. The habeas litigation is discussed above and in Chapter 11. Attempts to secure damages from US courts have thus far proved fruitless. Firstly, as noted above detainees are specifically precluded by legislation from seeking any damages before US courts.[399] While the ban on habeas proceedings has been lifted, this ban on the right to a remedy remains in place, representing a manifest violation of victims' right to a remedy under international law. For those victims that have left and sought remedies, among the obstacles on the national level has been a finding that those accused of responsibility for their torture or ill-treatment enjoyed official immunities from civil suit. This was illustrated by one claim for damages brought by former Guantanamo detainee where torture was held

397 *See* 'A.1.X Limbo within Limbo'.

398 'Demand U.S. Torturers be Held Accountable', CCR, available at: http://ccrjustice.org/get-involved/action/demand-accountability-u.s.-torture.

399 Presidential Military Order, supra note 130, Order, Sec 7(b)(2): '(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.' Detainee Treatment Act 2005: '... [N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.' It has been made explicit that 'a military commission may not adjudge the payment of damages ...': 2010 Manual for Military Commissions, supra note 141. Cases of former detainees have been dismissed by a D.C. District Court because of a lack of jurisdiction as 'The Congress has spoken with particular clarity on the matter': *al Jenko* v. *Gates*, Civil Case No. 10-1702 (RJL), (D.C. Dist. Ct. 2011), *dismissed*, p. 11-12.

by a US court to fall within the scope of the employment of government officials, who were as a consequence immune from liability.[400]

Attempts in other countries to seek redress for the detainees are on-going. Some legal actions sought to force foreign governments to intervene in Guantanamo. A case brought before the English courts by family members of one of the seven UK nationals detained at Guantanamo Bay, for example, was ultimately unsuccessful as English courts were found not to have jurisdiction to provide a remedy directly to persons held by another state on the sole basis of their nationality. Nor, contrary to the applicant's submissions, was there held to be any duty incumbent on the Secretary of State to make diplomatic representations on behalf of the detainee. The court noted, however, its 'deep concern that, in apparent contravention of fundamental principles of law, Mr Abbasi may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal'.[401]

Others cases seek to advance accountability for criminal conduct arising in relation to Guantanamo. Various attempts to bring charges in France or Germany against former Secretary of Defense Donald Rumsfeld, former CIA director George Tenet, and former White House Counsel and Attorney General Alberto Gonzales and legal advisers, in respect of torture at Guantanamo and elsewhere, have thus far proved unsuccessful.[402] Other initiatives have had greater traction, however, such as criminal investigations opened in Spain into the alleged torture and abuse of Guantanamo detainees by 'possible material and instigating perpetrators, necessary collaborators and accomplices'.[403]

400 *Rasul v Myers* 512 F.3d 644, 660 (D.C. Cir. 2008) (*Rasul I*), *vacated Rasul* v *Myers* 129 S.Ct. 763 (2008), *aff'd Rasul* v. *Myers* 563 F.3d 527 (D.C. Cir. 2009) (per curiam). According to the Court of Appeal: 'The plaintiffs concede that the torture, threats, physical and psychological abuse inflicted on them, which were allegedly approved, implemented, supervised and condoned by the defendants, were intended as interrogation techniques to be used on detainees... . While the plaintiffs challenge the methods the defendants used to perform their duties, the plaintiffs do not allege that the defendants acted as rogue officials or employees who implemented a policy of torture for reasons unrelated to the gathering of intelligence. Therefore, the alleged tortious conduct was incidental to the defendants' legitimate employment duties.' *Rasul*, at 858-59 (internal citations and quotation marks omitted).

401 *Abbasi*, supra note 5, para. 107. At paras. 66-7 the court noted that the treatment of detainees was 'objectionable', and had given rise to 'serious concerns internationally'.

402 The claims alleged a conspiracy that authorized the torture program in Guantanamo, Iraq, secret CIA sites, and elsewhere: 'Donald Rumsfeld Charged with Torture During Trip to France: Complaint Filed Against Former Defense Secretary for Torture, Abuse at Guantánamo and Abu Ghraib', CCR, available at: http://ccrjustice.org/newsroom/press-releases/donald-rumsfeld-charged-torture-during-trip-france; see also M. Ratner, 'The Trial of Donald Rumsfeld: A Prosecution by Book', (The New Press, 2008).

403 Decision to open a preliminary investigation into the alleged torture and abuse of four former Guantánamo detainees (Hamed Abderrahman Ahmed, Ikassrien Lahcen, Jamiel Abdul Latif Al Banna and Omar Deghayes), Juzgado Central de Instrucción No 5, Audiencia

Having apparently had no response to letters rogatory to the US and UK inquiring whether any investigations are currently pending into the individual cases of the four plaintiffs,[404] the Spanish courts decided there was jurisdiction over these cases in Spain[405] and reactivated the investigation.[406]

In a second case known as the 'Bush Six' case,[407] a criminal complaint was filed against six administration lawyers for participating in or providing assistance to the torture and abuse of persons detained at Guantanamo Bay.[408] In that case the US did respond[409] and the case was 'temporarily stayed' – transferred it to the US Department of Justice 'for it to be continued, urging it to indicate at the proper time the measures finally taken by virtue of this transfer of procedure'.[410] One might well question whether, in light of US inaction, such deferral was unwarranted or at a minimum precipitous, but

Nacional, Madrid (Spanish High Court), decision (*auto*) of 27 April 2009, Preliminary Investigations (*diligencias previas*) 150/09-N, at 9.

404 On 15 May 2009, J. Garzón issued Letters Rogatory to which reportedly neither country responded. D. W. Krohnke, 'Spain's Criminal Case Over Alleged U.S. Torture of Guantanamo Detainees', available at: http://dwkcommentaries.wordpress.com/2012/01/23/spains-criminal-case-over-alleged-u-s-torture-of-guantanamo-detainees.

405 In June 2010, Judge Ruz took over this case. *Ibid. See also*, A. Worthington, 'Spanish Torture Investigation into Gitmo to Continue', 28 February 2011, available at: http://www.fff.org/comment/com1102n.asp.

406 Juzgado Central de Instrucción No. 5, Audiencia Nacional, Madrid (Spanish High Court), decision (*auto*) of 3 January 2012, Preliminary Investigations (*diligencias previas*), 150/2009-P, available at: http://media.miamiherald.com/smedia/2012/01/13/17/35/Xfe8u.So.56.pdf (Spanish Only).

407 The 'Bush six' are: Alberto Gonzales, former US Attorney General and White House Counsel; John Yoo, of the Justice Department's Office of Legal Counsel (author of many of the 'torture memos'); Douglas Feith, former undersecretary of defense for policy; William Haynes II, former general counsel for the Department of Defense (chief counsel to Donald Rumsfeld); Jay Bybee, of the Justice Department's Office of Legal Counsel (another author of the 'torture memos'); and David Addington, former Chief of Staff to the Vice President.

408 Case no. 134/2009, filed 17 March 2009 by the Association for the Dignity of Male and Female Prisoners of Spain. alleged 'the creation, approval and execution of a judicial framework that allowed for the deprivation of fundamental rights ...torture ... the establishment of impunity for all ... in the detention centre at Guantánamo;' 'Spanish Investigation against the "Bush Six": Judge Velasco, Central Tribunal of Instruction No. 6', Center for Constitutional Rights, available at: http://ccrjustice.org/spain-us-torture-case. *See also*, J. Borger and D. Fuchs, 'Spanish judge to hear torture case against six Bush officials', Guardian, 29 March 2009, available at: http://www.guardian.co.uk/world/ 2009/mar/29/guantanamo-bay-torture-inquiry. For allegations of crimes committed by the Bush Six, *see* P. Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (Allen Lane, 2008).

409 Response of U.S. Department of State, 'Re: Request for Assistance from Spain in the Matter of Addington, David; Bybee, Jay; Feith, Douglas; Haynes, William; Yoo, Joohn; and Gonzalez, Alberto; Spanish Reference Number: 0002342/2009-CAP', 1 March 2011, on file with author.

410 Decision, 13 April 2011 at http://ccrjustice.org/ourcases/current-cases/spanish-investigation-us-torture.

it remains to be seen whether the investigation will be reopened if inactivity persists in the US.[411]

Proceedings have also sprung up in response to torture allegations elsewhere,[412] Despite pressure from the United States,[413] there may therefore be some indication that a shift may be afoot internationally to hold US officials to account abroad, at least for as long as they are not be held to account at home; leaked cables reveal the Spanish Prosecutor describing a US investigation as ''the only way out' for the US government.[414] Until then, those accused of serious crimes may well be vulnerable to arrest if they travel outside the US, leading to what has been described as 'their own legal black hole'.[415]

8D CONCLUSION

The anomalous situation in which the Guantanamo detainees are held, without basic legal protections, is not a casualty of any 'legal limbo' or 'black hole' in international law. The Guantanamo detainees are entitled, under international human rights and humanitarian law, to certain core human rights protections irrespective of who they are, where they are detained, or their nationality.

Guantanamo does not therefore challenge the weakness of the legal framework as such, and nor is it likely to change it. In certain circumstances tolerance or acquiescence by third states may contribute to a shift in customary law – and state reactions are therefore important not only to the enforcement of law, but to the maintenance of international standards. Even if the particular norms at issue in Guantanamo were susceptible to change, the extent of international opposition to the Guantanamo regime, as highlighted above, may well have guarded against the law being directly affected in this way. It is

411 See challenge to the decision. at http://ccrjustice.org/files/2012-09-25%20CCR%20ECCHR%20Amicus%20Brief. The Judge is free to reopen the case as it was suspended not closed.

412 Eg. on 2 January 2012, French investigating magistrate Sophie Clement requested access to documents as part of an investigation into allegations of torture of three former French prisoners. H. Stemple, 'France judge requests access to Guantanamo to probe torture allegations', *The Jurist*, 17 January 2012, at: http://jurist.org/paperchase/2012/01/france-judge-requests-access-to-guantanamo-to-probe-torture-allegations.php. A. Makhoul, 'French judge seeks access to Guantanamo amid torture probe', *France 24*, 18 January 2012: http://www.france24.com/en/20120118-france-judge-guantanamo-bay-prison-investigation-torture-rape-clement-usa-afghanistan.

413 Leaked cables reveal how US officials met with the Spanish chief prosecutor and judges, who described prosecution as 'the only way out' for the US Government. 'US embassy cables: Spanish prosecutor weighs Guantánamo criminal case against US officials', *The Guardian*, 1 December 2010, available at: http://www.guardian.co.uk/world/us-embassy-cables-documents/200177.

414 *Ibid*.

415 J. Meyer, 'The Bush Six', *The New Yorker*, 13 April 2009, available at: http://www.newyorker.com/talk/2009/04/13/090413ta_talk_mayer.

also doubtful to what degree Guantanamo demonstrates a compelling need for such development of legal standards, though it may, of course, highlight areas where the law could be clarified, developed or at least better understood, to prevent manipulation of the legal framework in the future.

While Guantanamo may not challenge the law, it may challenge its perceived relevance and compelling effect. The continued existence of Guantanamo more than ten years on certainly highlights the weakness of international enforcement. International legal mechanisms have played their part in monitoring, responding and condemning, the cumulative impact of which is difficult to determine. Their role has been curtailed by limited access of victims to the mechanisms (for lack of acceptance of jurisdiction by the US),[416] and limited access of the mechanisms to detainees. Ultimately their impact depends on political will to stand up for international law (and most critically in this context to stand up to the US). While the Inter-American Commission on Human Rights was prompt to request that the US take precautionary measures to protect the detainees' fundamental rights,[417] for example, the US response was predictably dismissive, and little apparent weight was attributed to the decision thereafter. In this respect, Guantanamo serves as a reminder of the need to strengthen those mechanisms enshrined in IHRL and IHL, and the international community's commitment to them.

It is however the role of states that is critical. States have been unusually condemnatory, at least eventually, and international reactions perhaps serve to clarify that Guantanamo has no place within a rule of law approach, and to resist the erosion of legal standards through practice. The reaction of states may also have contributed to making Guantanamo so unsustainable, a recognised international affront. While not all ways in which states exert influence are public and readily assessable, it is must be asked whether enough was done to ensure the basic rights of all detainees in a timely manner. Many were tortured during the years it took for states to overcome their hesitation to condemn the arbitrariness of Guantanamo. The following has been said of Guantanamo Bay:

> At present we are not meant to know what is happening at Guantanamo Bay. But history will not be neutered. What takes place there today in the name of the United

416 *See* Chapter 7A1 on mechanisms, and Chapter 11 on human rights litigation for victims. The US has not ratified the ICCPR Optional Protocol on which the right of individual petition to the Human Rights Committee depends, nor accepted the jurisdiction of the IACtHR. However, the Inter-American Commission on Human Rights has jurisdiction in respect of the American Declaration on the Rights and Duties of Man, binding on the US.

417 *See* IACHR, *Precautionary Measures*, supra note 181. While the potential impact was undermined by the refusal of the US to do as requested by the Commission, it remains significant as a reassertion of the role of international law in this context. It has followed up since with statements of concern that the situation has not been remedied. IAHCR Press Release, supra note 38.

> States will assuredly, in due course, be judged at the bar of informed international opinion.[418]

The US may well be judged harshly. But it will not be judged alone. Other states, and the international community more broadly, stand to be judged for their determination, or their failure, to protect not only their own nationals, but other Guantanamo detainees and the rule of law.

To paraphrase the Nuremberg judgment, it may be that international law will only be given meaningful effect in relation to Guantanamo when the individuals who ordered and gave effect to these violations, and not only the 'abstract entities' through which they act, are held to account.[419] Accountability may yet arise in respect of Guantanamo Bay for crimes of torture and inhuman treatment, wilfully depriving prisoners of war of fair trial rights, or arbitrary prolonged detention.[420] While legally possible on the international level, the more conceivable prospect is of individual accountability enforced nationally, if not in the state of territory, in the courts of another state exercising universal jurisdiction or passive personality jurisdiction.[421] It remains to be seen whether there will be, in the fullness of time, any meaningful individual or state accountability in respect of the Guantanamo situation.

The implications of Guantanamo detentions for detainees held without legal protection, and without a remedy, and for their families, are immediate and apparent. Less so perhaps are the broader long-term implications for the rule of law and its respect in the future. While as noted above the widespread condemnation of Guantanamo as unlawful minimises the risk of a shift in legal standards, the Guantanamo experiment may give credence to the insidious notion of legal limbo (that certain persons fall entirely outside the framework

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418 Steyn, 'Guantanamo Bay: The Legal Black Hole', supra note 5.

419 Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (London, 1950), p. 447.

420 The crimes may be war crimes for those detained in relation to a conflict, or crimes against humanity given the nature of some of the wrongs, and the widespread and systematic nature of Guantanamo, detentions and ill-treatment. Wilfully depriving a prisoner of war of fair trial rights is a grave breach of the Geneva Conventions. Arbitrary detention was not included, for example, in the ICC Statute, though it may amount to a crime against humanity.

421 On the national level, states may exercise universal jurisdiction or passive personality jurisdiction for those states with such bases of jurisdiction in their domestic systems. As noted, the conferral of jurisdiction (unlike criminal responsibility) can be *ex post facto*. ICC jurisdiction is unlikely as most detentions were before its entry into force and, in any event, it would only have jurisdiction if a national of a state party to the ICC Statute (not an American) was responsible, or the offences arose on the territory of a state party, or a state decided to accept jurisdiction over the offences retroactively. An *ad hoc* tribunal could be set up, but the Security Council route would be vetoed leaving the Nuremberg model of several states collectively establishing a body. While this may be legally possible, it is hardly conceivable politically, at least at this stage.

of international legal protection) or contribute to the perceived inevitability of human rights as the first casualty of counter-terrorism, conflict and security-sensitive situations. It may give cover to other states detaining arbitrarily, seeking to circumvent basic legal obligations by crude manipulation of the principle of territoriality or applying the law only 'to the extent appropriate.'[422] Evidence already exists of the practice other states, many of whom are not new to human rights repression, relying on Guantanamo to justify arbitrary detention of alleged terrorists or resort to military commissions to try civilians.[423]

Unsurprisingly, an additional by-product of this role for the US is that its credibility to act as the restraining force it once was on human rights issues is seriously undermined,[424] with its condemnation of military commissions, arbitrary detentions or impunity,[425] ringing hollow and hypocritical when juxtaposed alongside the notoriety of Guantanamo Bay.[426]

While numbers are dwindled, Westerners are gone, and the public perception may be of a Guantanamo-era drawing to a close, that is far from the case. Much remains uncertain as to the nature of the long term impact of Guantanamo. Will the ad hocary and violations of the military commissions give way to a reinforcement of the importance of regular criminal law and

422 Presidential Memo of 7 February 2002, supra note 194 'As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.' *See also*, G. W. Bush, 'Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate', supra note 216.

423 *See, e.g.*, statement by President Mubarak of Egypt that resort to military commissions 'prove[s] that we were right from the beginning in using all means, including military tribunals' to curb terrorism, in J. Stork, 'The Human Rights Crisis in the Middle East in the Aftermath of 11 September', paper presented at the Symposium on Terrorism and Human Rights, Cairo, 26-28 January 2002, on file with author.

424 Guantanamo is the most flagrant example of US exceptionalism on human rights issues. Others include the increased resort to targeted killings and other counter-terrorism measures highlighted in this book, the position on establishment of an ICC, banning of child soldiers, creation of mechanisms for individual redress for torture, environmental protection that had already diminished the standing and authority of the US internationally.

425 *See* Annual Country Reports on Human Rights Practices Released by the Bureau of Democracy, Human Rights, and Labour of the Department of State.

426 This has been exploited by critics of the US such as Fidel Castro who criticized the U.S. for its 'concentration camp' at Guantanamo Bay. 'Castro blasts Guantanamo "concentration camp"', *ABC News*, 20 April 2004, available at: http://www.abc.net.au/news/2004-04-20/castro-blasts-guantanamo-concentration-camp/173218. More recently, the Russian Parliament (Dumas)'s human rights report which lambasts the US with particular focus on Guantanamo, noting that 'Washington's pretentions of being a leader in the defence of human rights and democratic values were not justified'. 'Russian report censures US human rights record', *Press TV*, 23 October 2012, available at: http://www.presstv.ir/detail/2012/10/23/268224/russia-deplores-us-human-rights-record.

mechanisms,[427] or will death sentences executed absent fair trial guarantees darken the 'stain' on American justice?[428] Will the US judiciary be able to deliver on the Supreme Court's promise of 'meaningful' judicial oversight and ensure effective implementation?[429] What will be the long term fate of those slated for indefinite detention?[430] Will Guantanamo close in form and substance, and with it a chapter of arbitrariness, or will it metamorphose into new ways of achieving the same thing – military commission on US soil or arbitrary detention by proxy, further off-shore and under the radar?[431] Will policy in other areas, such as targeted killings, recognise and avoid the many errors of mistaken identity, and dangers of discarding the rule of law, that Guantanamo illustrates? Will states which have negotiated the release of nationals continue to insist respect for international law for all detainees? Will the principle of non-cooperation with Guantanamo and military commissions extend to other states and other contexts? Will they recognize as victims the detainees emerging from Guantanamo, provide them necessary assistance and a measure of justice? Will the violations of the past be ignored, or will accountability be pursued, as the law requires and the years and lives lost in Guantanamo deserve? What measures will be taken to ensure that the violations, much lamented across political and national barriers, will not happen again? What will the world have learned from Guantanamo, and at what cost?

427 President Obama indicated the possibility of moving military tribunals to US soil in May 2013, supra note 7.

428 Steyn, 'Guantanamo Bay: The Legal Black Hole', supra note 5.

429 On meaningful opportunity to challenge the lawfulness of detention and practice, *see* *Boumediene*, supra note 16; '[A] state of war is not a blank check for the President'. *Hamdi* v. *Rumsfeld*, supra note 175, p. 28. Although perhaps somewhat less robustly, it reached the same conclusion in respect of non-citizens at Guantanamo Bay in *Result*. *Rasul*, supra note 16. On non-implementation, *see* 'A.1.X Limbo within Limbo', above.

430 Forty-eight detainees were determined by the 2010 Guantanamo Review Task Force to be too dangerous to transfer but not feasible for prosecution. 'Guantanamo Review Task Force', supra note 43. Obama announced a lifting of the moratorium on transfers to Yemen in May 2013 but there was no clear plan for their release.

431 *See also* Chapter 10 on detention and torture 'by proxy' at the hands of other states. As oversight of Guantanamo (and other sites) increased in the course of the habeas litigation, some detainees were moved on to alternative sites.

9 *Case Study II:* Osama bin Laden: 'Justice Done'?

9.1 Introductory Overview of Available Facts

On 1 May 2011, 25 highly trained US Navy SEALs[1] raided a compound in Abbottabad, Pakistan where bin Laden, some of his family and his bodyguard had been hiding. The SEALs overwhelmed the compound, and shot bin Laden and another five individuals dead. Hours later, President Obama announced that 'justice had been done'.[2]

Analyses and opinion promptly followed. While many applauded – including notably UN Secretary General Ban Ki Moon[3] – dissenters lamented the decision to kill rather than capture and prosecute bin Laden as an 'assassination'[4] or, in the words of former German Chancellor Helmut Kohl, 'quite

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1 The United States Navy's Sea, Air, and Land Teams are known as SEALs.

2 D. Walsh, E. MacAskill and J. Burke, 'Osama bin Laden killed in US raid on Pakistan hideout', *The Guardian*, 2 May 2011, available at: http://www.guardian.co.uk/world/2011/may/02/osama-bin-laden-dead-pakistan.

3 Secretary General Ban Ki Moon stated: 'The death of Osama bin Laden... is a watershed moment in our common global fight against terrorism.... Personally, I am very much relieved by the news that justice has been done'. Statement by the Secretary-General Following the News of Osama Bin Laden's Death, 2 May 2011, available at: http://www.un.org/sg/statements/?nid=5235. *See* M. Milanovic, 'Was the Killing of Osama bin Laden Lawful?' *EJIL Talk*, 2 May 2011, available at: http://www.ejiltalk.org/was-the-killing-of-osama-bin-laden-lawful; R. Chesney, 'The Legality of the UBL Operation: Responding to the Der Spiegel Criticism', Lawfare Blog, 3 May 2011, available at: http://www.lawfareblog.com/2011/05/the-legality-of-the-ubl-operation-responding-to-the-der-spiegel-criticism; M. Lewis, 'The Boundaries of the Battlefield', *Opinio Juris*, 15 May 2011, para. 5, available at: http://opiniojuris.org/2011/05/15/the-boundaries-of-the-battlefield; B. Saul, 'Delivered from Evil… to a minefield of law and consequence', *ABC*, 6 May 2011, available at: http://www.abc.net.au/unleashed/1433114.html. *See* description of the operation as President Obama's 'greatest success' in the war on terror. J. Yoo, 'Assassination or Targeted Killings After 9/11', 56 N.Y.L. Sch. L. Rev. 57, p. 59

4 Geoffrey Robertson QC stated to the Australian Broadcasting Corp: 'It's not justice. It's a perversion of the term. Justice means taking someone to court, finding them guilty upon evidence and sentencing them. This man has been subject to summary execution, and what is now appearing after a good deal of disinformation from the White House is it may well have been a cold-blooded assassination'. E. Kirschbaum and J. Thatcher, 'Concerns raised over shooting of unarmed bin Laden', *Reuters*, 4 May 2011, available at: http://www.reuters.com/article/2011/05/04/us-binladen-legitimacy-idUSTRE74371H20110504. *See also* critiques by other academics and practitioners in O. Bowcott, 'Osama bin Laden: US responds to questions about killing's legality', *The Guardian*, 3 May 2011, available at: http://www.guardian.co.uk/world/2011/may/03/osama-bin-laden-killing-legality.

clearly a violation of international law'.[5] Slower to emerge, as well as erratic and inconsistent, were details of the nature of the operation[6] upon which, as explained below, legality in fact depends.

Different versions of the facts have 'evolved' over time. The earliest reports suggested that bin Laden was armed and 'engaged in a firefight with those that entered the area of the house' and that he had used a woman as a human shield.[7] Shortly thereafter, a spokesperson stated that they 'expected a great deal of resistance and were met with a great deal of resistance,' describing a 'highly volatile fight out' in the compound.[8] By other official accounts neither bin Laden nor anyone else in the room with him when he was killed was armed, while the Press Secretary noted somewhat obliquely that 'resistance does not require a firearm'.[9] There were indications at one point that bin Laden's wife may have 'rushed' the SEALs,[10] though other accounts question

5 Former West German Chancellor Helmut Schmidt told German TV that the operation could have incalculable consequences in the Arab world at a time of unrest there. 'It was quite clearly a violation of international law.' Kirschbaum and Thatcher, 'Concerns raised over shooting of unarmed bin Laden', *ibid.*

6 The Navy SEAL operation to capture or kill bin Laden was code-named 'Operation Neptune Spear'. *See e.g.*, P. Sherwell, 'Osama bin Laden killed: Behind the scenes of the deadly raid,' *The Guardian*, available at: http://www.telegraph.co.uk/news/worldnews/al-qaeda/8500431/Osama-bin-Laden-killed-Behind-the-scenes-of-the-deadly-raid.html.

7 Assistant to the President for Homeland Security and Counterterrorism, John Brennan on 2 May 2011 appeared to have said bin Laden was armed, noting '[h]e was engaged in a firefight with those that entered the area of the house he was in. And whether or not he got off any rounds, I quite frankly don't know.' *See* White House Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, *The White House*, 2 May 2011, available at: http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-press-secretary-jay-carney-and-assistant-president-homela. *See also* 'Bin Laden hid behind women in firefight: White House', *Reuters*, 2 May 2011, available at: http://www.reuters.com/article/2011/05/02/us-binladen-usa-women-idUSTRE74166F20110502. 'After a firefight, they killed Osama bin Laden and took custody of his body.' Obama, 'President Obama on Death of Osama bin Laden', *The White House*, 2 May 2011, available at: http://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead.

8 *See* Press Briefing by Press Secretary Jay Carney, *The White House*, 3 May 2011, available at:http://www.whitehouse.gov/the-press-office/2011/05/03/press-briefing-press-secretary-jay-carney-532011. 'We expected a great deal of resistance and were met with a great deal of resistance.' Carney noted that 'there were many other people who were armed in the region -- I mean, in the compound. There was a firefight ... a highly volatile firefight'.

9 In a 'new narrative' later on the same day (Telegraph, 3 May 2012) Carney noted: 'There was concern that bin Laden would oppose the capture operation -- operation rather, and, indeed, he did resist. In the room with bin Laden, a woman -- bin Laden's -- a woman, rather, bin Laden's wife, rushed the U.S. assaulter and was shot in the leg but not killed. Bin Laden was then shot and killed. He was not armed.' Cf. Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, supra note 7.

10 *Ibid.*

this.[11] When pressed regarding uncertainty as to the nature of the force the SEALs had met, the authorities were reluctant to provide details clarifying versions of events.[12]

Subsequently, accounts have emerged from 'insiders' and investigative journalists, which suggest that an unarmed bin Laden was shot in the head while in the corridor of his apartment.[13] He retreated to a room where SEALs entered and found him lying on the floor 'twitching' and apparently 'fatally wounded,' with two unarmed women bent over him, and 'fired several more shots into his chest'.[14]

Facts regarding the purpose and planning of the operation have also been slow to emerge. While official statements initially suggested that the objective had indeed been to kill bin Laden, they subsequently suggested a policy that could have seen him captured or killed.[15] In an interview, then-CIA Director Leon Panetta confirmed that the 'authorities' were to kill bin Laden, but added that the rules of engagement were such that 'if he had thrown his hands up' the 'opportunity' to capture may have arisen.[16] There can be little doubt that killing bin Laden had long been a goal of the US administrations.[17]

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11 M. Owen and K. Maurer, *No Easy Day: The Firsthand Account of the Mission That Killed Osama Bin Laden* (Dutton Adult, 2012), pp. 235-36.

12 The following day, when asked to clarify, the Press Secretary invoked security concerns as a basis for not doing so. *See* 'Press Briefing by Press Secretary Jay Carney', *The White House*, 4 May 2011, available at: http://www.whitehouse.gov/the-press-office/2011/05/04/press-briefing-press-secretary-jay-carney-542011

13 Owen, *No Easy Day*, supra note 11, pp. 235-36.

14 'According to one of the Seals, the first man up spotted a tall, bearded, swarthy man ... One or more of the Seals fired at him. The man retreated quickly into a bedroom and the Seals followed. In the bedroom they found two women leaning over a fatally wounded Bin Laden, who had been shot in the head. The first Seal violently moved the women out of the way and the other two stood over him and fired several more shots into his chest.' M. Bowden, *The Finish: The Killing Of Osama Bin Laden*, (New York: Atlantic Books, 2012), p. 230. *See similarly*, Owen, *No Easy Day*, supra note 11, p. 236.

15 Assistant to the President for Homeland Security and Counterterrorism, John Brennan, stated: 'If we had the opportunity to take bin Laden alive, if he didn't present any threat, the individuals involved were able and prepared to do that. We had discussed that extensively in a number of meetings in the White House and with the President. The concern was that bin Laden would oppose any type of capture operation. Indeed, he did. It was a firefight. He, therefore, was killed in that firefight and that's when the remains were removed. But we certainly were planning for the possibility, which we thought was going to be remote, given that he would likely resist arrest, but that we would be able to capture him.' Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, supra note 7.

16 'CIA chief Leon Panetta admits 'if Osama bin Laden surrendered we wouldn't have killed him"', *The Telegraph*, 4 May 2011, interview available at: http://www.youtube.com/watch?v=gYvu8Wuddp4.

17 As a Presidential candidate, Obama had said. "We will kill bin Laden. We will crush al-Qaida. That has to be our biggest national security priority." Transcript of Second Presidential debate, 7 Oct.2008, at http://elections.nytimes.com/2008/president/debates/transcripts/second-presidential-debate.html. See also 'Bush: bin Laden "Wanted Dead or Alive"',

As regards the instructions and direction given to those involved in the operation, one of the SEALs involved records that, when asked, a White House lawyer indicated to those carrying out the raid that '[i]f he is naked with his hands up, you're not going to engage him ... I am not going to tell you how to do your job. What we're saying is if he does not pose a threat, you will detain him'.[18] Another account by an officer involved in the operation contradicts this, stating his understanding of the position in no uncertain terms: 'There was never any question of detaining or capturing him – it wasn't a split-second decision. No one wanted detainees'.[19]

A detailed account by a journalist who interviewed President Obama on the matter lays out in detail how in the months leading up to the operation, plans were made around three options, which remained on the table until close to the time of the operation.[20] These options were a bombardment of the compound, a drone attack on bin Laden when engaged in his regular pattern of 'pacing' the courtyard, or the ground operation.[21] The account also makes clear the level of doubt as to whether the target identified was indeed bin Laden, described by Obama as '50-50',[22] with the CIA deputy director reported to have told the President that 'the case for WMDs wasn't just stronger, it was much stronger'.[23] The many men, women and children who would have been killed in an aerial attack, against a '50-50 chance of also killing Osama bin Laden,' was said to give the President 'pause' and may have contributed to the decision to engage ground troops.[24] Other reported reasons included the need to ensure the identification of bin Laden, if killed, the risk of a drone

CNN, 17 September 2001, available at: http://articles.cnn.com/2001-09-17/us/bush.powell.terrorism_1_bin-qaeda-terrorist-attacks, and the bounty on Bin Laden's head, Chapter 6B.2.3

18 Owen, *No Easy Day*, supra note 11, p. 177.

19 J. Swaine, 'Osama Bin Laden: mission was to shoot to kill from the start', *The Telegraph*, 1 August 2011, available at: http://www.telegraph.co.uk/news/worldnews/al-qaeda/8676157/Osama-Bin-Laden-mission-was-to-shoot-to-kill-from-the-start.html.

20 Bowden notes 'Planning for either an air or a ground assault on the compound proceeded through February 2011...' while noting that several options were on the table during that time from bombardment to other methods of execution. Bowden, *The Finish*, supra note 14, p. 155.

21 *Ibid.*

22 '"This is 50-50," [Obama] said. "Look, guys, this is a flip of the coin. I can't base this decision on the notion that we have any greater certainty than that."' Bowden, *The Finish*, supra note 14, p. 163.

23 Morell, CIA deputy director's advice to President Obama, *Ibid.*, p. 161.

24 'Obama asked how many people were living at the compound and was informed that there were four adult males, five women and nearly twenty children. He asked about the houses that were close to the compound in the neighborhood. Those, too, would be completely destroyed, along with every resident man, woman and child. This really gave the president pause. America was not going to obliterate them on a 50-50 chance of also killing Osama bin Laden.' *Ibid.*, p. 164.

missing the target and target fleeing, and the importance of seizing material from the compound.[25]

The truth is difficult to ascertain Reports regarding the preparatory stage, the official statements in relation to the event and the immediate response of declaring the mission accomplished,[26] all appear consistent with the SEALs published account that purpose of the operation was to kill bin Laden.[27] Many details of the exact orders issued and the plans and preparations have not, however, been made public. References to the desire to take bin Laden 'dead or alive' have been made by successive US presidents,[28] according to earlier statements. The statement that no one wanted detainees resonates with those of commentators on the undoubted political 'difficulties' that would have arisen from his capture, regarding where to detain him, whether to prosecute him and, if so, where to do so. These issues have blighted US counter-terrorism policy since 9/11.[29] Those factors can have no legitimate bearing on a determination of the lawfulness of resort to lethal force, addressed in the following section.

Official reports indicate that bin Laden's body was removed from the compound, washed and prepared in accordance with Islamic traditions and religious rites were read by US army personnel.[30] Bin Laden was then dropped from US aircraft carrier Carl Vinson into the North Arabian Sea.[31]

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25 On the drone possibility, Bowden notes, 'What if it worked and you dropped the Pacer in his tracks? How would you know that you had killed Osama bin Laden? And it was strictly a one-shot deal. If you missed, the Pacer and his entourage would vanish ...'. *Ibid.*, p. 175. As regards the President's decision the night before the raid, see p. 206.

26 It has been noted that if the forces were in fact prepared to capture, with the intelligence value, prosecution, and propaganda benefits said capture would have entailed, the mission would have been a considerable failure as a result of bin Laden's death. Saul, 'Delivered from Evil', supra note 3.

27 Owen, *No Easy Day*, supra note 11.

28 Obama interview cited in Bowden, *The Finish*, supra note 14, p. 206. As noted in Chapter 6, President George W. Bush on September 17, 2001, when responding to the press question 'Do you want bin Laden dead?', said 'There's an old poster out West, as I recall, that said, "Wanted Dead or Alive"'. 'Bush: bin Laden "Wanted Dead or Alive"', *CNN*, 17 September 2001, available at: http://articles.cnn.com/2001-09-17/us/bush.powell.terrorism_1_bin-qaeda-terrorist-attacks.

29 'If bin Laden had been captured, rather than killed, the US would have become entangled in a plethora of legal issues. If he had been taken alive, issues would have been raised about would he have been subject to prosecution? Would it be before the US courts? Would he have been taken to Guantanamo? It clearly would raise a whole series of legal issues, ultimately not that dissimilar confronted with many of these people who have captured in recent years and taken to Guantanamo'. Prof. Rothwell cited in A. Jamieson, 'Crikey Clarifier: was it legal to kill Osama?', *Crikey*, 4 May 2011, available at: http://www.crikey.com.au/2011/05/04/crikey-clarifierwas-it-legal-to-kill-osama. See also Chapter 6B22.

30 S. Kneezle, 'Official E-mails Detail Osama bin Laden's Sea Burial', *TIME*, 22 November 2012, available at: http://newsfeed.time.com/2012/11/22/official-e-mails-detail-osama-bin-ladens-sea-burial last visited at 22 November 2012.

31 *Ibid.*

The bin Laden killing raises several issues from intersecting areas of international law from previous chapters, which are addressed in turn in Part A below. One is the legitimacy of the use of force itself, and whether the intervention on Pakistani soil was justified by state consent or, as Attorney General Eric Holder argued at the time, self-defence. Another issue is whether the bin Laden killing can, as the US authorities suggested at the time, be justified by reference to IHL. The third, notably neglected in the US analysis, is whether the human rights framework was applicable and, if so, whether its requirements in relation to the strict necessity of the use of force were met.[32] Finally, although ignored in official justifications and most of the analysis surrounding the killing, the relevance of criminal law is considered. The treatment of OBL's corpse after the killing and legal issues that arise from the framework are highlighted in Part B.

9.2 The Killing of Osama bin Laden and the Legal Framework

9.2.1 Use of Force against the Territorial Integrity of Pakistan: the sovereignty question?

A preliminary legal question relates to the lawfulness of a forceful intervention on another sovereign state's territory, in light of the rules on force set out in Chapter 5. Did the operation, as former President Musharraf suggested shortly thereafter, amount to an unlawful use of force against the state in violation of Article 2(4) of the Charter?[33] As explored in Chapter 5, the basic rule against the use of force on another state's territory is enshrined in Article 2(4) of the UN Charter, which represents one of the most basic rules of the legal order.[34] According to the prevailing view of the law as it currently stands, even incursions which are limited temporally, geographically and purposively, as was the bin Laden operation, may in principle violate the territorial integrity of another state. Lawfulness therefore depends on the existence of one of the exceptions to the prohibition on the use of force under international law.

Firstly, if the state of Pakistan in fact consented there would of course be no violation. The facts surrounding Pakistani-US relations, and specifically what the Pakistani state knew, authorised or forbade, are almost as murky as those

32 See standards in Chapter 7A Life, and 7B3 for interplay between IHL and IHRL

33 J. Bacon, 'Musharraf: U.S. violated Pakistan's sovereignty', *USA Today*, 3 May 2011, available at: http://content.usatoday.com/communities/ondeadline/post/2011/05/musharraf-us-violated-pakistan-sovereignity/1.

34 The nature of the rule and the exceptions to it have been discussed in Chapter 5A.

in relation to the covert operation itself.[35] By most official accounts, both Pakistani[36] and American,[37] it would appear that Pakistan was not informed of the operation nor was its consent sought. It has been noted that President Zardari, while noting that the operation was not joint, nonetheless applauded it.[38] To some, this amounted to an indication that 'there may have been tacit consent ex-ante, that there is at least tacit consent post-hoc'.[39] Such an argument is undermined, however, by the authorities expressing 'deep concerns and reservations on the manner' of the operation.[40] Nevertheless, it did not condemn the attack as a violation of its sovereignty or territorial integrity as former President Musharraf had, settling instead for emphasising that such incursions should not occur in the future.[41] It is a question of fact whether there was in fact consent, authorisation or approval, whether tacit or explicit, prior to the operation or, perhaps, ex post facto.

Secondly, had the intervention been authorised by the Security Council under its Chapter VII powers, there would naturally be no violation of Art 2(4). However even with the broad reaching resolutions against terrorism that have been passed post 9/11, there is little suggestion that these could be

35 Numerous commentators note the state indications of consent or lack of it may be politically motivated; in relation to Pakistan, one commentator notes often have to be taken 'with a grain of salt'. M. Schmitt, *Essays on Law and War at the Fault Lines* (The Hague: T.M.C. Asser Press, 2011), p. 74.

36 'The Government of Pakistan recognizes that the death of Osama bin Laden is an important milestone in fight against terrorism and that the Government of Pakistan and its state institutions have been making serious efforts to bring him to justice. However, the Government of Pakistan categorically denies the media reports suggesting that its leadership, civil as well as military, had any prior knowledge of the US operation against Osama bin Laden carried out in the early hours of 2nd May 2011.' 'Death of Osama bin Ladin-Respect for Pakistan's Established Policy Parameters on Counter Terrorism', press statement by the government of Pakistan, PR. NO. 152/2010, Date: 03/05/2011, available at: http://www.mofa.gov.pk/Press_Releases/Printer_Friendly/2011/May/PR_Print_152.htm(MOFA Statement'). It also notes that the 'CIA exploited the intelligence leads given by us to identify and reach Osama bin Laden, a fact also acknowledged by the US President and Secretary of State, in their statements'.

37 'We didn't contact the Pakistanis until after all of our people, all of our aircraft were out of Pakistani airspace'. Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, supra note 7.

38 Chesney, 'The Legality of the UBL Operation', supra note 3, citing A. Zardari, 'Pakistan did its part', *The Washington Post*, *Opinions*, 2 May 2011, available at: http://www.washingtonpost.com/opinions/pakistan-did-its-part/2011/05/02/AFHxmybF_story.html.

39 *Ibid.*

40 'Notwithstanding the above, the Government of Pakistan expresses its deep concerns and reservations on the manner in which the Government of the United States carried out this operation without prior information or authorization from the Government of Pakistan'. MOFA Statement, supra note 36.

41 'This event of unauthorized unilateral action cannot be taken as a rule. The Government of Pakistan further affirms that such an event shall not serve as a future precedent for any state, including the US. Such actions undermine cooperation and may also sometime constitute threat to international peace and security.' *Ibid.*

construed as authorizing a state to use force against another state to kill or indeed apprehend terrorists suspects without that state's consent.[42]

Thirdly, the attack would not be illegal if it could be justified as an act of self-defence, as indeed US Attorney General Eric Holder argued in the wake of the attack.[43] While some controversy continues to surround the use of force in self-defence against non-state actors, the stronger view of the law is that self-defence may arise whether or not the armed attack emanates from a state or non-state actor.[44] This is more readily established where the state – which might otherwise be expected to take the necessary action in accordance with its own international obligations towards terrorism[45] – proves unwilling or unable to do so.[46]

The lawfulness of resort to self-defence would however depend on certain critical conditions being met. It depends first on bin Laden representing a real concrete and imminent threat to the US. Second, the force used must be a necessary and proportionate response to avert that threat. In this particular scenario (unlike that posed in respect of the use of force in Afghanistan post-9/11 for example[47]) it may be the first element that gives greatest pause for reflection. Was there reliable information concerning the extent to which bin Laden posed a direct, concrete and imminent threat to the US at the time of the operation? In this respect, the relevant question is not his role and influence at the time of 9/11, but as a fugitive a decade later.[48] The symbolic significance of bin Laden, even at that stage, is beyond doubt, but the legitimacy of self defence depends on his contribution to an actual or imminent armed attack. Nor is the question whether he posed any threat at all, as many notorious criminals do, but whether he posed a threat of a nature and degree sufficient to constitute an 'armed attack' by non-state actor against the United States.[49] The nature of the threat posed by bin Laden, from his apartment in Abottabad in 2011, is the subject of considerable controversy.[50] This factual

42 *See* Chapters 2 and 7B1 on the broad reach of resolutions against terrorism generally, though these fall short of authorizing the use of force on another states territory

43 Kirschbaum and Thatcher, 'Concerns raised over shooting of unarmed bin Laden', supra note 4.

44 *See* Chapter 5, para. 5.A.2.

45 *See* Chapter 2, para. 2.2.

46 *See generally* Chapter 5.

47 Chapter 5B.2; in the wake of the 9/11 attack questions of necessity and proportionality were perhaps more difficult and more critical to lawfulness than the existence of the attack or the threat itself.

48 *See e.g.*, P. Bergen, *Manhunt: The Ten-Year Search for Bin Laden--from 9/11 to Abbottabad* (New York: Crown Publishers, 2012).

49 On the nature of the threshold, which applies only to non-state actor, is not uncontroversial. Some consider only states can conduct armed attacks, others that there is no threshold. *See* discussion in Chapter 5.

50 *See e.g.*, T. Darnstädt, 'Was Bin Laden's Killing Legal?', *Spiegel Online*, 3 May 2011, available at: http://www.spiegel.de/international/world/justice-american-style-was-bin-laden-s-killing-legal-a-760358.html.

assessment would have to have been made by the authorities, based on available intelligence, much of which is not in the public domain.

To meet the necessity test required for the use of force on another state's territory, there must be no alternative way of neutralising the threat; thus, for example, consulting or engaging the national authorities in international cooperation must not be a feasible route, and there are certainly shades of this in statements made by the US since the operation. A determination of whether Pakistan could be trusted not to jeopardize the operation against bin Laden, or indeed whether it was able and willing to cooperate with the US, entails undoubtedly complex political and pragmatic questions which fall to the state to determine based on available information.[51]

If the use of force met the 'necessity' test, the nature of the operation lends itself favourably to a 'proportionality' analysis. The use of ground forces – rather than aerial bombardment as has been used elsewhere and as was reportedly seriously countenanced as an alternative for the Abottabad operation – limited the use of force. While the action led to five deaths (including bin Laden's) and other injuries,[52] some seventeen or eighteen other persons living in the compound apparently survived.[53] Had the operation led to a fire fight with Pakistani authorities, which the US acknowledged was one of the potential outcomes of the operation,[54] the level of force could have escalated, leading to a very different scenario. But, as the operation was conducted, the forceful incursion onto Pakistani territory was relatively limited in both time and effect.

Sovereignty cannot be used as cloak to shield terrorists from the reach of legitimate defensive measures. While facts remain elusive, if bin Laden was assessed to make a decisive contribution to an imminent threat of armed attack, and the Pakistani authorities could not be relied upon to cooperate to meet

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51 *See e.g.*, Saul, 'Delivered from Evil', supra note 3. During the Presidential debates, Obama stated openly that had they informed Pakistan the operation would not have happened. The unwillingness and inability of Pakistan is relevant to the necessity of the use of force in self defence, where other criteria is met, rather than as is sometimes suggested providing a broader pretext for lawful use of force See Chapter 5.B.2.1.

52 A. Brown, 'Osama Bin Laden's death: How it happened', *BBC, News South Asia*, 10 September 2012, available at: http://www.bbc.co.uk/news/world-south-asia-13257330; s*ee generally* Bowden, *The Finish*, supra note 14.

53 *Ibid.*

54 Statement by White House Advisor Mr. John Brennan who, while replying to a question, said: Clearly, we were concerned that if the Pakistanis decided to scramble jets or whatever else, they didn't know who were on those jets. They had no idea about who might have been on there, whether it be US or somebody else. So, we were watching and making sure that our people and our aircraft were able to get out of Pakistani airspace. And thankfully, there was no engagement with Pakistani forces. This operation was designed to minimize the prospects, the chances of engagement with Pakistani forces. It was done very well, and thankfully no Pakistani forces were engaged and there were no other individuals who were killed aside from those on the compound.' Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, supra note 7.

that threat, there may well be a compelling argument that the incursion onto Pakistani territory was a necessary and proportionate response under the law on the use of force.

This question of the lawfulness under *jus ad bellum* must be distinguished from the entirely separate questions of whether the particular operation, and bin Laden's killing and the disposal of his body, were lawful under *jus in bello*, if applicable, or under international human rights law, to which we now turn.

9.2.2 International Humanitarian Law (IHL): Lawful Killing of a Legitimate Target?

As with the drone strikes, addressed in Chapter 6, the killing of bin Laden was justified by the US authorities by reference to IHL and the right to kill "enemy combatants in the field" (as well as self-defence).[55] As has frequently been noted in the chapter on IHL, a key question is whether he was targeted as part of an armed conflict to which IHL applies. According to the US, the applicability of IHL stems from his participation in the global armed conflict it considers itself to be waging with al-Qaeda and associated groups around the globe.[56] If one rejects this view, as the author and most others seem to, for the reasons discussed fully in Chapter 6,[57] could he be said to have been participating in another armed conflict, and if so which?

The non-international armed conflict (NIAC) in Afghanistan for example, may have spilled over into parts of Pakistan (though not Abottabad), and the question arises whether he could be considered to be participating in that conflict and if so in what capacity at the time of his death? Or could there be said to be a separate conflict in Pakistan to which the US is a party, such that the IHL framework applies? Doubts regarding the existence of such separate conflict in Pakistan have been expressed in relation to drone attacks, though some contend in the specific context of Pakistan there may be such

55 Attorney General Eric Holder told a U.S. Senate Committee: 'He was the head of al Qaeda, an organization that had conducted the attacks of September the 11th ... . The operation against bin Laden was justified as an act of national self-defense. It's lawful to target an enemy commander in the field. We did so, for instance, with regard to Yamamoto in World War II, when he was shot down in a plane.' Kirschbaum and Thatcher, 'Concerns raised over shooting of unarmed bin Laden', supra note 4.

56 *See e.g.*, H. Koh, 'The Obama Administration and International Law', Remarks at the Annual Meeting of the American Society of International Law (ASIL), 25 March 2010, available at: http://www.state.gov/s/l/releases/remarks/139119.htm (hereinafter 'ASIL Speech'). *See* Chapter 6.B.1.1.

57 *See* Chapter 6B.2, for the resounding international rejection of the notion of a 'Global War on Terror' on grounds, inter alia, that al Qaeda and associated groups lack the organisational structure to constitute parties to an armed conflict, that the intensity threshold for armed conflict may not be met, occasionally based on concerns regarding the possibility of a 'war of global reach,' or a combination of the above.

a conflict.[58] Notably, there is no suggestion that bin Laden was targeted in relation to any such Pakistani or Afghan conflict and the case has never therefore been made out in these terms.

If conceivably there were a conflict between the US and al-Qaeda, in Pakistan or beyond, it is on almost all views a non-international conflict.[59] Assuming for argument's sake, that there could be and *was* such an armed conflict with the US, what then was bin Laden's status for targeting purposes? The relevant factual question is not what role he had played in past events such as 9/11, but what his role was at the time of his death. Publicly available information on the nature of his activities during the six years leading up to his death, which is necessarily incomplete, may cast some doubt on the common assertion that he was targeted as the leader of a party to an armed conflict.[60] He was living in an apartment in Abottabad with no phone or internet, emitting occasional videos intended to inspire and incite violence[61] – criminal activity most likely, but a doubtful basis to establish leadership in an armed conflict.

Bin Laden could be targeted if he was 'directly participating in hostilities', as explored in Chapter 6. If allegations that he was actively involved in planning additional attacks are well founded, then it may well be justifiable to consider him an active participant in hostilities, despite his reclusive lifestyle. He may indeed on this basis be considered as having a 'continuous combat function,' as a result of which – if one accepts the approach of the ICRC Guidance on 'Direct Participation in Hostilities' – means that he could, in principle, be attacked at any time, even if at that moment he was not engaged in hostilities. Once again the extent of any participation in hostilities depends on an assessment of the facts.

Assuming he could be targeted on this basis, the next question (of considerable controversy) is whether, under IHL, such an individual should be captured rather than killed, where this proves feasible. While some dispute this standard, according to the ICRC Guidance, a person in a 'continuous fighting function' in a NIAC who surrenders, or if in all the circumstances it is feasible to capture instead of kill, this route should be taken.[62] Such an approach finds additional support if one takes the view that in interpreting IHL in this context, the terms of IHRL – with its clear obligation to capture rather than kill and to plan and

58 *See* Chapter 6, para. 6B.2.2.1 on the lawfulness of drone killings in Pakistan under IHL. Cf. Saul, 'Delivered from Evil', supra note 3.

59 *See* Chapter 6A.1.1 on characterisation of conflicts.

60 *See, e.g.*, Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, supra note 7.

61 The US alleges that he was 'planning further attacks'. Crimes may well have been committed during this period (see below). But whether he could be said to have been actively participating in a conflict is more questionable.

62 *See* Interpretative Guidance on the Notion of Direct Participation in Hostilities under IHL', ICRC, 2009 (hereinafter 'ICRC DPH Guidance').

carry out operations to minimise any loss of life – should also be borne in mind.[63] Questions may then arise as regards the necessity of the use of lethal force, depending on which version of the facts one considers. If, as some accounts suggest, bin Laden was shot and incapacitated on the floor when the SEALs entered the room, there would seem little basis for firing additional multiple rounds into his chest.

A few commentators seem to have suggested that bin Laden should be seen as a 'combatant' who could therefore be killed unless and until he was 'hors de combat'.[64] First, these categories apply in IAC and few (including those in the US administration) would assert he was a combatant in an IAC.[65] If he were, the question to be assessed on the facts would appear to be whether he was 'hors de combat' or already 'in the power of the enemy' when the special forces raided the compound and found him.[66] While some have suggested this requires the individual to have 'completed' surrender before he was killed,[67] it must surely be the better view in light of the clear wording of the provision as well as the objectives of IHL, that the 'intention to surrender' would suffice to render him 'hors de combat'.[68] Moreover if he was firmly under the control of the troops, in the hands of the enemy, and no longer posing an active threat the lawfulness of his killing under IHL would be doubtful whatever his status. The rules of IHL that prohibit giving no quarter,

63 As noted in Chapter 7, even if IHL applies, it does not do so to the exclusion of IHRL. On intersection in the context of the bin Laden killing, *see* Milanovic, 'Was the Killing of Osama bin Laden Lawful?', supra note 3.

64 US Attorney General Eric Holder testified before the House Judiciary Committee: '[I]f someone is an enemy combatant, it does not matter if he is unarmed or not, because lethal force is permitted against enemy fighters and commanders in the course of an ongoing armed conflict, and sometimes in cases of self-defense.' 'Justice Department Oversight, Part 1', *C-Span*, 3 May 2011, available at: http://www.c-spanvideo.org/program/299299-1. Prof.D Rothwell states: 'He has combatant status as he is the head of al-Qaeda, an organisation involved in armed conflict with the US, not only because of the events of 9/11 but because it continues to be at conflict with the United States.' Jamieson, 'Crikey Clarifier: was it legal to kill Osama?', supra note 29. CF legal standards Chapter 6A.2.1.

65 *See* Chapter 6 B.2.1 for discussion on the US justification of 'self-defence or IHL'.

66 If 'hors de combat' he must not be made the object of attack. A person is 'hors de combat' if: (a) in the power of an adverse Party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.' Article 41 of Additional Protocol I to the Geneva Conventions. *See also* C. Mallat, 'The Geneva Conventions and the Death of Osama Bin Laden', *JURIST*, 4 August 2011, available at: http://jurist.org/forum/2011/08/chibli-mallat-bin-laden.php ; *but see* G. Rona, 'Was killing Osama bin Laden legal?', Human Rights First, 5 May 2011, available at: http://www.humanrightsfirst.org/2011/05/05/was-killing-osama-bin-laden-legal.

67 S. Pezzi, 'The Legality of Killing Osama bin Laden', National Security Journal Blog, 16 May 2011, available at: http://harvardnsj.org/2011/05/killing-osama-bin-laden-and-the-law.

68 '[T]he only way OBL could immunize himself from targeting would be if clearly announced his intention to surrender.' Milanovic, 'Was the Killing of Osama bin Laden Lawful?', supra note 3.

deemed customary for either type of conflict,[69] support the view that had the orders effectively been to kill bin Laden and avoid another complicated detainee scenario, this would conflict with long established rules of IHL.

In conclusion, the applicability of the IHL framework to this operation is questionable. It is premised on his participation in a conflict that most of the world believes does not exist. While the US reliance on IHL is entirely unsurprising, in light of its position on the 'global war,' the fact that much commentary in the wake of his killing revolved around considerations of IHL of doubtful application is perhaps less readily comprehensible in legal terms. The key question for the bin Laden killing, like that of the many other individuals subject to targeted killings at a growing pace,[70] is whether they were participating in an armed conflict as defined in international law. If the armed conflict paradigm were to properly apply, there may well be a compelling case for the view that this particular individual was engaged as an active participant in the conflict, though this depends on the intelligence as to his role at the time of death, not previously. Even on this analysis unanswered questions remain: was he hors de combat or under the control of the enemy before he was killed?[71] Could he have been detained and prosecuted instead of killed, without losses to those carrying out the raid? Did the circumstances of operation make it militarily necessary to kill rather than capture him, or was that the plan from the outset?

9.2.3 The Killing of Osama bin Laden under the Neglected Framework of International Human Rights Law?

How does the killing of bin Laden measure up against the framework of IHRL? As has been discussed in Chapter 7, if the scenario arose within an armed conflict, IHRL should be interpreted in light of IHL, with a view to determining whether the violation of the right to life was 'arbitrary'.[72] If however, as would appear to be the most likely case, the situation was not one of armed conflict, IHRL applies without reference to IHL.

A preliminary issue that has arisen relates to the extra-territorial reach of IHRL.[73] The US position is that its ICCPR obligations do not arise where it oper-

69 Rule 46, ICRC Study on Customary Law "Rule 46. Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited"

70 *See* Chapter 62.2.1 'Targeted Killings, Drones and attacking al-Qaeda', noting that drones in Pakistan targeted more than 3000 individuals between 2004 and 2010 and the numbers are increasing, as is the geographic reach of the programme expanding.

71 As noted, it is implausible that bin Laden was a combatant in an IAC to which this legal characterisation applies, but even as regards this category which allows greatest leeway as regards targeting, questions remain.

72 *See* Chapter 7B3 on interplay between IHL and IHRL.'

73 Chapter 7A.2.2 for legal standards and 7B.2 for issues arising in practice post 9/11.

ates outside its own territory.[74] However the international legal framework dictates otherwise: where the state exercises sufficient 'authority and control' abroad, its human rights obligations apply.[75] It has been held on repeated occasions that this *de facto* control can arise in many ways, some of which are comparable to the present situation: notably where individuals were briefly subject to the state's physical control through kidnapping,[76] where they were subject to the lethal use of force by troops in occupied territory,[77] or where they were subject to extra-judicial executions abroad.[78] There can be little doubt in light of the current state of the law, as elaborated through ample jurisprudence, that the armed US forces were exercising sufficient *de facto* control of the particular situation and individuals, triggering its human rights obligations, by entering the compound heavily armed and resorting to lethal force. The more interesting question is whether the operation meets the standards enshrined in that body of law.

Despite the fundamental nature of the right to life, the use of lethal force is not necessarily unlawful under human rights law. It is however strictly curtailed, as IHRL is geared towards the protection of life, and the prevention so far as possible of the loss of life.[79] Under IHRL, to be lawful the use of force must therefore be 'absolutely necessary'[80] or 'strictly unavoidable'[81] pursuant

74 *See* US reports to international human rights bodies where it asserts its position, while, most recently, recognizing that it is out of step with international legal authorities. *See, e.g.*, Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, 30 December 2011, available at: http://www.state.gov/j/drl/rls/179781.htm last visited 22 November 2012.

75 *See, e.g.*, HRC General Comment No. 31 and fuller sources, Chapter 7A2.

76 *See* e.g. *Lopez Burgos* v. *Uruguay* (Comm. No. 52/1979), Views of 29 July 1981, UN Doc. CCPR/C/13/D/52/1979, and other cases discussed at Chapter 7A2. Many relate to detention, but some to other forms of 'power or control' over the individual.

77 *Case of al-Skeini* v. *The United Kingdom*, ECHR Grand Chamber, Judgment, 7 July 2011.

78 *See eg. Letelier* v *Chile*, Report No. 167/10, Petition 402-03, Chile, 1 November 2010 (concerning the killing of Orlando Letelier by Chilean forces in Washington DC).

79 *See* Chapter 6A.5.1 on the fundamental non-derogable nature of the right to life and states' obligations to take positive measures to protect life.

80 Article 2(2) of the ECHR notes that where employed in defence against unlawful violence, to effect lawful arrest or detention or quell a riot or insurrection, lethal force will not constitute an unlawful deprivation of life, provided action taken is no more than 'absolutely necessary'; *but see, e.g.*, interpretation in, *Ogur* v *Turkey* (App. 21594/93), Judgment of 20 May 1999, ECtHR, *Reports 1999-III*. The ICCPR and the ACHR refer to the prohibition on the 'arbitrary' deprivation of life (Articles 6 and 4, respectively). Article 1 of the American Declaration of the Rights and Duties of Man also provides for the right to life without any explicit qualification. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August – 7 September 1990), UN Doc. A/CONF.144/28/Rev.1 at 112 (1990)) (hereinafter 'UN Basic Principles on the Use of Force') provides that 'intentional' lethal use of firearms may only be made when 'strictly unavoidable in order to protect life' *See also* Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by ECOSOC

to a lawful purpose – which may include self-defence or defence of others from imminent harm. The necessity test implies that if non-lethal measures are available, they must be exhausted first, and the risk of loss of life 'minimised' wherever possible.[82] Moreover, the operation must be 'planned and carried out' so as to strictly limit the danger of recourse to the use of force.[83] The operation must take 'all feasible precautions in the choice of means and methods' with a view to avoiding loss of life,[84] which has implications for the instructions, preparation, training, equipment and execution of an operation such as the one at hand.

– *The Critical Question of Goals*

Several elements of the test for establishing the legality of the operation under IHRL are worth considering in turn. The most critical questions, factually and legally, relate to starting positions. Factually, what was the goal of the Abottabad operation from the outset? Was it in fact to kill, or to capture, bin Laden? In this respect, the starting points of IHL and IHRL *vis-à-vis* the use of lethal force are radically different. Under IHL, an operation that has as its primary objective the killing – or killing or capturing – of a legitimate military target may well be lawful. Under IHRL it is not. Not all lethal force is unlawful as noted above, but there is a distinction between the use of lethal force that may prove strictly necessary in the course of an operation aimed at a legitimate purpose on the one hand, and the specific targeting and killing of an individual on the other. On this basis, targeted killings, which by their very nature fall into the second category, have been stridently condemned by international courts and bodies in a range of situations.[85] Similarly, if this operation had

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Res. 1989/65 of 24 May 1989 (hereinafter 'ECOSOC Principles'), and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, 22 October 2002, OAS Doc. OEA/Ser.L/V/II.116, para. 87 (hereinafter 'IACHR *Report on Terrorism and Human Rights*').

81 IACHR *Report on Terrorism and Human Rights*, 2002, para. 87; *see also* Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, supra note 80.

82 *See McCann, Farrell and Savage* v. *United Kingdom*, Judgment of 27 September 1995, *Series A*, No. 324.

83 *See ibid.* The Court held that the standard of absolute necessity in the defence of persons from unlawful violence within the meaning of Article 2(2)(a) had not been met. The use of lethal force against suspected members of the IRA amounted to a violation of Article 2(2) based largely on what was found to be defective planning of the operation. The question of whether the killing of a Brazilian national, misidentified as a suicide bomber, by the police in the London underground was 'absolutely necessary' is currently pending: *Armani da Silva v. the UK* (no. 5878/08), communicated on 28.09.2010.

84 *Ergi* v. *Turkey* (App. 23818/94), Judgment of 28 July 1998, 32 (2001) EHRR 388, para. 79.

85 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2006/53, paras. 45 and 51 condemning 'shoot-to-kill' policies. *See also* Concluding Observations of the Human Rights Committee: Peru, UN Doc. CCPR/C/79/Add.8 (1992); *McCann* v. *United Kingdom*, supra note 82. For a detailed discussion of the legality of the Israeli

the use of lethal force as a goal from the outset – rather than as an unavoidable outcome in face of the particular situation presented in the compound at the point in time – it would be difficult if not impossible to reconcile with IHRL.

– *The Requisite Planning and Preparation*

Assuming for argument's sake that the mission had the goal of capturing bin Laden, if possible, IHRL requires that the operation be planned and organised so as to meet this goal and minimise the risk of loss of life. This requires clear instructions, suitable guidance, training, preparation and appropriate equipment. The preparation must be geared to the particular situation, and in the context of a raid such as this one would expect the forces executing the mission to be prepared to use lethal force if necessary. In the seminal *McCann* case, where the killing of terrorist suspects was deemed unlawful, the ECtHR was critical of the fact that the soldiers had not been adequately trained or instructed in order to assess whether the use of firearms to wound, rather than kill their targets, might have been warranted by the specific circumstances that confronted them. As a result, the Court found that the soldier's reflex reaction in this vital aspect lacked the necessary caution in the use of firearms expected in a democratic society, even where dealing with dangerous terrorist suspects. By contrast, in a case where Dutch or Cypriot forces had been instructed and trained in use of lethal force, but instructed and trained only to shoot where lives were in danger, the lethal use force was found to be lawful.[86]

– *Necessity: legitimate grounds and split second decisions*

However legitimate the aim of a dangerous counter-terrorist operation, and however well planned and prepared it is, the possibility of circumstances in

practice of extra-judicial executions of terrorists under IHRL and IHL, *see* O. Ben-Naftali and K. R. Michaeli, '"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings', 36 (2003) *Cornell International Law Journal* 233; D. Kretzmer, 'Use of Lethal Force Against Terrorist Suspects', *Counter-Terrorism, International Law and Practice* (Oxford: Oxford University Press, 2012), p. 618.*See e.g.*, 'Civil and Political Rights, Including questions of: Disappearing, and Summary Executions', 9 January 2002, UN Doc. E/CN.4/2002/74, noting that such killings amount to suggesting that it is futile to operate inside the law in face of terrorism.

86 In *Andronicou and Constantinou* v. *Cyprus* (Appl. No. 25052/94), Merits, 9 October 1997, 25 (1997) EHRR 491, the Court held that although the officers were trained to shoot to kill if fired at, they were instructed only to use proportionate force if lives were in danger. *See also Nachova and Others* v. *Bulgaria* (Appl. Nos. 43577/98 and 43579/98), Grand Judgment, 6 July 2005, 42 (2006) EHRR 43. Likewise, in *Case of Ramsahai* v. *The Netherlands*, (Appl. No. 52391/99), Grand Judgment, 15 May 2007, the Grand Chamber found that the arrest operation was planned correctly, that the officers acted in conformity with instructions intended to minimise the danger from the use of firearms, that the firearms and ammunition issued to them were specifically designed to prevent unnecessary fatalities, and that the police officer who fired the fatal shot had been adequately trained in the use of his service firearm for personal defence.

which the lethal use of force might prove absolutely necessary and appropriate must always be evaluated. Was such an evaluation made by those carrying out the operation against bin Laden? On what grounds and in what particular circumstances did the use of force prove necessary in the compound? As the US fails to justify its actions by reference to its HR obligations, which it would appear to consider simply absent from the equation, it seems unlikely that it would maintain that the operation fell into one of the exceptional scenarios in which the use of lethal force might be justified under IHRL. However, the most relevant would appear to be self-defence.[87]

In the immediate aftermath of the operation, the US invoked IHL and also 'national self-defence'.[88] Self-defence is a concept that appears in several guises in international law, offering different legal standards by way of answer to different legal questions. Self-defence under IHRL is not necessarily the same as self-defence under criminal law (Chapter 4), and it is certainly different from self-defence that may justify the use of force against a state's territorial integrity (Chapter 5). At least for the purposes of HRL, it is clear that a 'national'[89] or general threat to a state is not the sort of threat that is envisaged as resulting in the right to self-defence.[90]

Rather, the use of lethal force by law enforcement officials may be justified on this basis only 'where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury, or to otherwise maintain law and order where strictly necessary and proportionate'.[91] An essential question is whether there were alternative ways to overwhelm bin Laden or others who may have posed a threat? Was there an alternative to shooting repeatedly in the head and chest, such as shooting in the legs to incapacitate the suspect?

It is noteworthy though, that in the application of this necessity test, courts have shown due flexibility in recognising the extremely difficult split-second assessments that need to be made in precisely these sort of situations. Where an operation is appropriately planned and prepared for, and an on-the-spot assessment is made that force is necessary and proportionate in self-defence or defence of others, based on an 'honest belief' which is perceived for good

87 Other issues possibly arising, such as national security more broadly, or difficulties relating to the detention or criminal processes that would have followed capture, cannot justify the use of lethal force.

88 Kirschbaum and Thatcher, 'Concerns raised over shooting of unarmed bin Laden', supra note 4.

89 *Ibid.*

90 *See* Concluding Observations of the Human Rights Committee: Peru, UN Doc. CCPR/C/79/Add.8 (1992), supra note 85, para. 8; *see also* E. Gross, 'Thwarting Terrorist Attacks by Attacking the Perpetrators or Their Commanders as an Act of Self Defence: Human Rights Versus the State's Duty to Protect its Citizens', 15 (2001) *Temple Int'l and Comparative Law Journal* 195.

91 IACHR *Report on Terrorism and Human Rights*, supra note 81, n. 36; *See also* ECOSOC Principles, supra note 81, Principle 9.

reason to be valid at the time, there will be no violation, even where that assessment subsequently turns out to be mistaken.[92] In *McCann* the court noted that 'to hold otherwise would impose an unrealistic burden on the state and on its law-enforcement personnel in the execution of their duties, perhaps to the detriment of their lives and the lives of others'.[93] Inevitably, such real time assessments in charged and dangerous situations are difficult and the true necessity of the force may only be effectively assessed with the benefit of hindsight. But what is required is an honest and reasonable assessment, based on adequate training and preparation, and in light of all the circumstances as they presented themselves in the compound, that no measures short of resort to lethal force were possible.

– *Positive State Obligations vs. the Onus of Conspicuous Surrender?*

It is clear from the above discussion that the state is under a human rights obligation to detain rather than use lethal force wherever possible. The state has positive obligations to take all feasible measures to ensure that the individual can be captured, while being prepared for the alternative if unavoidable. It follows that 'kill or capture,' 'dead or alive', cannot be equally rated alternatives, as some of the discussion in relation to the bin Laden operation perhaps suggests.[94]

The debate on 'surrender' in this context also may be somewhat confusing. Naturally, part of the state's positive obligation to protect life in operations of this nature is ensuring that the person has a meaningful opportunity to

92 'The use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others […].' *McCann* v. *United Kingdom*, supra note 83, pp. 177-78; *see also Giuliani and Gaggio* v. *Italy* (Appl. No. 23458/02), Chamber Judgment, 24 March 2011, concerning the police killing of their son and brother during 'anti-globalisation' demonstrations on the fringes of the G8 summit in Genoa. Given the extremely violent nature of the attack on the vehicle, it was concluded that the officer acted in the honest belief that his own life and physical integrity, and those of his colleagues, were in danger, and that he was, therefore, entitled to use appropriate means to defend himself and the colleagues. The Court found the use of lethal force justifiable *See also* acceptance of necessity in *Gül* v. *Turkey*, (Appl. No. 4870/02), Judgment, 14 December 2000.

93 *Ibid.*

94 *See, e.g.*, PBS Frontline, Kill/Capture, 'Interview: General David Petraeus', available at: http://www.pbs.org/wgbh/pages/frontline/afghanistan-pakistan/kill-capture/interview-general-david-petraeu. Petraeus stated that kill/capture is 'a very important tool – by the way, quite a surgical tool. The ones conducted by the U.S. Special Mission Unit have a very, very high rate of success. Way over half of the operations actually detain the individual, or in some cases kill the individual that they are after. And, by the way, we normally want to detain, because we want to be able to interrogate – humanely.' *See* Obama and Bush's use of 'dead or alive', supra notes 26 and 29. Sometimes the term is 'capture or kill' and sometimes vice versa.

surrender, unless doing so would itself present an imminent danger to life.[95] It may be questioned how meaningful the opportunity to surrender was in the current situation: what form might this opportunity have taken between the time the SEALs entered the room and the time they riddled bin Laden's body with bullets.[96] The Navy SEALs' account suggests that bin Laden was shot dead before he was even identified.[97]

Moreover, 'surrender' at the victim's initiative is not the only possible scenario, and in the current situation it was presumably an extremely unlikely eventuality (given what we think we know about bin Laden). The state nonetheless has positive obligations under IHRL to overwhelm the individual and take him into custody; this applies whether or not the individual himself might have preferred the kill rather than the capture option.[98] The accounts and analyses that have been most favourable to the US in this context have suggested that had bin Laden 'offered to surrender',[99] or 'conspicuously surrendered',[100] 'thrown up his hands' or waved a white flag in the extremely short time before the forces shot him in the head and chest, he may have avoided the lethal use of force. Positive obligations are such that it is not enough to put the onus on the individual to wave a white flag on time before bullets riddle his head and chest,[101] but rather the opportunity to surrender should be meaningful. It is doubtful whether the accounts of the facts, or the

95 *Ogur* v *Turkey*, supra note 81; *Guerrero* v. *Colombia*, Views on Communication 45/1979, 1982; UN Basic Principles on the Use of Force, supra note 81; Code of Conduct for Law Enforcement Officials, adopted by UNGA Res. 34/169 of 17 December 1979.

96 Owen, *No Easy Day*, supra note 11, pp. 235-36.

97 *Ibid.*, pp. 235-36 and 245-47.

98 *See, e.g.*, *Mammadov* v. *Azerbaijan* (Appl. No. 4762/05), Judgment, 17 December 2009, paras. 99-100. noting the prohibition on taking life "intentionally," through force disproportionate to the legitimate aims referred to in sub-paragraphs (a) to (c) "but also to take appropriate steps to safeguard the lives of those within its jurisdiction." The obligation is to "... take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."'

99 The White House press secretary stated that '[t]he team had the authority to kill Osama bin Laden unless he offered to surrender; in which case the team was required to accept his surrender if the team could do so safely'. Carney, 'Press Briefing by Press Secretary Jay Carney', supra note 13.

100 First-hand account in Owen, *No Easy Day*, supra note 11, pp. 235-36. *See also* Bowden, *The Finish*, supra note 15. Bowen indicates that bin Laden was killed before being identified, and not given an opportunity to surrender. *See* interview with Peter Bergen, author of *Manhunt*,

101 A. Silverleib, 'The killing of bin Laden: Was it legal?', *CNN World*, 4 May 2011, available at: http://articles.cnn.com/2011-05-04/world/bin.laden.legal_1_al-qaeda-leader-bin-cia-director-leon-panetta/2?_s=PM:WORLD. UN Special Rapporteur on the promotion of human rights and counter-terrorism, Martin Scheinin, stated '[t]he United States offered bin Laden the possibility to surrender, but he refused. Bin Laden would have avoided destruction if he had raised a white flag'

ways in which comments around surrender have been made in this context, as mentioned above, might meet this test.[102]

– *Clarifying the Facts and the Duty to Investigate*

The operation illustrates the factual uncertainties that so often attend operations in the GWOT, making assessment of lawfulness infinitely more challenging. Information concerning goals and instructions, on which there has been much speculation, shifting responses and conflicting accounts,[103] represents a critical factor for determining lawfulness in the present case. Less consistent still are accounts of the dangers that presented themselves to the SEALs carrying out the operation, which may have justified resort to lawful use of force. Yet such additional information[104] has not been forthcoming. In particular, two UN Special Rapporteurs have asked for information as to the extent to which the mission 'allowed for capture.'[105] Clearly states have the right to protect genuinely sensitive operational information. But where death results from the lethal use of force, there is an obligation to investigate and to clarify. Such investigation should be thorough, effective, and independent,[106] and insofar as possible public.

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102 'Bin Laden clearly didn't conspicuously surrender'. Peter Bergen, '"Manhunt" Author Reviews Navy SEAL's "No Easy Day"', Transcript, *NPR*, available at: http://www.npr.org/2012/08/30/160322677/manhunt-author-reviews-navy-seals-no-easy-day.

103 *See* Scheinin, supra note 103; Cf. Owen, *No Easy Day*, supra note 11, pp. 235-36, suggesting bin Laden was never offered the possibility to surrender, but had been shot dead while peeking out of his bedroom door.

104 Pillay first noted, in gentle terms, that 'This was a complex operation and it would be helpful if we knew the precise facts surrounding his killing. The United Nations has consistently emphasized that all counter-terrorism acts must respect international law.' 'U.N. rights boss asks U.S. for facts on bin Laden killing,' *Reuters*, 3 May 2011, available at: http://www.reuters.com/article/2011/05/03/us-binladen-un-rights-idUSTRE7425PR20110503. On 6 May, special rapporteurs on Terrorism and Extra-judicial Killing called somewhat more clearly for information. 'Independent UN human rights experts seek facts on Bin Laden killing', UN News Centre, 6 May 2011, available at: http://www.un.org/apps/news/story.asp?NewsID=38293. 'In respect of the recent use of deadly force against Osama bin Laden, the United States of America should disclose the supporting facts to allow an assessment in terms of international human rights law standards,' Osama bin Laden: statement by the UN Special Rapporteurs on summary executions and on human rights and counter-terrorism', *United Nations Office of the High Commissioner for Human Rights*, *News and* Events, 6 May 2011, available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E.

105 'For instance it will be particularly important to know if the planning of the mission allowed an effort to capture Bin Laden,' Heyns and Scheinin noted, *Ibid.*

106 On independence, *see e.g.*, *Hugh Jordan* v. *The United Kingdom* (Appl. No. 24746/94), ECHR Chamber, Judgment, 4 May 2001; on rigour and effectiveness, *see Case of al-Skeini*, supra note 78; *Finucane* v. *The United Kingdom* (Appl. No. 29178/95), ECHR Chamber, Judgment, 1 July 2003.

9.2.4 The Role of Criminal Law?

Osama bin Laden was a notorious criminal. He had been indicted by the US before 9/11.[107] In notable contrast, he was not indicted by the US afterwards.[108]

Bin Laden could presumably have been prosecuted for various crimes, under national and international law.[109] The most obvious are murder or crimes against humanity, with possible modes of liability ranging from incitement to participation as highlighted in Chapter 4. The extent to which he would have had sufficient overall control of those conducting the attacks at the material time, or could have been shown to have ordered the attacks as such, may be questionable, but it would appear beyond dispute that his role amounted to one of the several forms of criminal contribution discussed in Chapter 4. Likewise, he could, in principle, have been prosecuted before a range of international or national fora.[110] Multiple national courts could have exercised jurisdiction in respect of their nationals killed on 9/11 (passive personality jurisdiction) or under universal jurisdiction. Conceivably, given the unparalleled isolation of bin Laden and al Qaeda internationally, there would have been little difficulty in finding the required consensus to establish an ad hoc international criminal tribunal if that had proved necessary or desirable. The most natural forum would however have been regular US courts.

The failure to detain bin Laden may indeed have been influenced by political 'difficulties' that would have resulted from his capture, regarding where to detain, and whether and if so where to prosecute.[111] Such difficulties can have no legitimate bearing on the use force (and certainly do not provide

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107 '[B]in Laden was indicted for the embassy bombings there in 1998' and 'placed on the Ten Most Wanted list in June 1999 after being indicted for murder, conspiracy and other charges in connection with the embassy bombings.' D. Eggen, 'Bin Laden, Most Wanted For Embassy Bombings?', *The Washington Post*, 28 August 2006, available at: http://www.washingtonpost.com/wp-dyn/content/article/2006/08/27/AR2006082700687.html.

108 This was perhaps consistent with the shift from law enforcement to conflict paradigm, though an FBI spokesperson reported stated there was 'no hard evidence' linking bin Laden to 9/11 as a basis for this. http://www.globalresearch.ca/fbi-says-no-hard-evidence-connecting-bin-laden-to-9-11/2623.

109 *See* Chapter 4A.1.1, 'Crimes under International or National Law'.

110 *See* Chapter 4A.1.3, 'Jurisdiction to prosecute'.

111 Professor Rothwell stated: 'If bin Laden had been captured, rather than killed, the US would have become entangled in a plethora of legal issues. If he had been taken alive, issues would have been raised about would he have been subject to prosecution? Would it be before the US courts? Would he have been taken to Guantanamo? It clearly would raise a whole series of legal issues, ultimately not that dissimilar confronted with many of these people who have captured in recent years and taken to Guantanamo.' Jamieson, 'Crikey Clarifier: was it legal to kill Osama?', supra note 30. *See also* interview with Obama by Bowden, referred to 'hard' issues that would have arisen if he had been captured, though Obama noted the advantages of this prosecution route for the rule of law. Bowden, *The Finish*, supra note 15, p. 191.

a legal justification). It is however noteworthy that one extreme impact of the controversies around detention and criminal justice policy may ultimately be to jeopardise the right to life.

Bin Laden's killing provoked comments reminiscent of discussions on the expressive function of criminal law in Chapter 4.[112] It is a matter of speculation what the effect of a criminal trial would have been on bin Laden or his followers: whether it would have demythologised bin Laden, recast him as common criminal rather than warrior;[113] as one commentator has noted, serving a prison sentence in a New York jail would presumably have been the last thing he would have wanted.[114] It may have been, as Obama reportedly reflected at one point, 'that displaying due process and rule of law would be our best weapon against al-Qaeda, in preventing him from appearing as a martyr'.[115] Bin Laden was subject to one of the most intensive and ultimately successful manhunts in history. Finding, capturing, and subjecting him to a criminal trial could have provided a compelling international symbol of the long arm of the law, something which would arguably have been more valuable than another show of military strength.

9.3 Disposal of Bin Laden's Corpse and Legal Issues arising

Legal issues also arise in respect of the subsequent disposal of bin Laden's body in the North Arabian Sea.[116] While the US has not provided a detailed explanation or justification for these measures, from the information provided it appears that this choice of burial was an attempt to avoid the propaganda advantage that al-Qaeda might otherwise have enjoyed.[117] On the other hand,

112 Chapter 4, para. 4A.1.

113 'If he had been imprisoned for life then, like Sheikh Omar, [bin Laden] would also have been denied the status of martyr'. R. Lambert, 'What if Bin Laden had stood trial?', *The Guardian*, 3 May 2011, available at: http://www.guardian.co.uk/commentisfree/2011/may/03/osama-bin-laden-trial-al-qaida.

114 Kirschbaum and Thatcher, 'Concerns raised over shooting of unarmed bin Laden', supra note 4.

115 Obama reportedly stated: 'But, frankly, my belief was if we had captured him, that I would be in a pretty strong position, politically, here, to argue that displaying due process and rule of law would be our best weapon against al-Qaida, in preventing him from appearing as a martyr'. Bowden, *The Finish*, supra note 15, p. 191.

116 L. Sweet, 'Osama Bin Laden Buried in the North Arabian Sea off the USS Carl Vinson', *Chicago Sun-Times*, 2 May 2011, available at: http://blogs.suntimes.com/sweet/2011/05/osama_ bin_laden_buried_in_the.html

117 ' 'Akbar Ahmed, the chairman of the Islamic studies department at American University, [added that] the sea burial prevented Bin Laden's resting place from becoming a focus for discontent. "Shrines of controversial figures in Muslim history become centers to attract the angry, the disenchanted. The shrine bestows powers of religious charisma. If they allowed Osama bin Laden to be buried in Pakistan, his followers would show up, plant flowers, and women will say the shrine has healing powers, especially among the un-

serious concern has been raised regarding the decision to immediately dispose of a corpse in this way,[118] with the method of disposal of the body having been described by at least one Muslim authority as causing greater offence than the killing itself.[119] It has been used as an argument to further delegitimize the US' authority to hold individuals to account for terrorism, while itself violating international law.[120]

IHL provides rules on the return and disposal of the dead. As a general rule, under IHL applicable in international and perhaps also non-international conflicts,[121] states must 'endeavour to facilitate the return of the remains of the deceased'.[122] In situations such as this in which the state may have concerns that allowing a burial site may lead to fanaticism and support for bin Laden,[123] there appears to be little practice indicating what reasons for not returning the dead might be considered to relieve the state from this obligation. The right of family members to claim the remains of those who have died in conflict, and to transfer and bury them has been recognised in various con-

educated. His myth would continue to grow."' J. Leland and E. Bumiller, 'Islamic Scholars Split Over Sea Burial for Bin Laden', 2 May 2011, *The New York Times*, available at: http://www.nytimes.com/2011/05/03/world/asia/03burial.html.

118 Saudi Sheikh Abdul Mohsen Al-Obaikan, an adviser to the Saudi Royal Court, said: 'That is not the Islamic way. The Islamic way is to bury the person on land (if he has died on land) like all other people.' Amidhan, a member of Indonesia's Ulema Council (MUI), went so far as to say he was more concerned about the burial than the killing: 'If the U.S. can't explain that, then it appears just like dumping an animal and that means there is no respect for the man ... and what they did can incite more resentment among Osama's supporters.' Kirschbaum and Thatcher, 'Concerns raised over shooting of unarmed bin Laden', supra note 4. *See also* Leland and Bumiller, 'Islamic Scholars Split Over Sea Burial for Bin Laden', supra note 119.

119 Amidhan, a member of Indonesia's Ulema Council, ibid..

120 Statement by K.S. Mohamad at the opening of his military commission proceedings included the following: 'The president can take someone and throw him into the sea under the name of national security and so he can also legislate the assassinations under the name of national security for the American citizens ... Your blood is not made out of gold and ours is made out of water. We are all human beings.' 'Alleged 9/11 mastermind: America killed more people than hijackers did', *Reuters*, 17 October 2012, available at: http://www.reuters.com/assets/print?aid=USBRE89G1EJ20121017.

121 Under NIAC, there is no written rule though a 'trend' and applicable principles suggest that the same rules may apply in NIACs as in IACs. J.M. Henckaerts and L. Doswald-Beck, 'ICRC Study of Customary International Humanitarian Law, Volume I: Rules', Rule 114 (hereinafter 'ICRC Study on Customary IHL').

122 'Return of the Remains and Personal Effects of the Dead: Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them.' *Ibid.*

123 Leland and Bumiller, 'Islamic Scholars Split Over Sea Burial for Bin Laden', supra note 119.

texts.[124] Where the dead cannot be returned, customary law also provides for the disposal of the dead in accordance with religious principles.[125] Although the US has sought to justify the killing by reference to IHL, this aspect of the operation has been explained in legal terms.

As regards IHRL, several rights are potentially implicated in the decision to dispose of bin Laden's corpse in this way. The Human Rights Committee has specifically addressed the refusal to return the bodies of two persons subject to the death penalty for terrorism as potentially giving rise to ill-treatment against family members under Article 7 ICCPR.[126] An argument of ill-treatment can only be sustained however in exceptional circumstances where the totality of the circumstances led to an extreme level of distress, and in the present circumstances, the high threshold of ill-treatment may not be met.[127] But the argument is more compelling in relation to other human rights provisions. The right to private and family life of family members has been found to be violated by the refusal to allow – or the delay in allowing – family members to bury their dead.[128] Funeral rites are also closely related to the exercise of the right to one's religion and belief,[129] a right which notably the US acknowledges as one of the few it considers plainly applicable in armed conflict.[130] Islamic religious traditions dictate procedures in connection with death, incompatible with summary disposal of the body.[131] The UN Human Rights Committee has noted the importance of these religious rituals in life

124 Colombia, Administrative Court in Cundinamarca, (Case No. 4010), view of the Attorney General given before the House of Representatives; UN General Assembly, Res. 3220 (XXIX); 27th International Conference of the Red Cross and Red Crescent, Res. I (adopted by consensus); 'ICRC Study on Customary IHL', supra note 123, Rule 114.

125 'ICRC Study on Customary IHL', supra note 123, Rule 115.

126 *See e.g.*, *Shukurova* v. *Tajikistan*, no. 1044/2002, para. 8.7; *see also* Human Rights Committee Concluding Observations on Tajikistan, CCPR/CO/84/TJK 18 July 2005, para. 9.

127 Some reports indicate that the US did inform the family promptly of the circumstances of death.

128 In *Ploski v Poland*, no. 26761/95, 12 November 2002, paras. 35-39, on the right to attend parents' funerals; *annullo and Forte* v. *France*, no. 37794/97, 30 January 2001, para. 31-40, concerned a violation of private and family life on account of the French authorities' delay in returning the body of the child to the family for burial.

129 *E.g.*, Article 18 of the ICCPR.

130 *See* Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, supra note 74.

131 *See e.g.*, H. Granqvist, *Muslim Death and Burial* (Helsinki, 1965): 'Muslims are required to bury their dead as soon as possible, ideally before the nightfall on the day of death ... [The deceased's] eyes and mouth are closed, its limbs straightened, and the body covered by a sheet. Relatives should be present to pray for the dying person ... the body is then committed to the grave ... It is preferred that the body be laid on its right side, facing Mecca, in a niche hollowed out of the grave wall. The head rests on a support and the grave clothes are loosened. A relative should pronounce the Shahadah in the deceased's ear.' *See also* Javed Ahmad Ghamidi, Customs and Behavioral Laws (Lahore: Daru'l-Ishraq, 2001).

and death,[132] and the Special Rapporteur on freedom of religion has called for family members to be allowed to 'bury their dead'.[133]

The rights in question regarding the disposal of the corpse are generally not absolute rights but ones that allow limitations.[134] The refusal to deliver the body may be justifiable, if it can be shown to constitute an interference which is both necessary and proportionate and to have been the result of a legitimate aim by the state. Determining whether this test is met requires considering whether there are less intrusive means of meeting any legitimate objective, such as limiting the circumstances of burial to avoid security risks or propaganda-inciting violence. The US concerns may have been a legitimate aim, had the case been convincingly made. Their actions may have been necessary and there may well not have been feasible alternative. The lack of willingness to submit to human rights framework or to provide accountability within its terms means that we may never know.

The facts and the rationale for withholding the body and burying it at sea are reminiscent of broadly similar arguments advanced in the Russian Federation for withholding the bodies of persons killed during terrorist operations.[135] The Russian Parliament (Duma) adopted controversial amendments to anti-terror laws in 2002,[136] which provided that the bodies of terrorists would not be returned to their families.[137] Part of the rationale was to prevent shrines and martyrdom, though the transcript of the Duma session describes the law's purpose as 'of a general preventive nature' noting that 'it says to a terrorist: if you commit a terrorist attack and there are grave consequences, then you are outside the law even when you are dead'.[138] In cases before

132 It stated that the 'observance and practice of religion or belief may include not only ceremonial acts but also such customs as ... participation in ritual associated with certain stages of life ...'. UN CCPR General Comment 22, para. 4.

133 United Nations Distr. General A/51/542, 23 October 1996).

134 *See* Chapter 7, para. 7A.3, 'The Flexible Framework of Human rights Law'.

135 *Mashkhadov* v *Russia* (no. 18071/05), and *Sabanchiyeva and Others v. Russia* (no. 38450/05), where violations of Article 8 private and family life were found.

136 The amendments were introduced on 1 November 2002, shortly after the incident in the Dubrovka Theater in Moscow, in which approximately 129 hostages and 60 alleged terrorists were killed.

137 'On Countering Terrorism' 25 July 1998 ã. N 130-ÔÇ, adopted on 21 February 2002 by Federal Law N 144-ÔÇ. On Burial and Internment' of 12 January 1996 N 8-ÔÇ, adopted on 11 December 2002 by Federal Law N 170-ÔÇ. Bother provision state in similar terms that: 'The interment of terrorists who die as a result of the interception of a terrorist act is carried out in accordance with a procedure established by the Government of the Russian Federation. Their bodies are not handed over for burial, and the place of their burial is not revealed.'

138 Statement of the MP A.I. Gurov, supported by the President's representative A.A. Kotenkov. See transcript of the Russian Parliament (*ÃîñÄóìà* / Duma) session of 1 November 2002, p. 5, in Applicants' Submissions, Application no 18071/05, Maskhadovy v Russia. Relevant papers on file with author, who is one of the counsel for the applicant in the case. *See* www.interights.org/maskhadov.

the ECtHR, including one brought by the family of former Chechen rebel leader Aslan Maskhadov, killed by a special operation by security service in 2005,[139] the Court found the refusal to return the bodies of 'terrorists' to be a violation of the family members right to private and family life, just as the Human Rights Committee has in the context of alleged terrorists sentenced to death in Tajikistan.[140] Like these cases, the bin Laden situation raises significant human rights concerns that should at least be addressed and explained.

9.4 CONCLUSION

Few who approach these issues through a rule of law lens would grieve the passing of a criminal of the notoriety of bin Laden. But the measure of the rule of law must surely be how it is respected, and insisted upon, to protect the least and the worst in any society. Questions continue to arise as to whether the legal framework was respected – questions that need to be asked and answered in this situation just as in the other situations where victims are more 'sympathetically' received. Moral and political factors inevitably influence reactions to the bin Laden operation. These include feelings towards the individual targeted and what he 'deserves',[141] the policy complexities surrounding law enforcement alternatives,[142] and even an acute awareness that the bin Laden operation – with its limited use of force and civilian casualties – compares favourably in many respects to other operations in GWOT. It could, of course, have been so much worse. But, while this may lead to an inevitable sigh of relief, does it mean that the rule of law was respected and 'justice' could really be said to have been done?

An assessment of lawfulness depends on the applicable framework, and ultimately the facts, only some of which we have. But from information available, it appears the operation raises doubts as to some aspects of its

139 *Ibid*. The case is brought by the family of Aslan Maskhadov – elected in 1997 as president of the breakaway Chechen Republic of Ichkeria – who was killed on 8 March 2005 in Chechnya during the course of a special operation by Russia's internal security services, the FSB. His body was not released for burial.

140 'Tajikistan sentences 34 alleged Islamist terrorists', *UNHCR*, 19 April 2012, available at: http://www.unhcr.org/refworld/docid/4f9e7c65c.html last visited 22 November 2012.

141 'We'll have the kind of treatment of these individuals that we believe they deserve.' Remarks by Vice President Dick Cheney to the US Chamber of Commerce, 14 November 2001, http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20011114-1.html.

142 The detention and trial policy debacle in the US regarding Guantanamo vs. detention in the US, and trial by military commission vs. the regular court route which were blocked by Congress have been highlighted above and in more detail in Chapter 8. In addition, international criminal law enforcement poses undoubted challenges. These are all of doubtful legal relevance (except as potentially relevant to the specific question of the necessity of measures of self-defence on the basis of lack of alternatives, as discussed above and in Chapter 5).

legality which deserve to be investigated and clarified. Whether the operation should be seen as a violation of Pakistani sovereignty is somewhat doubtful: the Pakistani authorities have not condemned it, and it may be that there was a reasonable basis for arguing that informing or involving Pakistan would have jeopardised the mission. As regards the applicable framework for assessing the mission itself, the assertion that it forms part of an armed conflict with al-Qaeda, and that bin Laden was a legitimate target as someone participating in that conflict, is legally very doubtful. Even if it were correct that IHL applies, and *a fortiori* if it does not and only IHRL governs, the question of the necessity and appropriateness of the use of force remains.

The marginalisation of human rights law, despite its applicability to operations of this nature here (just as it has in the past[143]), is one of the greatest causalities of the war on terror. Under IHRL, the assessment of legality depends on two sets of facts which require clarification, concerning the plans and purpose of the mission and what transpired in the compound. If the operation was in fact focused on killing bin Laden or taking him out 'dead or alive,' it would not be lawful. Lawfulness depends on the operation being planned, prepared and conducted with a view to avoiding and minimising the use of force *if* possible. Legality also depends on the use of lethal force having proved necessary in the compound in self-defence. On the emerging facts it is at least questionable why numerous highly trained and well-armed US special forces could not have incapacitated and overpowered an unarmed Bin Laden, rather than shooting in the head and chest.[144] Such situations present difficulties and immediate assessments cannot be second-guessed after the fact, but the onus is on the state to justify conduct by reference to the legal framework.

Statements to the effect that the killing of bin Laden is clearly and uncontroversially legal are, like the premature endorsement of the killing by the UN Secretary General, misplaced.[145] The dismissal of such questions of legality as 'pointless moral posturing'[146] is a regrettable but common feature of some of the political debate and media reporting of the killing of bin Laden and,

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143 Human rights bodies have considered many comparable cases in light of the legal framework applicable in security sensitive situations: *e.g.*, for a raid on a terrorists hiding place, *see Guerrero* v *Columbia*, supra note 95; for the use of lethal force against terrorists, *see*, *e.g.*, *McCann* v. *United Kingdom*, supra note 82.

144 Saul questions why well-armed, highly trained special forces found it 'necessary to shoot him, instead of simply overpowering an unarmed man who was not taking a direct part in hostilities. That there was armed resistance in other parts of the compound is irrelevant to what happened *to those people, in that room*. Humanitarian law requires positive identification of a person taking direct participation in hostilities, not eyes wide shut assumptions about what one might expect to find there.' Saul, 'Delivered from Evil', supra note 3.

145 On self-defence, relevant to an assessment of the lawfulness of the use of force, *see* Chapter 4.

146 'Don't cry for Osama bin Laden', *The Australian*, *Opinion*, 5 May 2011, available at: http://www.theaustralian.com.au/opinion/editorials/dont-cry-for-osama-bin-laden/story-e6frg71x-1226050063282.

more generally, the role of law in the war on terror. As the Special Rapporteur on Extra-judicial killings noted in relation to arbitrary killings, this debate may not really be about the law, but about whether the legal framework should be applied at all in 'exceptional cases'.[147]

While bin Laden may indeed be an exceptional character, the issues raised by his demise and disposal are not in fact exceptional but arise with increasing regularity on a global scale. In this respect, the immediate context is of course the practice of widespread and systematic targeted killings by the US: the figures indicating several thousand casualties of that policy[148] undermine any perception that the goal of killing bin Laden involved the use of lethal force on anything like an exceptional basis.[149] But such a policy is not unique to the US, as the Russia anti-terrorism law – permitting the Russian president to order the killing of broadly framed categories of 'terrorists or extremists' in whichever corner of the globe they are found – graphically reminds us.[150] Protecting against the lethal use of force must surely be one of the greatest challenges posed by the war on terror.

The bin Laden operation and reactions to it, by discarding or minimising the importance of right to life protections for those we disdain, may have contributed to further undermining the relevance of human rights and the rule of law for all. Reflection may be due in this context on what meaning has been given to 'justice' in the 'war on terror.'

147 P. Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2006/53, para. 51.

148 *See, e.g.*, 'Living Under Drones', Report by Stanford University and New York University, available at: http://livingunderdrones.org/report/ last visited 22 November 2012.

149 Yoo notes that 'the ultimate goal of the bin Laden operation was identical to that of prior operations: to kill a specific individual because of their leadership role in al-Qaeda'. Yoo, 'Assassination or Targeted Killings', supra note 3, at p. 59.

150 S. T. Bridge, 'Russia's New Counteracting Terrorism Law: The Legal Implications of Pursuing Terrorists Beyond the Borders of the Russian Federation', 3 (2009) Colum. J. E. Eur. L. 1. On the potential scope and implications, *see, e.g.*, S. Eke, 'Russia law on killing "extremists" abroad', *BBC News*, 27 November 2006, available at: http://news.bbc.co.uk/2/hi/europe/6188658.stm. As noted in Chapter 7B, the law also expands the categories of 'terrorists' that may be targeted, including those seeking to overthrow the Russian government, "those causing mass disturbances, committing hooliganism or acts of vandalism" and "those slandering the individual occupying the post of president of the Russian Federation." Killings of terrorist suspects in Chechnya, for example, have been common practice for many years and there are several examples in practice of alleged killings abroad, e.g. Alexander Litvinenko in London in November 2006, or former Chechen separatist president, Zelimkhan Yandarbiev, who was blown up by a car-bomb by Russian special forces in Qatar in 2004.

10 *Case study III*: Extraordinary Rendition

> We also have to work, though, sort of the dark side, if you will. … That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.… It is a mean, nasty, dangerous dirty business out there, and we have to operate in that arena. I'm convinced we can do it; we can do it successfully. But we need to make certain that we have not tied the hands, if you will, of our intelligence communities in terms of accomplishing their mission."
>
> US Vice President Dick Cheney, 16 September 2001[1]

10.1 INTRODUCTION

Immediately following the 11 September 2001 attacks, the US government decided that a key component of its 'war on terror' would include covert international CIA action targeting 'high value targets' they would be subject to lethal use of force or detention for intelligence gathering purposes. On 17 September 2001, President Bush signed a classified Presidential Memorandum of Notice granting the CIA authority to detain terrorist suspects and to set up secret detention facilities (sometimes known as 'black sites') outside the US where it could subject 'high-value detainees' to 'enhanced interrogation techniques'.[2] The result was an innovative, systematic and complex programme of 'extraordinary rendition,' operated by the CIA, designed and authorized

1 Interview with U.S. Vice President Cheney on Meet the Press (16 September 2001), quoted in Human Rights Watch, 'Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees' (2005), available at http://hrw.org/reports/2005/us0405/us0405.pdf.

2 Classified 17 September 2001 Presidential Memorandum of Notice: See Statement of Michael F. Scheuer, former Chief of bin Laden Unit of the CIA, at United States House of Representatives – Committee on Foreign Affairs¯Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations, Serial No. 110-28, 17 April 2007, p. 12, available at: http://foreignaffairs.house.gov/110/34712.pdf (last accessed 7 November 2012) and 'The CIA's Secret Detention Program', *Human Rights First*, 1 May 2008, available at: http://www.humanrightsfirst.org/2008/05/01/the-cias-secret-detention-program.

at the highest levels of the Bush administration, and made possible by a global network of cooperation and support.[3]

'Extraordinary rendition' involved the state-sponsored abduction from one country, with or without the cooperation of the government of that country, and the extra-judicial transfer to another country for detention and abusive interrogation outside the normal legal system.[4] Several characteristics of the extraordinary rendition programme (ERP) make it worthy of special consideration as a case study. Firstly, extraordinary rendition may represent the nadir of the descent into international illegality of the 'war on terror'. It not only involved serious illegality, but a scheme specifically designed and meticulously carried out to nullify the effect of the law – removing entirely its protection, avoiding oversight and leaving no trace, and permitting no prospect for accountability. It was shaped around a policy of systematic torture, a violation of the most firmly enshrined prohibitions in international law. The ERP embodied and epitomised the dehumanisation of individuals and their reduction to objects of 'intelligence' value, pursuant to the all-consuming end of intelligence gathering.

Secondly, although the programme was largely operated by the CIA, and designed and authorised at the highest levels of the Bush administration,[5] it is now a matter of public knowledge that it was carried out with, and

3 'Joint study on global practices in relation to secret detention in the context of countering terrorism' of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention, and the Working Group on Enforced or Involuntary Disappearances', A/HRC/13/42, 19 February 2010, § 103, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf (last accessed 7 November 2011) (hereinafter 'UN Joint Study on Secret Detention); Parliamentary Assembly of the Council of Europe (hereinafter PACE), 'Alleged Secret Detention and Unlawful Inter-State Transfers of Detainees involving Council of Europe Member States', PACE, Doc. 10957, 12 June 2006, available at: http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf (first CoE Rendition Report 2006). Council of Europe Committee on Legal Affairs and Human Rights, 'Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report', 7 June 2007, available at: http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf (Second 'CoE Rendition Report (7 June 2007)').

4 Various working definitions are used; e.g. the European Court of Human Rights (ECtHR) adopted the definitions of the UK Intelligence and Security Committee, taking 'extraordinary rendition' to mean the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment: *Babar Ahmad and Others* v. *United Kingdom*, Appl. Nos. 24027/07, 11949/08, and 36742/08 (ECtHR 6 July 2012), at para. 113).

5 See, e.g., 'Getting Away with Torture: The Bush Administration and Mistreatment of Detainees, Human Rights Watch, July 2011, available at http://www.hrw.org/sites/default/files/reports/us0711webwcover.pdf.

depended upon, a multitude of other states as well as private actors.[6] As such it exposes unique levels of inter-state cooperation and with it interesting questions concerning state and individual responsibility.[7]

Thirdly, the ERP is not an atrocity that can be relegated to history. It is a matter of speculation to what extent the programme is on-going: while the CIA 'black sites' that housed rendition victims have been closed, and the US has committed itself not to torture,[8] as noted further below the rendition programme is reported to continue in other forms. Notably, extra-legal transfers to foreign states for unlawful detention and intelligence gathering are said to have reduced the US fingerprint, but not necessarily stopped extraordinary renditions. Moreover, it is in relation to this programme that the demands for justice discussed elsewhere in the book are most strident and concerted, and perhaps where the greatest resistance to accountability is encountered.

This chapter is in five parts. The second provides a brief factual overview of extraordinary rendition, and illustrates the practice by reference to a few of the many victims behind the ERP programme. The third highlights briefly aspects of the international legal framework discussed in previous chapters – in particular use of force, IHL and IHRL, and issues regarding state and individual responsibility – as they apply to the ERP. The fourth considers how the law applies in various scenarios which arose in the ERP, from states that housed secret prisons to those that provided or received intelligence information for example, and issues of state and individual responsibility arising. The fifth sketches out limited progress towards justice and accountability, as well as some of the challenges arising in this respect.

10.2 FACTUAL OVERVIEW

Facts concerning the extraordinary rendition programme are predictably untransparent. It was designed as a secret detention programme, was driven by the CIA and targeted those detainees deemed to be of the highest intelligence value (High Value Detainees or 'HVD's). Its *modus operandi*, and the wall of secrecy that has surrounded it since, reveals the resolute determination to ensure that no information would ever come to light. It concerns serious criminality, apparently at the highest levels. It is no surprise then that the

6 'CoE Rendition Reports, above, note 3; Report of the European Parliament Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners(2006/2200(INI)), 30 January 2007 (hereinafter 'Fava Report (30 January 2007)'). Open Society Justice Initiative Report, Globalising Torture: CIA Secret Detention and Extraordinary Rendition, 2013.

7 See Parts 10.3.4 and 10.3.5 below.

8 'Executive Order 13491 – Ensuring Lawful Interrogations', *The White House*, 22 January 2009, available at: http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations.

elucidation of 'facts' relating to the practice of extraordinary rendition has been a slow, painstaking and faltering process.

However, due to determined and systematic research by a range of actors – NGOs,[9] journalists,[10] academics,[11] certain governments and national parliaments,[12] prosecutors' offices,[13] and regional and international institutions (notably the Council of Europe and the European Parliament reports) and ultimately insiders' revelations,[14] considerable and consistent information has come to light on the nature of the US led rendition programme. President Bush confirmed in September 2006 that, while he would not reveal 'the specifics of this programme, including where detainees have been held and the details of their confinement',[15] the CIA held captives in secret detention for interrogation using 'tough' and 'alternative sets of procedures'.[16] By 2007 the Council of Europe Parliamentary Assembly's Rapporteur began his ground-

9 See, e.g., 'U.S.A: Below the Radar: Secret Flights to Torture and "Disappearance"', *Amnesty International*, 4 April 2006, available at: http://www.amnesty.org/en/library/asset/AMR51/051/2006/en/b543c574-fa09-11dd-b1b0-c961f7df9c35/amr510512006en.pdf ; 'The Road to Abu Ghraib', *Human Rights Watch*, June 2004, available at: http://www.hrw.org/reports/2004/usa0604/usa0604.pdf.

10 For one of the earliest accounts to grasp public attention, see D. Priest and B. Gellman, 'U.S. Decries Abuse but Defends Interrogations' *Washington Post*, 26 December 2002, available at: http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html.

11 See, e.g., M. Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law', 75 (2007) *George Washington Law Review* 1333, 1336; L.N. Sadat, 'Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law', 309 (2006) *Case Western Reserve Journal of International Law* 320; L.N. Sadat, 'Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror', 75 (2007) *George Washington Law Review* 1211-15.

12 'Report of the Events Relating to Maher Arar – Analysis and Recommendations', Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (hereinafter 'Arar Commission'), available at: http://epe.lac-bac.gc.ca; UK Parliamentary Joint Committee On Human Rights, 'Nineteenth Report', 18 May 2006, available at: http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/ 18502.htm ; German Bundestag, 'Report of the 1st Inquiry under Article 44 of the Basic Law' (18 June 2009) <http://www.cducsu.de/Titel__bericht_des_1_untersuchungsausschusses_nach_artikel_44_des_grundgesetzes/TabID__1/SubTabID__2/InhaltTypID__12/InhaltID__2607/BtID__2607/Inhalte.aspx ('German Bundestag Report').

13 See e.g. trial of those responsible for the Abu Omar abduction, in F. Messineo, '"Extraordinary Renditions" and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy', 7 (2009) *Journal of International Criminal Justice* 1023.

14 See information from former interrogators, e.g. A. Soufan, *The Black Banners: The Inside Story of 9/11 and the War Against al-Qaeda* (W.W. Norton & Co., 2011).

15 *Id*.

16 'President Discusses Creation of Military Commissions to Try Suspected Terrorists', President G.W. Bush, *The White House*, 6 September 2006, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html. See further, 'Declaration of Ralph S. DiMaio' (21 April 2008), *Amnesty International et al* v. *CIA et al*, Case 1:07-cv-05435-LAP, Southern District of New York (9 August 2007), at pp. 114-6; Bush: "We're fighting for our way of life"', *CNN Politics*, 6 September 2006, available at: http://www.cnn.com/2006/POLITICS/09/06/bush.transcript/index.html.

breaking second report on extraordinary renditions by announcing that '[w]hat was previously just a set of allegations is now proven'.[17]

In light of the Presidential authorization of 17 September 2001,[18] , the CIA developed and tested a set of 'enhanced interrogation techniques (EITs)' with a view to the extraction of information from 'high value detainees.'[19] At first these were authorized orally, but on 1 August 2002, the US Department of Justice Office of Legal Counsel issued a memorandum authorising in writing the use of ten identified 'enhanced interrogation techniques' that provided general guidelines for determining the lawfulness of additional EITs.[20] Deputy Defence Secretary Paul Wolfowitz reportedly issued a directive removing the requirement that detainee treatment adhere to the Nuremburg Directives for Human Experimentation.[21] The ERP was put into practice when the first so-called 'high value target', Abu Zubaydah, was captured and flown to a secret prison in Thailand; he was described by a former national security officer as 'an experiment, a guinea pig' for the enhanced interrogation techniques and their limits.[22]

According to an FBI special agent present during CIA interrogations, who subsequently resigned,[23] the purpose of such interrogations 'was to make [the detainee] see his interrogator as a god who controls his suffering' through

17 Second 'CoE Rendition Report' (7 June 2007), above, note 3, p. 6.

18 Presidential Memorandum of Notice, 17 September 2001, note 2.

19 'Inquiry into the Treatment of Detainees in US Custody', US Senate Armed Services Committee, 20 November 2008, available at: http://armed-services.senate.gov/Publications/Detainee Report Final April 22 2009.pdf.

20 'U.S. Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A', 1 August 2002, available at http://www.usdoj.gov/olc/docs/memo-gonzales-aug2002.pdf. The CIA began EITs on the basis of verbal legal authorisation from the Department of Justice Office of Legal Counsel (OLC): Interview with John Helgerson, 'Ex-CIA Inspector General on Interrogation Report, "The Agency Went over Bounds and Outside the Rules"', *Spiegel Online*, 31 August 2009, available at http://www.spiegel.de/international/world/0,1518,646010,00.html.

21 'U.S. Department of Defence Directive, Number 3216.02' (cancelled 8 November 2011) (25 March 2002), available at http://www.dtic.mil/whs/directives/corres/pdf/321602p.pdf ; *see* J. Leopold and J. Kaye, 'Wolfowitz Directive Gave Legal Cover to Detainee Experimentation Program', *Truthout*, 14 October 2010, available at http://www.truth-out.org/wolfowitz-directive-legal-cover-human-experimentation-detainees64184; see also 'U.S. National Institutes of Health, Office of Human Subjects Research, Directives for Human Experimentation, Nuremberg Code', available at http://www.hhs.gov/ohrp/archive/nurcode.html.

22 J. Leopold, 'Torture Diaries, Drawings and the Special Prosecutor', *Truthout*, 29 March 2010, available at http://archive.truthout.org/torture-diaries-drawings-and-special-prosecutor 58108. See 'Practice Illustrated' below. Author is counsel for Abu Zubaydah before the ECtHR.

23 A. Soufan, *The Black Banners: The Inside Story of 9/11 and the War Against al-Qaeda* (W.W. Norton & Co., 2011). Ali Soufan is a former FBI agent who first interrogated Zubaydah shortly after he was captured. He reportedly resigned over the introduction of a cramped 'confinement box' in May 2002.

the use of coercive techniques.[24] Exorbitant claims have been made by the government as to the utility of intelligence that was achieved from certain detainees or pursuant to certain methods,[25] while the FBI agent present at the time, like others, claims that 'actionable intelligence' was in fact achieved by traditional methods and the torture was counterproductive.[26]

As set out in memorandum from the US Department of Justice Office of Legal Counsel, the authorised treatments comprised 'conditioning', 'corrective', and 'coercive techniques.'[27] The list of methods of interrogation, approved and employed, is chilling. The list stems not from allegations, but from official and publicly available US government documents, including the CIA's Inspector General Report and a report by the US Senate Armed Services Committee, among others, which specify in some detail the nature and effect of the torture and ill-treatment authorized and employed by the CIA.[28] Among the standard techniques referred to in US government documents are the following: whipping by the neck into concrete walls; chaining to a chair for a period of weeks; the use of the 'box', including forcing into a small box for up to 18 hours; stripping and hanging naked from the ceiling; sleep deprivation, including keeping detainees awake for 11 consecutive days; exposure to extreme

24 Ibid, p. 394.

25 Dick Cheney's memoir, published 30 August 2011, claims that the CIA's 'enhanced interrogation techniques' on Abu Zubaydah led to a 'fount of information' and saved 'thousands of lives.' D. Cheney, *In My Time: A Personal and Political Memoir*, 2nd ed. (Threshold Editions, 2012), pp. 357-58.

26 Soufan, *The Black Banners*, above. Other professional interrogators, Matthew Alexander of the Air Force and Glenn Carle of the CIA, have publicly stated that torture was counterproductive to the intelligence gathering aim: see M.D. Davis, 'Consign Bush's "torture memos" to history', *LA Times*, 30 July 2012, available at: http://articles.latimes.com/2012/jul/30/opinion/la-oe-davis-torture-memos-bybee-20120730.

27 Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, CIA, on Application of 18 §§2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees, 10 May 2005 (hereinafter 'OLC Combined Techniques Memo'), p. 12-14. Conditioning techniques were to 'demonstrate to the [detainee] that he has no control over basic human needs,' including nudity, dietary manipulation and sleep deprivation. Corrective techniques 'dislodge expectations that the detainee will not be touched' and instill fear and apprehension. Coercive techniques impose "more physical and psychological stress" including walling, cramped confinement and the waterboard.

28 Special Review, Counterterrorism Detention and Interrogation Activities Report, CIA Office of Inspector General, 7 May 2004, available at: http://www.aclu.org/torturefoia/released/052708/052708_Special_Review.pdf (hereinafter 'CIA OIG Special Review (2004)'); 'Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists', Department of Justice, Office of Professional Responsibility, 29 July 2009,at: http://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf ; 'Inquiry Into the Treatment of Detainees in U.S. Custody', Report of The Senate Committee on Armed Services, 20 November 2008, at: http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf.

noise;[29] exposure to cold until the victim turned blue;[30] denial of pain medication for injuries;[31] 'waterboarding' or simulated drowning, constituting a 'threat of imminent death.'[32] An ICRC Report documents the extent to which rendition victims were cut off from the outside world, with:

> 'no knowledge of where they were being held, no contact with persons other than their interrogators or guards. Even their guards were usually masked and, other than the absolute minimum, did not communicate in any way with the detainees. None had real – let alone regular – contact with other persons detained… None had any contact with legal representation... None of the fourteen had any contact with their families …As such, the fourteen had become missing persons….'[33]

The authorised conditions of detention and transfer applicable at the relevant time also provide an insight into the mistreatment of the detainees.[34] Official guidelines and subsequent legal reviews reveal certain "standard conditions of confinement," including the following: hooding to disorient the detainee and keep him "from learning his location or the layout of the detention facility"; shackling to a chair and shaving the head upon arrival at the detention facility; solitary confinement for years[35]; continuous noise in cells and

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29 'ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody' (in public domain as of 30 April 2009), International Committee of the Red Cross, February 2007, pp. 28-31, available at: http://humansecuritygateway.com/documents/ICRC_Report_TreatmentOfFourteenHighValueDetainees_CIACustody.pdf (hereinafter 'ICRC Report on CIA Detainees'); CIA OIG Special Review (2004), *ibid*. at § 15; J. Leopold, 'Zubaydah's Torture, Detention Subject of Senate Inquiry', *Truthout*, available at http://archive.truthout.org/zubaydahs-torture-detention-subject-senate-intelligence-inquiry58666.

30 K. Eban, The War on Terror, Rorschach and Awe, *Vanity Fair*, 17 July 2007, available at: http://www.vanityfair.com/politics/features/2007/07/torture200707.

31 D. Priest, 'CIA Puts Harsh Tactics on Hold', *Washington Post*, 27 June 2004, available at: http://www.washingtonpost.com/wp-dyn/articles/A8534-2004Jun26.html.

32 CIA OIG Special Review (2004), above, note 32 at § 223; A CIA memo makes clear that through waterboarding 'any reasonable person undergoing this procedure ... would feel as if he is drowning ... due to the uncontrollable physiological sensation he is experiencing ... .' Legal Adviser Bybee's memo noted that '[i]t constitutes a threat of imminent death.' Davis, 'Consign Bush's "torture memos" to history, above, note 28.

33 ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody' 2007, 28-31

34 The conditions of detention at CIA detention facilities were officially governed by the Guidelines signed by the CIA Director, George Tenet on 28 January 2003: Guidelines on Confinement Conditions for CIA Detainees, Appendix D of CIA OIG Special Review (2004), above, note 32 available at http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc11.pdf. The actual conditions and techniques may have been more abusive than those prescribed in law.

35 Memorandum for John A. Rizzo, Acting General Counsel, CIA, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, Re: Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities (31 August 2006) (released 24 August 2009), p. 17, available at: http://www.justice.gov/olc/docs/memo-rizzo2006.pdf (hereinafter 'OLC DTA

walkways; continuous light such that 'each cell [was] lit by two 17-watt T-8 fluorescent tube light bulbs, which illuminate the cell to about the same brightness as an office'; use of leg shackles 'in all aspects of detainee management and movement,' in some cases for 24-hours per day.[36] These conditions have been described as 'unrelenting and, in some cases, hav[ing] been in place for several years,' and as having exacted, over time, 'a significant psychological toll.'[37]

In turn, the conditions of *transfer* of victims during rendition contain evidence of comparable abusive treatment.[38] The ICRC report refers to 'a fairly standardised' transfer procedure which included photographing the detainee clothed and naked; dressing the detainee in a diaper; denying access to the toilet (if necessary, the detainee was obliged to urinate or defecate into the diaper); blindfolding, putting on goggles, earphones or taping ears, shackling by hands and feet; transportation in semi-reclined position or lying flat on the floor of the plane with hands cuffed behind their backs, causing severe pain and discomfort.

Support for the regime came from many states and non-state entities and took many forms. NATO states apparently agreed in the immediate aftermath of 9/11 to a series of measures that have been described as providing 'permission' and 'protection' to CIA operational activity under the guise of the provisions on 'collective self defence' in Article 5 North Atlantic Treaty 1949.[39] The extent of collaboration from particular states is also uncertain, but has been estimated that some 54 states have participated in various ways.[40] In some cases, foreign authorities have been involved in the arrest, detention, and transfer of individuals into US custody.[41] Others have taken custody of rendered individuals following their abduction and transfer.[42] Some have housed CIA-operated 'black sites' for interrogation and detention, including Afghanistan, Guantánamo Bay, Lithuania, Morocco, Poland, Romania, and Thailand.[43] Additional states, including many outside Europe such as Syria,

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Memo (31 August 2006)') notes that 'the solitary confinement of detainees continued for years and may have altered their ability to interact with others'.

36 *Id*.

37 *Id*.

38 'Background Paper on CIA's Combined Use of Interrogation Techniques', Central Intelligence Agency, 30 December 2004, available at: http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc97.pdf.

39 'CoE Rendition Report (7 June 2007)', above, note 3, paras. 85-90.

40 Globalizing Torture OSJI 2013, note 6. See e.g.s below in 10.4.

41 UN Joint study note 3.

42 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights', ICJ (Geneva, 2009), p. 81 (hereinafter 'ICJ Eminent Jurists Report'), available at: http://ejp.icj.org/IMG/EJP-Report.pdf.

43 For a report on European states's involvement see e.g.'CoE Rendition Report (7 June 2007)', above, note 3, para 117, EU Parliament Resolution 11 Sept 2012, and for a map of the states alleged to have been involved by Amnesty International at http://www.unlockthetruth.org/1/en/.

Jordan, Egypt, and Morocco are now known to have received prisoners from the US for the purpose of using interrogation techniques amounting to torture.[44] Many others are alleged to have provided airports and military bases for 'staging' or 'stopover' by aircraft carrying detainees.[45] Some states are accused of allowing agents to participate in interrogations on foreign soil,[46] of providing intelligence to those carrying out this programme, or of systematically relying on intelligence information extracted under it.[47] In addition to state partners, the programme appears to involve a range of private companies, including those that have disguised flight plans, and provided and operated the aircraft for rendition flights.[48] This multiple-actor global system led the Council of Europe to refer to the rendition programme as a 'spider's web spun across the globe.'[49]

An unparalleled level of secrecy has surrounded the rendition programme, from the outset up to the present time.[50] The detainees were flown to multiple 'black sites' and moved on repeatedly to ensure they could not be traced, and sites were closed if information concerning their existence threatened to come to light.[51] The CIA at times operated in unmarked planes, and filed false flight plans showing erroneous destinations, or flew without the flight plans al-

44 UN Joint Study (2010), above, note 3.

45 'CoE Rendition Report (12 June 2006)' above note 3; Statement by T. Lloyd to OSCE parliamentary assembly on the adoption of OSCE resolution, reminding parliamentarians that there were 1,245 CIA flights from European territory to countries where suspects faced torture. '6 July 2012 OSCE PA Annual Session in Monaco 3rd Committee Meeting', *YouTube*, available at: http://www.youtube.com/watch?list=UUThKCTu7zkfJn0KgaYufK9g&v=ovjAw3GRM94&feature=player_detailpage#t=900s. See also http://www.unlockthetruth.org/1/en/ For a discussion of legal obligations see Part 3, and Part 4, 'Keeping them Airborne.'

46 See, for example, 'Report of the Special Rapporteur on The Protection and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin', UNHRC, (hereinafter 'Scheinin Report 2009'), 4 February 2009, UN Doc A/HRC/10/3. See below Part 4 for legal issues arising and examples.

47 *Id*. at paras 51-57.

48 *Mohamed v. Jeppesen Dataplan Inc.*, 614 F.3d 1070 (9th Cir. 2010) (*en banc*), available at: http://www.ca9.uscourts.gov/ datastore/opinions/2010/09/08/08-15693.pdf.

49 CoE Rendition Report (12 June 2006), above, note 3.

50 The Presidential memo was reportedly not made public or provided to members of Congress, and CIA attorneys argued that the level of classification was so exceptional that even the font is classified. Eighth Decl. of Marilyn A. Dorn ¶ XX, *Am. Civil Liberties Union* v. *Dep't of Def.*, No. 1:04-CV-4151 (AKH) (S.D.N.Y. 12 May 2003), available at http://www.aclu.org/files/pdfs/natsec/20070105_Dorn_Declaration_8.pdf.

51 On 4 December 2002, the secret detention facility in Thailand was closed down, reportedly as information on its existence had come to light: D. Priest, CIA holds terror suspects in secret prisons, *Washington Post*, 2 November 2005, available at: http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644_pf.html

together.[52] The widely reported use of 'front companies' made it possible to more effectively obscure the programme's activities.[53]

Despite information firmly entering into the public domain, a broad reaching approach to national security and state secrets continues, at time of writing, to seek to suppress information about the programme. As noted below, the US and other states have used secrecy or national security laws to obstruct both judicial and parliamentary proceedings.[54] Individuals that were subject to the programme and remain in detention at Guantánamo are under court orders that render any comment from them 'classified.'[55] Any reference to CIA detention or torture leads to immediate censoring of the military commission's proceedings.[56]

Other states are described as being under 'enormous pressure from Washington' and 'instructions from the CIA, with the support of the White House,[] not to give any facts on this ...'.[57] The US has refused to cooperate with foreign processes related to the rendition programme;[58] the extent of its determination to avoid disclosure is illustrated by a case before the UK Court of Appeals in which the US 'threatened' the British government to withhold intelligence information in the future if any information concerning the pro-

52 See, e.g., official documents disclosed by the Polish government through FOIA requests in Poland revealing "dummy" and false flight plans, or no flight plans at all, and the collaboration of aviation authorities. 'Explanation of Rendition Flight Records Released by the Polish Air Navigation Services Agency', Open *Society Justice Initiative*, p. 3, available at: http://www.europarl.europa.eu/document/activities/cont/201203/20120326ATT41895/20120326ATT41895EN.pdf.

53 *Id*.; S. Shane et al., 'C.I.A. Expanding Terror Battle Under Guise of Charter Flights', *New York Times*, 31 May 2005, available at: http://www.nytimes.com/2005/05/31/national/31planes.html ; C. Bollyn, '"Ghost Planes" Make Suspects Disappear, Pentagon has new secret weapon in "war on terror"', *American Free Press*, 14 January 2004, available at: http://www.americanfreepress.net/html/ghost_planes.html.

54 'PACE, Secret Detentions and Illegal Transfers', above, note3, at 1, refers to U.S., Poland, Romania, Macedonia, Italy, Germany, and the Russian Federation in the Northern Caucuses as having used national security or state secrecy to obstruct judicial or parliamentary scrutiny aimed at ascertaining responsibility for renditions. See Part 5 below on victims pursuing justice in U.S. courts who have had their proceedings wholly vacated on the basis of the 'state secrets' doctrine.

55 See Abu Zubaydah's case below and in the chapter 8 on Guatánamo Bay (where he continues to be detained).

56 Chapter 7A, 'Fair Trial.'

57 T. Hammarberg, European Commissioner of Human Rights stated that there was 'enormous pressure from Washington to keep all this secret. In fact, instructions from the CIA, with the support of the White House, are not to give any facts on this ... .' 'Who takes the rap for rendition?', *RT News*, 8 September 2011, available at: http://rt.com/news/hammarberg-cia-prisons-guantanamo-861.

58 See examples of refusal to cooperate with investigations, eg *al Nashiri v Poland, Abu Zubaydah v Poland*, recognsied by the governments in ECtHR litigation, though there are many other examples: 10.5 below and 7B.14.

gramme emerged.[59] The information in question – a few passages written by the Court itself summarizing the treatment of one rendition victim – was considered by the Court to be of genuine public interest on the one hand, and not to have any national security significance on the other.[60] This lead to unusually stinging condemnation by the Court:

> 'it was, in our view difficult to conceive that a democratically elected and accountable government could possibly have any rational objection to placing into the public domain such a summary of what its own officials reported as to how a detainee was treated by them and which made no disclosure of sensitive intelligence matters. Indeed we did not consider that a democracy governed by the rule of law would expect a court in another democracy to suppress a summary of the evidence contained in reports by its own officials or officials of another State where the evidence was relevant to allegations of torture and cruel, inhuman or degrading treatment, politically embarrassing though it might be.'

While the US approach to state secrecy may stand apart, other states have also been criticized for unsurpassed levels of secrecy and obfuscation. European states have been found to have been involved in 'carefully and deliberately' covering up facts related to the programme.[61] The 'cult of secrecy' that made the rendition programme possible in the first place seeks to obscure the truth and access to justice ex-post facto.[62]

On his second day in office President Obama signed executive orders to end secret detention and ensure 'lawful interrogations'.[63] The President ordered an end to torture by the US, withdrawing the infamous 'torture memos', and the closure of CIA detention sites.[64] He qualified the latter commitment in a footnote by noting that 'short term' or 'transitory' detention is

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59 *R (Binyam Mohamed)* v. *Secretary of State for Foreign and Commonwealth Affairs* (No 4) [2009] EWHC 152 (Admin), available at: http://www.bailii.org/ew/cases/EWHC/Admin/2009/152.pdf.

60 In the end the Court did not make public the passages, having found the public interest in their disclosure was outweighed by the national interest – not in protecting the substance of the information, but in preserving the on-going intelligence relationship with the U.S. Mohamed, above, note 65 at 33-34.

61 'CoE Rendition Report (7 June 2007)', above, note 3; See also Hammarberg who notes that crimes led by the U.S. have been 'carefully and deliberately covered up' by European states. 'Rights chief: Europe "complicit" in U.S. torture', *CBS News*, 1 September 2011, available at: http://www.cbsnews.com/2100-202_162-20100368.html.

62 D. Marty, Report to PACE, 'Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations', p. 6, available at: http://www.assembly.coe.int/CommitteeDocs/2011/State%20secrecy_MartyE.pdf. He describes resort to secrecy laws to shield intelligence agencies from accountability within the Council of Europe states as 'simply unacceptable.' See the Pursuit of Justice, 10.5 below.

63 See 'Executive Order 13491 – Ensuring Lawful Interrogations', above, note 8; for the Executive Order on Guatanamo see Chapter 8.

64 *Id*.

not covered by the ban,[65] and it appears to indicate that it may resort to rendition in the future under certain, unspecified, circumstances.[66] It is a matter of on-going speculation to what extent similar ends to those pursued by the ERP are achieved through other means, notably the use of other states as 'proxies.' This has come to the fore for example in relation to reports exposing US rendition to sites in Somalia, where local authorities detain at US behest and the US has unfettered access to detainees for interrogation purposes.[67] While not CIA-run sites, true to the letter of the President's commitment, the consequences for detainees is no less grave, the sites no less 'black', and US responsibility no less real than under CIA-run facilities.[68] Alternative Department of Defence operated detention sites are also reported in Afghanistan raising comparable if less egregious concerns.[69]

– *The Practice Illustrated: Victims of the ERP*

While information on the number of victims subject to these abusive techniques, and the true scale and nature of the extraordinary rendition programme continues to unfold, a senior US official has acknowledged that the CIA held approximately 100 persons in its extraordinary rendition programme.[70] This appears in light of subsequent reports to be an underestimate,[71] and some

65 'The terms "detention facilities" and "detention facility" in ... this order do not refer to facilities used only to hold people on a short-term, transitory basis.' 'Executive Order 13491 – Ensuring Lawful Interrogations', above, note 8, at Sec. 2 (g).

66 'Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President', *Department of Justice*, 24 August 2009, available at: http://www.justice.gov/opa/pr/2009/August/09-ag-835.html; D. Johnston, 'U.S. Says Rendition to Continue, but With More Oversight', *New York Times*, 24 August 2009.

67 See A. McCoy, 'Impunity at Home, Rendition Abroad', *Huffington Post*, 14 August 2012: 'In July 2009, for example, Kenyan police snatched an al-Qaeda suspect, Ahmed Abdullahi Hassan, from a Nairobi slum and delivered him to that city's airport for a CIA flight to Mogadishu. There he joined dozens of prisoners grabbed off the streets of Kenya inside "The Hole" -- a filthy underground prison buried in the windowless basement of Somalia's National Security Agency. While Somali guards (paid for with U.S. funds) ran the prison, CIA operatives, reported the Nation's Jeremy Scahill, have open access for extended interrogation.'

68 *Id*.

69 H. Andersson, 'Afghans "abused at secret prison" at Bagram airbase', *BBC*, 15 April 2010, available at: http://news.bbc.co.uk/1/hi/8621973.stm. Unlike in the CIA programme, however, the ICRC was aware of the facility and was notified of the names of detainees within fourteen days of their detention. See H. Andersson, 'Red Cross confirms "second jail" at Baghram', *BBC*, 11 May 2010, available at: http://news.bbc.co.uk/1/hi/8674179.stm. On the lack of any due process surrounding their detention, see Chapters 7B.3 and 11.

70 M.V. Hayden, 'Remarks of Central Intelligence Agency Director Gen. Michael V. Hayden at the Council on Foreign Relations (as prepared for delivery)', 7 September 2007, available at: http://www.fas.org/irp/cia/product/dcia090707.html.

71 See Globalizing Torture, OSJI (2013), supra note 6, which details 136 known cases.

estimates put the figure significantly higher into hundred or even thousands.[72] Whatever the number of victims, the practice of extraordinary rendition, and the legal issues it gives rise to which will be explored in the next section, are perhaps best illustrated and understood by brief reference to the experiences of real individual victims. Prominent among them are Abu Zubaydah, Binyam Mohamed, Khalid El-Masri, Abu Omar, and Maher Arar, whose situations are summarised below.

– *Abu Zubaydah, the First 'High Value Detainee', Still Detained without Charge*
Abu Zubaydah, the first so-called 'high value detainee' in the ERP was captured in Pakistan in March 2002,[73] and transferred to a secret CIA facility in Thailand.[74] From Thailand he was transferred to the site characterised as 'the most important' secret prison by the Executive Director of the CIA at the time, in northern Poland.[75] From there he was sent to secret detention in several undisclosed facilities believed to include Lithuania, Morocco and Afghanistan, from where he was later transferred to Guantánamo Bay, Cuba. The US authorities have publicly acknowledged inflicting extreme physical and psychological coercion, including a battery of waterboarding, on Abu Zubaydah[76] and the ICRC report indicates that he was subject to all of the EITs referred to above.[77] In an attempt to justify the detention and ill-treatment of Abu Zubaydah, the US originally publicly asserted that he was the 'third or fourth man' in al

72 See 'CoE Rendition Report (12 June 2006),' note 3, noting 'hundreds' while M. Satterthwaite and A. Fisher, 'Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law', 6 (2006) *The Long Term View* 4, 52-71, available at http://www.mslaw.edu/MSLMedia/LTV/6.4.pdf refer to thousands.

73 The author is one of the applicant's counsel in the case. On capture, see CIA OIG Special Review (2004) note 32; *Abu Zubaydah* v. *Lithuania* Application 46454/11, ECtHR, 27 October 2011 and *Abu Zubaydah v Poland* Application No. 7511/13, ECtHR, 26 March 2013 at http://www.interights.org/abu-zubaydah/index.html. While Zubaydah was the first 'HVD', other victims, such as Agiza and el-Zari, had been detained from December 2011.

74 'CoE Rendition Report (7 June 2007)', above, note 3, para 70; *Abu Zubaydah* ECHR litigation ibid.

75 See S. Shane, 'Inside the Interrogation of a 9/11 Mastermind', *New York Times*, 22 June 2008.

76 Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Interrogation of al Qaeda Operative, 1 August 2002, available at http://dspace.wrlc.org/doc/bitstream/2041/70967/00355_020801_004display.pdf (hereinafter 'OLC Abu Zubaydah Memo (1 August 2002)'); Background Paper on CIA's Combined Use of Interrogation Techniques, 30 December 2004, at: http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc97.pdf (hereinafter 'CIA Background Paper on Combined Techniques (2004)'); CIA OIG Special Review (2004), above, note 32. Interrogator James Mitchell is reported to have described Zubaydah's interrogation as 'like an experiment, when you apply electric shocks to a caged dog, after a while he's so diminished, he can't resist.' J. Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (Doubleday, 2008), p. 156.

77 ICRC Report, note 33.

Qaeda, with a role in every major al Qaeda terrorist operation, including 9/11,[78] though upon access to a lawyer such claims were dropped.[79] He is currently held in Guantánamo and has been detained, for reasons which are not publicly known,[80] without charge or even habeas review, for over a decade.[81] He appears to be one of those designated for indefinite detention.[82] Abu Zubaydah is also one of those on whom the US courts have placed a ban on communication with the outside world through the 'presumptive classification' of all information from or about him.[83] Requests for the release of basic information have thus far been unsuccessful.[84] His experience of the ERP may therefore never be heard. Applications concerning his secret detention and other violations in Lithuania and Poland are currently pending before the ECtHR.[85]

– *Maher Arar*

A dual Canadian and Syrian citizen, Maher Arar was detained at John F. Kennedy airport in New York while changing planes on his way home from

78 See, e.g., President Bush, Remarks by the President at Thaddeus McCotter for Congress Dinner, 14 October 2002 (describing Zubaydah as 'one of the top three leaders'), available at: http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021014-3.html; see likewise Remarks by the President at Connecticut Republican Committee Luncheon, 9 April 2002 at http://georgewbush-whitehouse.archives.gov/news/releases/2002/04/20020409-8.html; Remarks by the President in Address to the Nation, 6 June 2002 (describing Zubaydah as 'al Qaeda's chief of operations'), at: http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020606-8.html. See, e.g., S. Benen, 'Another Al Qaeda Number 3', Guest Posting, *The Washington Monthly*, 31 January 2008 (questioning how many 'number three' men one terrorist organization could have) at www.washingtonmonthly.com/archives/individual/2008_01/013025.php.

79 See Respondent's Memorandum of Points and Authorities in Opposition to Petitioner's Motion for Discovery and Petitioner's Motion for Sanctions, *Husayn* v. *Gates* (D.D.C. October 27 2009) (No. 08-1360) and Chapter 8.

80 See Respondent's Memo Regarding the Government's Detention Authority Relative to Detainees held at Guantanamo Bay, available at http://www.justice.gov/opa/documents/memo-re-det-auth.pdf.

81 *Husayn v. Gates*, Case no. 1:08-cv-1360, Factual Return for Abu Zubaydah (ISN 10016), 29 July 2009, at pp. 1-2 ('As described below, and based on the materials submitted with this Factual Return, Abu Zubaydah [eight lines redacted]. Consequently, for these and other reasons, Zubaydah is lawfully subject to detention pursuant to the Authorisation for the Use of Military Force and the laws of war.')

82 Chapter 8A.4.

83 Re: Guantánamo Bay Detainee Litigation, Case 1:08-cv-01360, Amended Protective Order (9 January 2009).

84 This includes drawings and writings by him during his period of detention and torture, an affidavit and even a simple power of attorney form for proceedings before the ECtHR. See eg. 'Abu Zubaydah and the Silencing of Guantánamo's "High-Value Detainees," as the CIA Censors His Drawings', available at: http://www.andyworthington.co.uk/2011/10/09/abu-zubaydah-and-the-silencing-of-guantanamos-high-value-detainees-as-the-cia-censors-his-drawings.

85 Abu Zubaydah v. Lithuania, and Abu Zubaydah v Poland,. above, note 73.

a family holiday. He was detained and interrogated by US authorities for one week before being transferred to Syria, via Jordan, despite assertions of the risk of torture, a risk which materialized during his year-long detention, interrogation and torture in Syria.[86] As noted below, a Canadian commission of enquiry investigating his case found him to have no alleged al Qaeda links and to be free of wrong-doing, and that Canadian authorities had provided inaccurate information to the US authorities which, it could reasonably be inferred, had lead to his capture and torture.[87] Attempts at justice in US courts, or individual accountability for wrongdoing have, however, yet to bear fruit.[88]

– *Khalid el Masri*

Khalid el Masri is a German national, detained by Macedonian officials at the border in 2003. He was held and interrogated there before being transferred, on a 'private' plane to Afghanistan, where he was interrogated and tortured, and eventually sent on to Albania.[89] There his detention followed a similar pattern for five months, until his mistaken identity was revealed and he was released, without support in finding his way home or re-establishing his life. His family, having not heard from him for many months had since left Germany. Efforts to secure justice in US courts have been blocked,[90] and efforts at accountability elsewhere have floundered. However, on 12 December 2012, a judgment of the European Court of Human Rights found Macedonia in violation of multiple rights and ordered compensation.[91]

– *Binyam Mohamad*

Binyam Mohamad is an Ethiopian national and UK resident who was captured in Pakistan and held incommunicado at secret undisclosed locations for 2 years before being rendered to Morocco. There he was tortured, before being returned to US custody in Afghanistan and on to Guantánamo. Unlike the other cases mentioned, Mohamed was eventually charged under the Military Com-

86 'Testimony of Maher Arar, Joint Oversight Hearing: Rendition to Torture: The Case of Maher Arar, Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight', *United States House of Representatives*, 18 October 18 2007, available at: http://foreignaffairs.house.gov/110/ara101807.pdf.

87 A separate report found collaboration between the Canadian police and Syrian officials contributed to torture.

88 Arar's attempts to secure justice in U.S. courts have been dismissed on 'state secrets' grounds. *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008), paras. 162-3. No-one has been prosecuted for his torture and secret detention.

89 See D. Weissbrodt and A. Bergquist, 'Extraordinary Rendition: a Human Rights Analysis', 19 (2006) *Harvard Human Rights Journal* 123, p. 124 describes the plane, arriving from Majorca as belonging to 'a CIA front company'. See his case set out in the application before the ECtHR al Nashiri v Poland, www.osji.org

90 See Chapter 11 on human rights litigation, highlighting the obstacles to litigation in this area.

91 *El Masri v the Former Yugoslav Republic of Macedonia,* [GC], No.39630/09, 13 December 2012.

mission Act, though these proceedings were later dropped and the case was not referred for trial.[92] UK intelligence services are alleged to have facilitated interviews by or on behalf of the US, in the knowledge of the allegations of ill treatment, and to have been present in his interrogation while in secret detention overseas. There has been no accountability in respect of his case.[93]

– *Abu Omar*

Hassam Osama Mustafa Nasr (known as Abu Omar), is an Egyptian national with political refugee status in Italy. He was abducted from the centre of Milan in 2003 and flown, via Germany, to Egypt where he was interrogated and tortured.[94] The second applicant, his wife, had no information as to what had happened to her husband. As discussed further below, his case has led to intense litigation through Italian criminal courts, part of which culminated in the convictions in absentia of numerous CIA agents and Italian officials, though other cases are on-going.

Although each victim's story is unique, their stories demonstrate numerous obvious similarities.[95] Each was captured by US and local authorities, rendered to US and/or proxy detention, often under the control of the CIA, and interrogated under torture. In several cases foreign agents, including in some cases agents of their own states, are alleged to have been present and involved at some point in interrogations. They suffered similar forms of ill treatment and/or torture, various combinations of the standard conditions of detention, transfer and 'EITs'.[96] They were transferred to multiple locations for interrogation, in a manner that caused physical and psychological harm and disorientated them as to time or location. No information was provided to families or to independent third parties including the ICRC. In many cases the secret detentions that followed lasted several years. Today, only Abu Zubaydah remains in US detention. All others have sought redress from courts in the US, in other countries that participated in their abuse, and increasingly internationally. While they have had limited success to date, as discussed in Part

92 The U.S. authorities had agreed in the context of UK court proceedings that, should his case proceed to trial, the information would be revealed. The UK court had found that 'the necessity of a fair trial inevitably defeats a claim for public interest immunity' (para. 29 at p. 11), and noted the concession by the U.S. in the course of proceedings that 42 documents which it wished to keep secret would be disclosed if the charges were referred for trial before a military commission. In the event, whether for this reason or another, his case was not referred for trial.

93 See Part 5 on UK enquiries and refusal to prosecute. Mohamad has been given an ex gratia award, as noted below and lives again in the UK.

94 CoE Rendition Report (12 June 2006), above, note 3, para 162.

95 Some examples of the cases are discussed in the text below. See also 'ICRC Report on CIA Detainees', *supra* note 33.

96 Some eg. Maher Arar and Abu Omar were tortured by other governments, others apparently only by the US.

5, their pursuit of justice is on-going and momentum may be gathering, at least outside the US[97]

It may be no coincidence that many of the stories to gain greatest prominence concern nationals or residents of Germany, Canada, UK and Australia,[98] and an abduction in Italy, while other cases continue to gradually emerge.[99]

10.3 Extraordinary Rendition: The Legal Framework

10.3.1 Wronging Other States: Territorial Integrity of States, Extradition Treaties and Consular Relations

While this chapter focuses on violations of human rights, IHL, and individual criminal responsibility, abduction by state agents within the territory of another state may also constitute a violation of obligations owed towards other states discussed in Chapter 5. The duties of non-intervention in the internal and external affairs of another state and respect for territorial integrity are relevant to incursions onto another state's territory without its consent, to effect an arrest or abduction operation for example. As noted in Chapter 5, at least the predominant view is that incursions by one state onto the territory of another without its consent violate the principles set down in Article 2(4).[100]

There are several examples in international practice of such abductions beyond the state's boundaries having been deemed to engage the international responsibility of the abducting state. The most notorious example is the Eichmann case, where Argentina challenged the abduction of the former Gestapo official on its territory by Israeli agents; the operation was condemned as a violation of Argentina's sovereignty and territorial integrity by Israel.[101]

The ERP may also fall foul of applicable rules under the Vienna Convention on Consular Relations 1963,[102] which are aimed at ensuring that individuals in states of which they are not nationals (as was the case in each of the examples named above), are afforded consular protection.[103] It has been the subject of criticism, for example, in the case of Maher Arar, that the Canadian consulate was not informed of Arar's detention, and became aware of it only

97 See 10.7 below.

98 Mammdouh Habib was another rendition victim, tortured in Egypt, and given compensation by the Australians reportedly in exchange for not pursuing legal action; his is not one of the cases highlighted above.

99 Globalizing Torture, OSJI 2013 identifies 139 cases.

100 On the rules governing the use of force see Chapter 5.

101 SC Res. 138 (1960), 23 June 1960, UN Doc S/RES/748 (1960).

102 Adopted 24 April 1963, entered into force 19 March 1967 (hereinafter 'Vienna Consular Convention').

103 Vienna Consular Convention Art. 36.

through his family. The US also allegedly refused to acknowledge Arar's transfer even after inquiries by Canadian consular officials.[104]

Also potentially relevant are the rules governing the circumstances in which civil aircraft may fly through or land in another State's territory, enshrined in the Chicago Convention on International Civil Aviation.[105] It has been suggested that the use of *civil* aircraft for extraordinary rendition would be a breach of the Convention, which excludes state aircraft.[106] A rendition flight landing on a state's territory absent prior agreement, or concealing the nature of the flight, would violate of the Chicago Convention.

Finally, it has been suggested that extra-legal abduction contravenes the spirit if not the letter of other legal arrangements which are put in place to regulate situations where persons suspected of involvement in international terrorism are found on one state's territory but are wanted by another state.[107] Extraordinary rendition flies in the face of the existing international framework for international cooperation, including extradition treaties and mutual legal assistance arrangements, which states may reasonably be expected to rely on in such situations.

As these rules, unlike human rights law, are primarily obligations due to the territorial state, a critical question is whether the operations on other states' territories – abductions, detentions or landing/flight of aircraft – were preceded by the consent of the territorial states. This is a question of fact that in some situations remains uncertain. In most of the cases that have come to prominence, it would certainly seem to be the case that such consent was forthcoming.[108] This is patently so for abductions conducted jointly, and almost certainly the case for establishment of detention sites that depended on state

104 *Arar v. Ashcroft* Complaint 60 18 CA No 04-CV-249-DGT-VVP (EDNY 2004) (hereinafter 'Arar Complaint' paras 39-40. See also D. Weissbrodt and A. Bergquist, 'Extraordinary Rendition'above note 99, at 146

105 See Chicago Convention on International Civil Aviation, signed at Chicago on 7 December 1944, and Richard Gardiner, Working paper: EEDP 04/07: Blair's foreign policy and its possible successors www.chathamhouse.org.uk 12.

106 The convention facilitates the entry of civilian aircraft – Art 3 – while State aircraft are excluded from the Chicago Convention regime and may only enter the airspace of another State if authorized under special (ad hoc or standing) agreements concluded with that State – Article 4. State flights include military or police flights and would appear to cover rendition flights. As regards the sometimes unclear distinction between state and civilian aircraft, 3 possible approaches based on command and control, use and purpose, and registration, or a combination thereof explored by Gardner, ibid. In practice, some but not all rendition flights were logged as 'state' flights.

107 See extradition arrangements, discussed in Chapter 4. As reflected in SC Res. 1373 (2001), 28 September 2001, UN Doc S/RES/1373 (2001), states are obliged to provide (and presumably to seek) this sort of cooperation in criminal matters, with the use of force not acting as an optional alternative.

108 The act of state consent is often murky and states may never acknowledge consent that is given, as illustrated e.g. by the killing of Osama bin Laden.

engagement in one form or another.[109] In respect of flights landing for refuelling, for example it may be less clear. If there were no consent, the acts of CIA agents on foreign territory would appear to give rise to responsibility on the part of the US (or any accompanying foreign state).

10.3.2 International Humanitarian Law

As in relation to other practices in the 'war on terror', international humanitarian law (IHL) has been invoked as an apparent panacea to the unlawfulness of the ERP and to preclude oversight by human rights bodies. The Bush administration asserted, in the face of the Human Rights Committee's (HRC) recommendation to close secret detention sites and grant access to the ICRC, that it: '... is engaged in an armed conflict with al-Qaeda, the Taliban, and their supporters [and as] part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not [human rights law], is the applicable legal framework governing these detentions.'[110] As set out in Chapter 6, the Obama administration also continues to assume that the US is engaged in a non-international armed conflict against al Qaeda, and to question the relevance of the human rights framework in this context.[111]

The applicability of IHL to the issue of ERP should be treated with particular reserve. First, it governs only those detentions and transfers carried out in association with a genuine armed conflict, international or non-international. While successive administrations claim to be at war with al Qaeda, the Taliban, and associated groups,[112] Chapter 6 explores the reasons why the concept of an armed conflict does not encompass a conflict with a loose ideological network and all those individuals who form part of or support it.[113] The conflicts in Afghanistan, Iraq or elsewhere could provide such a link; some

109 See Abu Zubaydah v Poland, note 83 – allegations that a document was drawn up agreeing to the site, and the state actively removed the normal processes of law. Less information is available in some other cases. Marty report considers there were 'operating agreements' for black site detention in Romania.

110 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, United States of America, Addendum, Comments by the Government of the United States of America on the concluding observations of the Human Rights Committee', UNHRC, 1 November 2007, UN Doc CCPR/C/USA/CO/3/Rev.1/Add.1, available at: http://www.univie.ac.at/bimtor/dateien/usa_ccpr_2008_govresponse.pdf.

111 'Executive Order 13491 – Ensuring Lawful Interrogations', above, note 8; *Al-Bihani v. Obama (Al-Bihani II)*, 590 F.3d 866, 872-73 (D.C. Cir. 2010); *Hamlily v Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009). This is a proposition that all three branches of the US government have accepted. See R. Goodman, 'The Detention of Civilians in Armed Conflict', 103(2009) *American Journal of International Law* 48.

112 *Al-Bihani v. Obama, id.*

113 See Chapter 6B1 on the nature of armed conflict and applicability of IHL.

of the detainees in Guantanamo Bay, discussed in Chapter 8, were detained in the broad context of the conflict in Afghanistan or arguably its 'spillover' into Pakistan.[114] However, it is far more doubtful that individuals detained on the streets of Milan,[115] Bosnia,[116] Djibouti[117] or Macedonia[118] could plausibly be said to be engaged in that conflict at the relevant time.[119] As the documentation makes clear, they were targeted for their perceived intelligence value and there is little in the facts known in relation to the individuals rendered, including the specific examples highlighted in Part A, to support the suggestion that their detention and transfer had any direct and meaningful association with an armed conflict.

Second, as regards the few individuals to whom IHL may in principle be relevant, no lawful basis for ERP can be found in the letter or spirit of IHL. Although specific provisions vary depending on the status of the detainee, as set out fully in Chapter 8, all detainees in the context of armed conflict are entitled to protection from torture and cruel, inhuman, and degrading treatment, and to some degree of oversight and procedural guarantees in respect of their detention.[120] Several provisions of the Geneva Conventions also impose specific requirements in relation to registration of detainees and access by, among others, the ICRC, that are at odds with an extra-legal detention and transfer system.[121]

Some specific provisions of IHL explicitly prohibit the transfer of detainees from the territory on which they were detained. These prohibitions apply irrespective of whether that transfer is across borders or from the control of one state to another – the critical question is whether there is a transfer between detaining powers, to which the IHL protections apply.[122] If entitled to be treated as prisoners of war, the detainees are protected under Geneva Convention III, which allows transfer only into the hands of a party to the

114 The existence of conflict does not mean individuals were in fact detained in connection with that conflict, but some of them may well have been.

115 Abu Omar, above.

116 E.g. Boumediene, whose case eventually went to the Supreme Court – see Chapter 8.

117 See the case of *Mohammed al-Asad* v. *Djibouti* filed before the ACHPR, where the author is one of the legal team before the Commission. Mr. Asad is a Yemeni national who alleges he was detained in Djibouti in December 2003 and January 2004 as part of the CIA's secret detention and rendition program and transferred into 'black site' detention where he spent some sixteen months in secret detention. In May 2005, al-Asad was transferred to Yemen where he now lives. See al-Asad v Djibouti, INTERIGHTS, available at: http://www.interights.org/al-asad/index.html.

118 *El Masri v. Macedonia* judgement, above note 91.

119 See Chapter 6B1 on the 'Global' nature of the purported 'war with al Qaeda and associates'

120 Chapter 8. See J. Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', 87 (2005) *International Review of the Red Cross* 375 (hereinafter 'Safeguards for Armed Conflict').

121 'ICRC Report on CIA Detainees', above, note 33.

122 Pejic, 'Safeguards', above, note 120.

conflict where the transferring power has satisfied itself 'of the willingness and ability of such transferee Power to apply the convention.'[123]

Specific rules also preclude transfer of civilians unless the detaining power is satisfied that their rights will be protected by the transferee power.[124] If it transpires that this is not so measures must be taken to request their return.[125] In situations of occupation, such as post-invasion Iraq, 'forcible transfer as well as deportation of protected persons' is 'prohibited, regardless of their motive.'[126] Violations, *inter alia*, of Article 49 concerning forced transfers constitute a 'grave breach' of the Geneva Conventions, a serious war crime carrying individual criminal responsibility, which all states are obliged to repress. Although US Assistant Attorney General Jack Goldsmith advised that transfer of illegal aliens in Iraq or temporary transfers of nationals of the occupied state to facilitate interrogation are not prohibited under IHL,[127] it is difficult to see any legal basis for such exceptions in the wording or literature surrounding Article 49.[128]

Although there are no comparable explicit rules for non-international conflicts, IHL protects against ill treatment and ensures basic fair trial guarantees in all conflicts;[129] as explored below, in the human rights context it has been recognised that extraordinary rendition and secret detention violate both. Transfer to a situation in which there is a clear risk of such violations cannot be consistent with the positive obligations to safeguard respect for the Geneva Conventions, applicable in either type of conflict.

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123 Geneva Convention Relative to the Treatment of Prisoners of War 1949, 6 U.S.T. 3316, Art. 12(2), 74 U.N.T.S. 135 (adopted 12 August 1949, entered into force 21 October 1950) (hereinafter 'GCIII').

124 Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, 6 U.S.T. 3516, Art. 45(3), 75 U.N.T.S. 287 (adopted 12 August 1949, entered into force 21 October 1950) (hereinafter 'GCIV').

125 *Id*.

126 Art. 48 GCIV: 'article 49 Geneva Convention IV 1949 states that: 'Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.'

127 See J.L. Goldsmith, 'Memorandum for Alberto R. Gonzales, Counsel to the President, Re: The Permissibility on Relocating Certain "Protected Persons" from Occupied Iraq', *Washington Post*, 19 March 2004, available at: http://www.washingtonpost.com/wp-srv/nation/documents/doj_memo031904.pdf.

128 The ICRC Commentary to Article 49 describes this provision as 'absolute and allows of no exceptions.' For a more detailed analysis of the argument, see Sadat, 'Ghost Prisoners and Black Sites', above, note 12, at 309.

129 See eg Common Article 3 Geneva Conventions and other provisions: J. Pejic, *Conflict Classification and the Law Applicable to Detention and the Use of Force*, in E. Wilmshurst (ed.), International Law and the Classification of Conflicts, OUP, 2012, p 18.

States are obliged to respect the Geneva conventions and to 'do everything in their power' to ensure that they are respected universally,[130] which also require a positive response from all states parties where such violations come to light. This is relevant to all states that cooperated or supported the programme in whatever form or even that knew of it and failed to take measures within their power to ensure that it cease. Moreover, aspects of the ERP could amount to grave breaches of the 1949 Geneva Conventions,[131] in which case states are obliged to 'search for all persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.'[132] Military and civilian superiors are also obliged to punish subordinates for crimes they know or have reason to know the subordinates have committed in the past. A superior can sufficiently discharge this obligation by reporting breaches of IHL to a competent authority for investigation and prosecution.[133]

IHL not only fails to provide a legal basis for the secret detention, transfer and abuse associated with the rendition programme, it also makes provisions relevant to ensuring justice and accountability in its aftermath.[134]

10.3.3 Human Rights Law

The practice of ERP is self evidently and straightforwardly a violation of many human rights, on account not only of its eventual purpose – torture, secret and arbitrary detention, or other serious violations – but also due to the procedural arbitrariness that attends the rendition. The following is a brief overview of affected rights and issues arising.

10.3.3.1 'Extraterritorial' Renditions and Human Rights Obligations

Violations have arisen on the territories of many states around the globe. A preliminary question raised by the US, relates to the relevance, in human rights law, of the fact that generally the state driving the rendition programme, and in some cases other states involved in various forms in supporting it, have

130 Common Article 1, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, adopted 8 June 1977, entered into force 7 December 1978 (hereinafter 'API')..

131 For a list of grave breaches, see ICRC, 'Grave breaches specified in the 1949 Geneva Conventions and in additional Protocol I of 1977', available at: http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jp2a?opendocument

132 For common articles on this see GCI Art. 49, GCII Art. 50, GCIII Art. 129, and GCIV Art. 146.

133 G. Mettraux, *The Law of Command Responsibility* (OUP, Oxford 2009).

134 For practice in this respect, see below 10.5 and further Ch 7B.14.

acted outside their own territories.[135] As noted elsewhere in this book, the US government has asserted that its obligations under human rights treaties – such as the International Convention on Civil and Political Rights 1966 (ICCPR), and UN Convention against Torture 1984 (CAT) – do not arise in respect of the ERP on the basis of its 'extra-territorial' nature.[136] For example, in line with its position that the ICCPR does not apply extraterritorially, the US responded to the HRC that it was not bound by the ICCPR in respect of ERP.[137]

However, as explained in Chapter 7, an assessment of the international legal framework suggests a different interpretation. The state's obligations under human rights treaties arise where individuals are within the state's territory or where they are subject to its jurisdiction, which can arise where it controls territory abroad *or* in certain circumstances where its agents act abroad.[138] It is now the consistent approach across courts and human rights bodies that if the state exercises its power abroad by taking physical custody or control of individuals, it is accountable for those actions under its human rights obligations.[139] In an important Grand Chamber judgement of July 2001 the ECtHR reasserted that '*what is decisive ... is the exercise of physical power and control over the person in question*.'[140] In the context of the ERP, the US might be said not to have controlled black detention sites abroad, but certainly to have controlled the individuals abducted, transferred detained or tortured by CIA agents.[141]

There are many comparable cases involving individuals being forcibly removed from one state to the jurisdiction of another, where courts have found their extra-territorial human rights obligations have been held to arise. For

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135 See Chapter 7A.2 and 7B.1 'Extra-territorial application of IHRL'.

136 Chapter 7B.2, referring to the Second, Third and Fourth Periodic Reports of the U.S.to the UN Committee on Human Rights For the Committee's response, see e.g. 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: United States of America', *UNHRC*, 18 Dec 2006, UN Doc CCPR/C/USA/CO/3/Rev.1.

137 Periodic Reports of the USA, *id*.

138 The UN Committee against Torture (CAT), the Human Rights Committee (UNHRC), and International Court of Justice (ICJ) have consistently held that the provisions of both the ICCPR and CAT arise where the state exercises its authority or control on its own territory or abroad. Chapter 7A2 'General Comment no. 31 [80] The nature of the General Legal Obligation Imposed on States Parties to the Covenant', *UNHRC*, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13; 'Concluding Observations of the Human Rights Committee on the United States of America', *UNHRC*, 15 September 2006, UN Doc CCPR/C/USA/CO/3.

139 Uncertainty that crept into ECtHR jurisprudence has not related to detentions abroad, where governments have accepted that IHRL obligations apply in the course of *Bankovic and Ors* v *Belgium and Ors*, App. 52207/99, (2001)) and *Al-Skeini and Ors* v *United Kingdom*, Appl. No. 55721/07 (2011). See also *Al-Saadoon and Mufdhi* v *United Kingdom*, Appl. No 61498/08 (2010) on transfer.

140 *Al-Skeini and Ors* v *United Kingdom*, *id*. at para. 136.

141 Intelligence agencies are clearly within the state apparatus for purposes of responsibility; see Chapter 3.

example, the seminal cases of *Lopez Burgos & Ors* v. *Uruguay* – in which the HRC famously described it as 'unconscionable' that the state could be permitted to do abroad what it was prohibited from doing to its own citizens at home – concerned abductions from Argentine soil.[142] The *Ocalan*, *Freda* and *Sanchez Ramirez* cases before the European Court all concerned individuals suspected of terrorism being detained and forcibly removed from another state without due protection of law.[143] There is little room for doubt that where an individual is subject to the sort of direct and overwhelming power and control envisaged in detention, interrogation or transfer within the ERP, he or she would come within the jurisdiction of the state.

10.3.3.2 Positive Obligations to Prevent, Protect and Respond to Human Rights Violations

As noted above, the ERP unfolded in many states worldwide. In some, the territorial states may be the instrument of the torture or other violation, as 'proxy' for the US or otherwise. In others wrongs may have resulted from joint operations. In others yet the state's territory may simply be being 'used' by foreign agents. In each case, the territorial state's responsibility may well be engaged on the basis of a failure to meet its positive obligations to secure to those within its jurisdiction the rights guaranteed under human rights law.

As Chapter 7 indicates, the notion of positive obligations under human rights law requires that the State take all feasible measures to prevent violations, and to respond where they arise.[144] Responsibility may arise where there is 'consent or acquiescence' by the states in the use of their territory by private or foreign state actors for human rights violations, but giving such consent is not however necessary. The test according to IHRL is whether the state exercised 'due diligence' to prevent the violations. The elements of this test are met where 'the authorities *knew or ought to have known* at the time of the existence of a *real and immediate risk* ... from the criminal acts of a third party and that they *failed to take measures within the scope of their powers* which,

142 *Sergio Euben Lopez Burgos* v. *Uruguay*, Communication No. R.12/52, UN Doc Supp. No. 40 (A/36/40) at 176 (1981) at para. 2.2.

143 *Al-Skeini and Ors* v *United Kingdom*, above, note 140, at para. 36, noting that 'irregular rendition' is recognized 'exception' to the territoriality principle, citing the *O¨calan*, *Freda* and *Sanchez Ramirez* cases all of which concerned an applicant being forcibly removed (albeit to stand trial not torture and arbitrary detention) in another state with the consent of the territorial state. *O¨calan* v *Turkey*, Appl. No. 46221/99, Merits (ECtHR 12 March 2003); *Illich Sanchez Ramirez* v *France* (dec.), Appl No. 28789/95 (ECommHR 24 June 1996); *Freda* v *Italy*, Appl. No. 8916/80, Admissibility Decision (ECommHR 7 October 1980).

144 *Osman v United Kingdom*, Appl. No. 23452/94, 29 EHRR 245 (1998), at para. 116; *Z and Ors v United Kingdom*, Appl. No. 29392/95, 34 EHRR 3 (2002), para. 73;*Velasquez Rodriques v Honduras*, above, note 165, at paras. 172-5.

judged reasonably, might have been expected to avoid that risk.'[145] The 'due diligence' obligation also requires that the state must act with 'exemplary diligence' to investigate, prosecute, and provide redress in the event of breach.[146]

10.3.3.3 Particular Rights Implicated by Extraordinary Rendition

– *Liberty and Security of the Person*

Incommunicado and unacknowledged detention are clearly at odds with the guarantees in respect of the right to liberty under international law.[147] Unacknowledged detention has been described as a 'complete negation of the guarantees of liberty and security of the person … and a most grave violation of that Article.[148] Incommunicado and unacknowledged detention by their nature entail also that the detainee does not have the benefit of the essential safeguards, discussed in Chapters 7 and 8, which have been held – by courts and bodies across human rights systems – to be an integral aspect of the protection of liberty.[149]

The failure to register and monitor detainees '... allows for serious violations of rights to occur, and enables those responsible for an act of deprivation of liberty to conceal their involvement in a crime so as to cover their tracks and to escape accountability for the fate of a detainee.'[150] Access to a lawyer, and to medical personnel, are among the critical safeguards accepted by human rights bodies as essential in recent years,[151] along with the right to challenge the lawfulness of detention before a judge, with sufficient fair trial rights to make such a challenge meaningful.[152] The most basic legal principles on

145 *Osman, id.*; see also *Kilic v Turkey*, Appl. No. 22492/93 (ECtHR 9 January 1995); *Kaya v Turkey*, above, note193. The jurisprudence of various courts and human rights bodies reflect a similar test: *Velasquez Rodriguez v Honduras*, above, paras. 172-5 ; 'General Recommendation No. 19, UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), Eleventh session, 1992, available at: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19.

146 Chapter 7A.2 See *Isayeva and Ors v Russia* (n 93) paras 208-13; and *Menesheva v Russia*, Appl. No. 59261/00, (ECtHR 9 March 2006), at para. 64.

147 Art. 5 ECHR; Art. 9 ICCPR; Art. 14 ACHR; Art. 6 ACHPR, Chapter 7A.5.3. *See eg Öcalan v. Turkey*, *id*. at § 103, and *Cyprus v. Turkey*, Grand Chamber, Appl. No. 25781/94, Grand Chamber (10 May 2001), at § 147.

148 *Kurt v. Turkey*, Appl. No. 15/1997/799/1002 (ECtHR 25 May 1998) at § 124.

149 See Chapters 7A.5.3 and 4, and 8.B.4. See eg *Sabbeh & Others* v *Egypt*, ACHPR, and Joint Report on Secret Detention 2010.

150 *Ibragimov and Others v. Russia*, Appl. No. 34561/03 (ECtHR 29 May 2008), at § 114.

151 E.g. 'Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment', UNGA, 9 December 1988, UN Doc A/Res/43/173, Principles 16 and 19; 'Standard Minimum Rules for the Treatment of Prisoners', 1977, UN Doc E/5988 rule 37.

152 As noted elsewhere, such protections are guaranteed in all circumstances; See e.g. IACHR Habeas Corpus in Emergency Situations, HRC GC 29 in Chapter 8.

lawful detention are patently vitiated by a clandestine programme of abduction and transfer to secret detention.[153]

– *Torture and Cruel, Inhuman, and Degrading Treatment*

Where states engage in torture or ill-treatment (TCIDT), alone or with other states, they are responsible for violation of the absolute prohibition of such treatment in human rights treaties and customary law.[154] Where states fail to exercise 'due diligence' to ensure that these rights are respected, whether by private actors or foreign states operating on their territory, they also fall foul of their positive obligations to prevent and protect from such ill-treatment.[155]

It is beyond doubt that, despite questions arising in the context of the war on terror in recent years, the prohibition on torture or cruel inhuman or degrading treatment or punishment is absolute, admitting of no exceptions or derogations.[156] It applies irrespective of a victim's alleged wrongdoing,[157] perceived 'intelligence value' or the purported need to extract information to prevent terrorism.[158] As has been seen, courts and bodies maintain a high threshold for the definition of TCIDT, consistent with the opprobrium associated with this absolute prohibition.[159]

There would seem to be little doubt that the interrogation techniques referred to above would amount to both torture and ill-treatment under human rights law. In respect of certain CIA 'enhanced interrogation techniques',

153 See, e.g., *Babar Ahmad and Ors v United Kingdom*, above, note 4 (opining in para. 114 that 'extraordinary rendition, by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention.')

154 Allegations in respect of rendition include that in some instances or for certain periods of time U.S. officials directly engaged in torture, while in other cases, other states may have done so at its behest.

155 Procedural rights and judicial oversight have also been held to constitute essential safeguards against torture which must therefore be guaranteed by the state, e.g., *Mohammed Alzery v. Sweden*, HRC Communication No. 1416/2005, UN Doc CCPR/C/88/D/1416/2005 (2006), 10 November 2006; *Ilascu and Others v. Moldova and Russia*, Appl. No. 48787/99 (ECtHR 8 July 2004) at § 318.

156 Chapter 7A5.2. See *Shamayev and Others v. Georgia and Russia*, Appl. No. 36378/02 (ECtHR 12 April 2005) at § 335.

157 See *Chahal v. the United Kingdom*, Appl. No. 70/1995/576/662 (ECtHR 15 November 1996) at § 79, and *Saadi v. Italy*, Appl. No. 37201/06 (ECtHR 28 February 2008) at § 127.

158 See *Gäfgen v. Germany*, Grand Chamber, Appl. No. 22978/05 (ECtHR 1 June 2010) at § 107, where a child's life may have been at stake but the prohibition was absolute.

159 See Chapter 7A.5.2; 'Inhuman' or 'degrading' treatment must attain a minimum level of severity (e.g.*Saadi v. Italy*, above, note 156; at § 135) while torture has a higher severity causing very serious and cruel suffering (eg. *Akkoç v. Turkey*, Appl. Nos. 22947/93 and 22948/93 (ECtHR 10 October 2010), at § 115).

159 See e.g., 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Addendum: Mission to the United States of America', UN General Assembly, November 2007, available at: http://www2.ohchr.org/english/issues/terrorism/docs/A.HRC.6.17.Add.3.pdf.

international human rights bodies have found them to constitute torture and ill-treatment.[160] The UN CAT has expressed its concern in respect of compliance with the UNCAT, called on the US to 'rescind any interrogation technique, including methods involving sexual humiliation, "waterboarding", "short shackling" and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.'[161]

The Committee on the Prevention of Torture has similarly concluded that: 'interrogation techniques applied in the CIA-run overseas detention facilities have certainly led to violations of the prohibition of torture and inhuman or degrading treatment. Any doubts that might have existed on this subject were removed by the publication of a Special Review of CIA counterterrorism detention and interrogation activities covering the period September 2001 to October 2003, carried out by the Agency's own Inspector General.[162] Despite being extensively censored, the published version of the Special Review makes clear the brutality of the methods that were being used when interrogating terrorist suspects at sites abroad.'[163]

The system of incommunicado and/or secret detention may itself amount to torture or inhumane treatment, as several courts and human rights courts and bodies have recognised. The European Court has specifically recognised that the extreme fear, anguish and vulnerability arising from the secret and arbitrary nature of the extraordinary rendition programme gave rise to torture.[164] The UN Joint Experts in their Report on Secret Detention have noted that secret detention may itself constitute torture.[165] The ICRC report on the 14 high value detainees indicated to similar effect that the extreme 'distress' resulting from rendering individuals 'missing persons' constitutes ill-treatment.[166] This is consistent with jurisprudence in other contexts, where for example the UN Human Rights Committee found the threshold of torture to have been reached in a case where an individual has been detained for three

160 See 'Report of the Special Rapporteur on Terrorism, Addendum', *id.*; Annex 7: UN Committee against Torture, Conclusions and Recommendations of the Committee against Torture to the United States of America, CAT/C/USA/CO/2, 25 July 2006, § 17 'ICRC Report on CIA Detainees', above, note 33, p. 26.

161 Annex 7: UN Committee against Torture, *id*.

162 CIA OIG Special Review, dated 7 May 2004 but released on 24 August 2009.

163 'CPT Report' on Lithuania Visit, below, note 310.

164 *El Masri v the Former Yugoslav Republic of Macedonia,* [GC], No.39630/09, 13 December 2012, para 202-3.

165 See UN Joint Study(2010), above, note 3, at § 31-35; see also UNGA Res. 148 (2005), 15 December 2005, UN Doc A/RES/60/148 (2005).

166 'ICRC Report on CIA Detainees', above, note 33, pp. 7-8.

years incommunicado and in a secret location.[167] It reflects a much broader body of human rights law recognising that the denial of safeguards – such as access to medical examinations, to a lawyer, to contact third parties and to judicial scrutiny[168] – may constitute violations of the positive obligations in respect of torture or ill-treatment.

Rendition may itself amount to cruel or degrading treatment not only of the individual involved, but also their family members.[169] Human rights courts and bodies have noted that the disappearance of a close relative with no information provided to the family, nor an effective investigation, may lead to anguish amounting to cruel, inhuman, or degrading treatment.[170]

– *Rendition as Enforced Disappearance*

Renditions have as their design and effect the removal of the person from the protection of law, and withholding information from that person and his/her family. As such, it meets the criteria of enforced disappearance in accordance with the definition in the Convention on Enforced Disappearance, which refers to ' ... the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.'[171]

In recent years the ERP has come to be recognised as secret detention amounting to the enforced disappearance of persons.[172] Disappearances may

167 *Yussef El-Megreisi v. Libyan Arab Jamahiriya*, UN Human Rights Committee (HRC) Communication No. 440/1990, UN Doc CCPR/C/50/D/440/1990, 23 March 1994 at § 5.4. See also *Velasquez Rodriguez* case, Judgment of 29 July 1988, Inter-American Court of Human Rights, (Ser. C); No. 4 (1988), availble at: http://www1.umn.edu/humanrts/iachr/b_11_12d.htm , at §187.

168 See Chapters 7A4.2 and 5.2.Eg include *Akkoc v. Turkey*, above, note 158, at § 118; *Kurt v. Turkey*, above, note 148, at § 123 and Sabbeh & Ors v Egypt, ACHPR February 2012.

169 'ICRC Report on CIA Detainees' note 33. See, for example, *Quinteros v Uruguay* (Communication No 107/1981), HRC, 15 October 1982, at para. 14; *Varnava and Ors v Turkey*, Grand Chamber, Appl. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, and 16073/90 (ECtHR. 18 September 2009);, at paras. 200-2; *Tanis and Ors v Turkey*, Appl. No. 65899/01 (ECtHR 2 August 2005), at para 219; *Cyprus v Turkey*, above, note 147, at paras 155-8; and *Kurt v Turkey*, above, note 148, at para 134; *Avdo and Esma Palić v Republika Srpska* (Decision on Admissibility and Merits), Human Rights Chamber for Bosnia and Herzegovina, Case no CH/99/3196 (December 2000), at paras. 79-80.

170 See e.g., *Bazorkina v Russia*, Appl. No. 69481/01 (ECtHR 27 July 2006); see also 'ICRC Report' supra.

171 International Convention for the Protection of All Persons from Enforced Disappearance, *UNGA* (adopted 20 December 2006, entered into force 23 December 2010). See also 'Report to the General Assembly on the First Session of the Human Rights Council', *UNHRC*, 2006, UN Doc A/HRC/1/L.10.

172 See e.g., the UN Joint Study (2010), above, note 3, at § 28 noting that "Every instance of secret detention also amounts to a case of enforced disappearance (para 28)".

in turn constitute torture, as recognised by the U.N. Human Rights Committee,[173] and the Working Group on Enforced or Involuntary Disappearances, which notes that 'the very fact of being detained as a disappeared person, isolated from one's family for a long period is certainly a violation of the right to humane conditions of detention and has been represented to the Group as torture.'[174]

– *'Non-refoulement' to Serious Violations*

As discussed fully in Chapter 7, the '*non-refoulement*' obligation requires that states refrain from transferring an individual to a state where there is a 'real' and 'foreseeable' risk of serious rights violations arising.[175] Developing practice suggests that the obligation not to transfer an individual arises where there is a risk not only of torture or ill-treatment, but also of a violation of the right to life, of a 'flagrant denial of justice', and potentially of other serious violations of human rights.[176] All of these issues arise in respect of the transfer by various states of individuals to CIA black sites, or to third states notorious for such violations, with the specific purpose of interrogation and 'intelligence gathering'.

The obligation not to transfer if there are 'substantial grounds' for believing that a non-derogable right would be violated is itself non-derogable.[177] It cannot be offset against any risk of terrorism or threat to national security, and is not affected by the alleged conduct of the individual in question.[178] Although the US has denied that it is bound by the *non-refoulement* prohibition,

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173 See *María del Carmen Almeida de Quinteros et al. v. Uruguay*, HRC Communication No. 107/1981, UN Doc CCPR/C/OP/2 (1990), at 138at §14; see also *El-Megreisi v. Libyan Arab Jamahiriya*, HRC Communication No. 440/1990, UN Doc CCPR/C/50/D/440/1990, 21 March 1994, at §§ 2.1-2.5; *Mojica v. Dominican Republic*, HRC Communication No. 449/1991, UN Doc CCPR/C/51/D/449/1991, 10 August 1994,at § 5.7. In the IACtHR see*eg. Velásquez Rodríguez* Case, Judgment of 29 July 1988, Inter-Am Ct. HR (Ser. C) No. 4 (1988), at §187.

174 *See* UN Doc E/CN.4/1983/14, § 131.

175 Chapter 7A.5.10 on jurisprudence including *Chahal v United Kingdom*, above, note 156; *Saadi v Italy*, above, note 158; *Othman (Abu Qatada)* v. *the United Kingdom*, Appl. No. 8139/09 (ECtHR. 14 December 2010); and *Agiza v Sweden*, Communication No. 233/2003, UN Doc CAT/C/34/D/233/2003 (2005). See further K. Wouters, 'Reconciling National Security and *Non-Refoulement*: Exceptions, Exclusion, and Diplomatic Assurances', in N. White et al., *Counter-Terrorism: International Law and Practice* (OUP, Oxford 2012), at Ch. 22, p. 579.

176 Chapter 7 (Human Rights); *Othman, ibid.; Baysakov and Ors* v. *Ukraine*, Appl. No. 54131/08, (ECtHR. 18 February 2010).

177 Chapter 7A.5.10 and practice post 9/11 in 7B.10; eg *Saadi v. Italy*, above, note 158, at § 127.

178 Ibid. See eg. *Saadi v Italy*, *id.*; *Chahal v UK*, above, note 158. *Agiza v Sweden*, above, note 175, at para 13.8; *Aemei v Switzerland*, Communication No. 34/1995, CAT, 29 May 1997, at para 9.8; *MBB v Sweden*, Communication No. 104/1998, CAT, 5 May 1999, at para 6.4; *Arana v France*, Communication No. 63/1997, CAT, 2 June 2000, para 11.5; and *Babar Ahmad and Ors v United Kingdom*, above, note 4; *Othman (Abu Qatada) v. the United Kingdom*, Final Judgement, Appl. No. 8139/09 (ECtHR 9 May 2012).

this is at odds with long standing jurisprudence of human rights bodies.[179] Human rights courts and bodies have repeatedly expressed concern that the rendition programme violates the *non-refoulement* rule.[180] In the context of an ECtHR case concerning transfer of terrorist suspects from the UK to the US, it was clear that one question courts will want to satisfy themselves in the future that there is no risk of the individual being subjected to unlawful rendition.[181] The rendition programme has also exposed the unreliability of diplomatic assurances, discussed in Chapter 7,[182] as several of those rendered to torture were supposedly subject to 'assurances' that they would not be mistreated.[183]

– *Procedural Rights applicable to Transfers*

Alongside due process rights in respect of detention, the legal framework indicates additional procedural rights applicable in respect of transfer,[184] safeguarding the *non-refoulement* right set out above. Human rights treaties have been interpreted as encompassing basic due process rights in the context of transfer cases.[185] Chapter 7 discusses how the precise parameters of the procedural rights arising in relation to transfer remain unclear in certain respects,[186] but there appears to be consensus among human rights courts and bodies that, as a minimum, the individual be given a 'meaningful' oppor-

179 See 'United States Written Response to Questions Asked by the Committee Against Torture', U.S. Department of State, 28 April 2006, available at: http://www.state.gov/g/drl/rls/68554.htm. See also Periodic Reports of the USA, above, note 138, where the U.S. notes it is bound neither by the ICCPR which it denies gives rise to a non-refoulement obligation, nor by the explicit *non-refoulement* obligations under CAT as a result of its reservation to Art. 3. It has said its policy is not, however, to transfer individuals where it is 'more likely than not' that they will be tortured; see e.g. in: *In re Guantanamo Bay Detainee Litigation* Case No 1:05-cv-01220 (D.D.C. 2007), at para 6.

180 See *Agiza v Sweden*, above, note 174; 'Report of the Committee against Torture Thirty-third Session (16-26 November 2004) Thirty-fourth Session (2-20 May 2005)', UNGA, Supplement No 44 (3 October 2005), UN Doc A/60/44 227.

181 *Babar Ahmad and Ors v United Kingdom*, above, note 4

182 Chapter 7.B.10

183 Eg. in the Arar case the US has relied on having sought sssurances: Transcript of Attorney General Alberto R. Gonzales, Press Conference, Department of Justice http://www.usdoj.gov/ag/speeches/2006/ag_speech_0609191.html. See also remarks of Secretary of State Condoleezza Rice December 5, 2005, online at http://2001- 2009.state.gov/secretary/rm/2005/57602.htm. Likewise Sweden claimed that assurances lay behind its decision to assist in the CIA's rendition to Egypt of Egyptian asylum seeker Ahmed Agiza in December 2001; see *Agiza v. Sweden*. See Ch 7A.6 and B.10 on refoulement post 9/11.

184 Chapter 7A5.10.

185 See e.g., *Jabari v. Turkey*, Appl. No. 40035/98 (ECtHR 11 July 2000), at § 40; *Shamayev and Ors v Georgia and Russia*, above note 155. For additional protections on the non-expulsion of foreign nationals see Article 13 ICCPR and Article 1 Protocol 7 ECHR.

186 Ch 7A.5 and B.10, on how rights regimes differ as to fair trial guarantees in transfer proceedings.

tunity to challenge detention and transfer.[187] In this context there is little doubt as to the unlawfulness of a system which entirely bypasses the legal process, allowing no right of challenge and with the specific design of ensuring that no one, including family or lawyers,[188] even know of the abduction and transfer, never mind having the opportunity to invoke judicial or other democratic oversight.[189]

– *The Right to Remedy and Reparation*

The fundamental nature of the right to a remedy is set out in Chapter 7.[190] What does the right entail for victims of the rendition programme? The right to a remedy embraces the right to restitution, and the state is obliged to 'whenever possible, restore the victim to the original situation before the gross violations of international human rights law ... occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.'[191] Offending states are also obliged to provide compensation for pecuniary and non-pecuniary damage flowing from breaches.[192] In addition, symbolic measures such as recognition of the wrong, provision of information, and where appropriate apology, can form part of the measures of reparation that states may be obliged to provide in the face of serious human rights violations such as those involved in extraordinary rendition.

Where a right to a remedy is not afforded by the state, victims have a right to pursue their claim through a court of law. In the context of US secret detentions and unlawful interrogation techniques by intelligence agencies, the HRC found that 'the State party should ensure that there are effective means to follow suit against abuses committed by agencies operating outside the military structure and that appropriate sanctions be imposed on its personnel who used or approved the use of the now prohibited techniques.'[193] An

187 See, e.g., *Shamayev and Ors v Georgia and Russia*, above, note 156; *Agiza v Sweden*, para 13.7. The UN CAT has for its part held that the remedy against *refoulement* requires 'an opportunity for effective, independent, and impartial review of the decision to expel or remove.'

188 Arar Complaint, above, note 106, para. 46: Arar alleged that his lawyers were purposely not informed of his pending transfer and transfer to Syria.

189 *Shamayev and Ors v Georgia and Russia*, above, note 156 at paras 333-9

190 Chapter 7A.4.2. E.g. ICCPR Art. 2(3)(a) or ECHR Art. 13, inherent in the duty to 'ensure' the protection of rights, and a principle of customary law.

191 Eg UNGA 'Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', 16 December 2005, UN Doc A/RES/60/147; Resolution 2005/35 on the Basic Guidelines and Principles, UNCHR, 19 April 2005, UN Doc E/CN.4/RES/2005/35 ('Basic Principles on the Right to a Remedy and Reparation'), at Principle 19.

192 *E and Ors v UK*, Appl No. 33218/96 (ECtHR 26 November 2002), at para. 110; *Keenan v UK*, Appl. No. 27229/95, 33 EHRR 913, at para. 130.

193 Concluding Observations of the Human Rights Committee on the United States of America, CCPR/C/USA/CO/3/Rev.1, UNHRC, 18 December 2006.

integral aspect of the right to reparation is the obligation to investigate and prosecute those responsible, addressed below.[194]

– *The Right to Truth and Justice and the Duty to Investigate and Prosecute*

The rights of victims of serious rights violations to know the 'truth' concerning the violations committed against them has been the subject of growing recognition internationally,[195] and is integral to the right of reparation.[196] The extent of secrecy that has continued to surround the ERP, and the official refusal to disclose information even when it is in the public domain, run counter to this right. Access to information has consistently been blocked by what has been criticised as an overreaching approach to national security.[197] The public interest in information concerning the rendition programme has also been recognised by the Court.[198]

These rights correspond to the duty on states to respond to violations that involve serious allegations of criminality by carrying out a prompt, impartial and thorough investigation.[199] The investigation must avoid unwarranted delays in collecting evidence and initiating investigations, and ensuring progress within a reasonable time.[200] It must be capable of leading to the identification and prosecution of those responsible and the provision of effective and transparent remedies for victims.[201] This duty has been held to apply in security sensitive circumstances, including in situations of armed

194 Chapter 7A.4.2. Eg. *Keenan v UK*, above, note 191, at para 132. Article 13 has been held to imply obligations to investigate: , *Kaya v Turkey*, Appl. No. 22535/93 (ECtHR 28 March 2000) (right to life) *Aksoy v Turkey*, Appl. No. 21987/93, 23 EHRR 533 (1996) (torture); *Orhan v Turkey*, Appl. No. 25656/94, (ECtHR 18 June 2002) (disappearance); and *Mentes v Turkey*, Appl. No. 23186/94 (ECtHR18 November 1997) (destruction of homes).

195 See e.g., *el Masri v Macedonia, para 191; Gomes-Lund et al (Guerrilha do Araguaia) v Brazil* (Preliminary Exceptions, Merits, Reparations and Costs), IACtHR Series C No 219 (24 November 2010). See survey of jurisprudence in Expert Opinion in the *Garzon v Spain* case before the ECHR at www.interights.org/garzon.

196 Chapter 7A.4.2.

197 E.g., the UN Special Rapporteur on human rights and counter-terrorism, Ben Emmerson expressed profound regret at a U.S. court decision that refused freedom of information requests concerning the involvement of the United Kingdom in the U.S. ERP. 'UN expert regrets US court decision preventing oversight of intelligence services', *UN News Centre*, 12 April 2012, available at: http://www.un.org/apps/news/story.asp?NewsID=41765#.UKHCuuOe_KA.

198 *El Masri v the Former Yugoslav Republic of Macedonia*, paras 191-192.

199 As Chapter 7 notes, the duty is recognised across IHRL and explicit in some provisions e.g. Article 12 CAT requiring 'prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction', and Article 5 CAT obligates a State Party to extradite or prosecute accused torturers who are present in any territory under its jurisdiction..

200 *Bati and Ors v Turkey*, Appl. Nos. 33097/96 and 57834/00 (ECtHR 3 September 2004).

201 *Hugh Jordan v United Kingdom*, Appl. No 24746/94 (ECtHR 4 May 2001), at para. 109, and Ch 7A4.2

conflict.[202] Several U.N. sponsored reports, including some addressing extraordinary rendition specifically, have noted mechanisms to investigate or oversee security and intelligence agencies '*should have access to any information, including sensitive information,*'[203] and that bodies investigating human rights abuses should have '*unhindered*' access to all confidential secret service materials.[204] A European Parliament report of 2012 notes that:

> "in no circumstances State secrecy takes priority over inalienable fundamental rights and that therefore arguments based on state secrecy can never be employed to limit legal obligations of states to investigate serious human rights violations; considers that definitions of classified information and State secrecy should not be overly broad and that abuse of State secrecy and national security constitute a serious obstacle to democratic scrutiny.[205]

Where serious violations arise, a thorough investigation must lead to a rigorous approach to prosecution.[206] IHRL recognises a duty to prosecute those responsible,[207] including the imposition of proportionate penalties.[208] Egregious crimes must be appropriately prosecuted as crimes that reflect the gravity of the underlying acts.[209] Thus acts of torture should not be prosecuted as 'abuse of office' offences for example, or concerns would arise as to whether these obligations had been met.[210]

The human rights law obligation does not necessarily entail the prosecution of all individuals conceivably tarnished by criminality; however, the scope of the investigation, and potentially the prosecutions policy, should include not only the immediate perpetrators of the crimes, but also the intellectual

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202 *Isayeva, Yusupova and Bazayeva v Russia*, Appl. Nos. 57947/00, 57948/00, 57949/00, 41 EHRR 39 (2005), at paras. 209-13; see also P. Alston, 'Report to the Human Rights Commission', 8 March 2006, UN Doc E/CN.4/2006/53 1125-6. Ch 7A4.2

203 UN Joint Study, para 292 (d).

204 Report of M Scheinin, Special Rapporteur on Terrorism, 'Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight', para 15.

205 The European Parliament's Report on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report,' Aug 2012.

206 See, for example, *Barrios Altos v Peru* (Judgment) IACtHR Series C No 7 (14 May 2001). For analysis of the duty to prosecute and its limits, see F. Guariglia, 'Los límites de la impunidad: la sentencia de la Corte Interamericana de Derechos Humanos en el caso Barrios Altos' in *Nueva Doctrina Penal, 2001/A* (Editorial del Puerto, Buenos Aires 2001), at 209-30.

207 See eg *Velasquez Rodriques v Honduras*, above, note 165; *Assanidze v Georgia*, Appl. No. 71503/01, 39 EHRR 653 (2004); *Isayeva v Russia,* above, note 202, at paras 209-13.

208 Chapter 4.B.2.2 OR 7.a.55. Eg *Gafgen v Germany*, at para. 123 on the duty to ensure against 'manifest disproportion between the gravity of the act and the punishment imposed.'

209 Article 4 CAT makes explicit the obligation to ensure that all acts of torture, as well as attempts to commit torture, be criminalized and punished proportionately.

210 See uncertainty surrounding the Polish investigation, which reports suggest is based on 'abuse of office' offfences, 10.4 below.

authors behind the programme.[211] Cases against higher level officials will tell a broader story, and generally contribute more to clarifying the historical understanding of the nature of the programme.[212] Measures such as statutes of limitations or amnesties that act as a bar to investigation and prosecution for the most egregious crimes in international law are generally considered inconsistent with these obligations.[213] Personal or functional immunities should, likewise, not preclude investigation and prosecution of conduct that amounted to crimes under international law.[214]

- *Other Rights*

The effect of rendition is the undermining of a whole host of other rights, beyond those most obviously implicated and itemised above.[215] These include freedom of movement, the right to private life,[216] family rights,[217] freedom of expression,[218] the right to health among other economic and social rights, and the right to life itself.[219] As the UN Joint Study on Secret Detention notes,

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211 Barrios Altos, in Guariglia, supra note 215.

212 See Chapter 4.1 and P. Akaban, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal' 20 (1998) *Human Rights Quarterly* 737 on criminal process, and Chapter 11 on the role of human rights litigation.

213 See Chapter 7A42, and for more detail the survey of practice on amnesty and prescription in the Expert Opinion Garzon v Spain (ECtHR).

214 Immunity *ratione personae* should not apply to acts such as torture or crimes under international law; see eg the famous *Pinochet* case, 1998 All ER 97 (Pinochet 3) concerned the torture specifically, and the Lords found that a former head of state was not immune for the purposes of criminal process. The immunities of sitting heads of state, as an extension of the immunity of the state itself, is more controversial. See also Arrest Warrant Case (Congo v Belgium), ECHR

215 Weissbrodt and Bergquist, 'Extraordinary Rendition', at 239.

216 See, e.g., allegations against Zubaydah which he had no opportunity to refute; video recording his suffering; and the gagging order which leaves him without a voice, all violations of the right to private life. See *Abu Zubaydah* v. *Lithuania*, above, note 29.

217 Both Khalid El Masri and Abu Omar emphasise the impact on family life of their families having no idea where they were. In the case of El-Masri, his family had no information of his fate or whereabouts for years, assumed he was not returning and had relocated to another country. This case demonstrates the devastating impact on the rights of the individual and his family.

218 See, e.g., the complete gagging order on all 'high value detainees,' including Abu Zubaydah, highlighted above, eviscerating his right to expression of any type which cannot be justified as necessary and proportionate limitation.

219 Little information has emerged about deaths in CIA custody though Gul Rahman reportedly died in November 2002 at a CIA-run prison in Afghanistan known as the Salt Pit after being shackled to a concrete wall. 'CIA interrogation probe ends without any charges', *BBC News*, 31 Auguist 2012, available at: http://www.bbc.co.uk/news/world-us-canada-19432553 ; S. Shane, 'No Charges Filed on Harsh Tactics Used by the C.I.A.', *New York Times*, 30 August 2012, available at: http://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html?pagewanted=all ; See also allegations by rendition victim Mamdouh Habib of detainees dying through torture at hands of Egyptian interrogators in M. Habib and J. Collingwood, *My Story: The Tale of a Terrorist Who Wasn't* (Scribe Publications Pty Ltd., 2009).

it may also violate the right to fair trial as it is used to circumvent the normally applicable criminal procedure and safeguards.[220] Rendition illustrates the extent of rights violations arising for immediate victims, as well as the range of the victims affected, going beyond those directly subject to the rendition to include family members and dependants.[221]

Likewise, ERP also violates the right to seek asylum from persecution in other states, or to enjoy such asylum where it has already been granted.[222] Where a person has a well-founded fear of persecution and is transferred to their country of nationality or habitual residence, the Refugee Convention and Protocol are also violated.[223]

10.3.4 State Responsibility

As the rules on state responsibility in international law make clear, several states may be responsible for an international wrong at the same time.[224] This is particularly obvious where some states may engage directly in wrong-doing while others fail in their positive human rights obligations of protection. Extraordinary renditions and the web of states that have, in various forms, made possible or contributed to the ERP, raise numerous issues concerning the nature of multiple states' responsibility.

10.3.4.1 Responsibility for Organs and Agents

The starting point for an assessment of state responsibility in this context is the basic rule that the state is responsible for the acts of the organs of the state, or its agents, as discussed in Chapter 3. Plainly intelligence agencies are part of the state apparatus and the state is responsible for their wrongful acts carried out by them, even if it should transpire that they acted beyond their authority. The same goes for police, customs officers or other state officials

220 UN Joint Study, p. 16-17. Notification of charges, trial without undue delay and the right to defend oneself are cited specifically. See also the working group on arbitrary detention which finds secret detention to violate fair trial: Opinions No. 5/2001 (E/CN.4/2002/77/Add.1), para. 10 (iii) and No. 14/2009 (A/HRC/13/30/Add.1).

221 Abu Omar's ECHR case is brought by him and his wife, both as victims of the ERP. As noted above, this is common is cases of disappearance that the family members are treated as victims.

222 Universal Declaration of Human Rights 1948 (adopted 10 December 1948) Art. 14.

223 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954); Protocol Relating to the Status of Refugees 1967 (adopted 31 January 1967, entered into force 4 October 1967). Weissbrodt and Bergquist, 'Extraordinary Rendition', above, note 91, at 139-40.

224 ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts', November 2001, UN Doc Supplement No. 10 A/56/10 67 (hereinafter 'ILC Articles on State Responsibility').

that may have collaborated in the ERP. In addition states are responsible for private actors outwith the state infrastructure where they acted under the 'direction or control' of the state.[225]

10.3.4.2 Responsibility of Third States for Aiding and Assisting, Directing, Controlling or Coercing

State responsibility arises not only where the state is directly involved in carrying out violations, or where the violations arise on its territory and it fails to take all feasible measures to prevent the violations. As made clear in Chapter 3, general international law on state responsibility provides that states may contribute to, and bear responsibility for, international wrongs in a variety of ways. This may take the form of 'aiding and assisting' other states (Article 16 International Law Commission Articles on State Responsibility 2001 (ILC Articles)), as well as 'directing or controlling' their actions (Article 17), or 'coercing' them into international wrongs (Article 18).

In light of the fact pattern that has been revealed to date, and allegations of 'conspiracy' and support for the ERP, it seems that most relevant to an assessment of the involvement of other states with the US rendition programme is 'aiding and assisting.'[226] Not every form of 'assistance' will give rise to responsibility. As a matter of general international law, a state is responsible for providing aid or assistance to another state in breach of its international obligations if it does so with *knowledge* of the circumstances of the internationally wrongful act of that state.[227] A '*close connection*' is then required between the actions of the states, and a *causal link* must exist between the state's conduct and the wrong.[228] While accusations are often lodged in terms of conspiracy, collusion, or encouragement, the law does not provide for responsibility of states for incitement, or for conspiracy as such, absent '*concrete* support'.[229] The CAT refers to states obligations to criminalise 'conspiracy' to commit

225 See Chapter 3 for principles of state responsibility, and discussion on responsibility for non-state actors including private contractors. These principles would also be relevant to the private actors employed in the ERP, including aviation companies and private firms.

226 It is not inconceivable that questions may arise regarding the 'control' or conceivably even 'coercion' of certain states by the U.S., though to the author's knowledge no such claims have been made. As regards aiding and assisting, Chapter 3 notes that the International Court of Justice (ICJ) has recognized the rules concerning aiding and assisting in the commission of a wrongful act, as enshrined in Article 16, as part of customary international law. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ, para. 420.

227 ILC Articles on State Responsibility 16 requiring also that the act would be internationally wrongful if committed by the accessory state.

228 Except for coercion, it must also be an obligation which is binding on both the aider and the state aided.

229 ILC Articles on State Responsibility 64. See Chapter 4 and below for individual responsibility.

torture, and it has been questioned whether 'conspiracy' might provide a more flexible and appropriate approach to hold to account a broader range of states.[230]

10.3.4.3 Broader Obligations in Face of Serious Breach of Peremptory Norm

As noted in previous chapters, it has been recognized increasingly in international standards and practice that some wrongful acts engage the responsibility of the state concerned towards several or many states or even towards the international community as a whole.[231] In certain circumstances international law enshrines obligations on all states to act to prevent and/or respond to very serious violations of international law. Where a violation amounts to a breach of *jus cogens* norms, all states have obligations to 'cooperate' to bring to an end, and not to recognize as lawful, a situation created by a serious breach, and not to render aid or assistance in maintaining that situation. This is reflected in articles 40 and 41 ILC Articles, and in the jurisprudence of the ICJ and other courts and tribunals.[232]

While these broader obligations apply only to a small group of 'peremptory norms' and only in respect of gross, flagrant, systematic, or organized violations of those norms, there is a strong case that these criteria are satisfied by the widespread and systematic nature of torture, secret detention and enforced disappearance intrinsic to the ERP.[233] Moreover they complement the particular positive obligations under IHL and IHRL referred to above.

10.3.5 Individual Criminal Responsibility

Individual criminal responsibility for involvement in ERP can arise under both international law and domestic law. Under international law, the principle categories of relevant crimes are war crimes and crimes against humanity. The ERP could entail war crimes such as torture, enforced disappearance, and illegal transfer, among others, if the acts are committed 'in the context of' or 'associated with' an armed conflict, whether international or not of an inter-

230 See eg S Fulton, *Cooperating with the enemy of mankind: can states simply turn a blind eye to torture?* International Journal of Human Rights, Vol. 16, June 2012, 773-795.

231 ILC Articles on State Responsibility 33; *Barcelona Traction, Light and Power Company, Limited, Second Phase* (Judgment) [1970] ICJ Reports 32, at para. 33: 'an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes.*'

232 Chapter 3.

233 See UN Joint Study, above, note 3; 'CoE Rendition Report (7 June 2007)', above, note 3; 'ICRC Report on CIA Detainees', above, note 37.

national character, and whether committed against civilians or combatants.[234] The same acts, with the requisite *mens rea*, would also amount to crimes against humanity if committed as part of a widespread or systematic attack directed against a civilian population.[235] It is critical that the individual is punished only to the extent of their conduct and intent, as set out in Chapter 4. While the requirement that an individual participating in the ERP have knowledge of the broader criminal enterprise[236] may raise issues for lower level participants (or indeed high level officials in some states may claim ignorance as is often done), it is clear that he or she need not have knowledge of the scale or precise details of the ERP.[237]

In accordance with forms of responsibility recognized in international law, an individual may be responsible for directly committing crimes, individually, jointly, and through other persons,[238] or for indirectly participating in their commission, including by ordering[239] or aiding and abetting,[240] or by acting in 'common purpose'[241] or through a 'joint criminal enterprise'.[242] In addition, superiors, whether civilian or military, may also be held responsible under the doctrine of superior responsibility if they fail to prevent or punish the criminal acts of subordinates over whom they have effective control.

A wide range of individuals – members of intelligence agencies, officials of various governments, and private actors – could be held to account for the commission of these crimes, for ordering or inducing them, for failing to prevent or punish them (while under a duty to do so), for 'aiding and abetting', or for acting in 'common purpose' or 'joint criminal enterprise' with those directly responsible.

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234 In the context of' and 'associated with' mean that the conduct must be 'closely related to a surrounding armed conflict in order to constitute a war crime': ICTY, *Prosecutor v Kunarac et al* (Judgment) IT96-23 and IT-96-23/1-A (22 February 2002), at para. 58.

235 See Chapter 4A11 on The definition of 'crimes against humanity': definitions of the terms widespread, systematic, attack, directed against, and civilian population have been elaborated upon by the international criminal tribunals in numerous judgments, though some e.g. civilian population remain open to questions. See, for example, ICTY cases: *Prosecutor v Kordić, Mario Cerkez* (Appeal Judgment) IT-95-14/2-A (17 December 2004), at para. 93; *Prosecutor v Tihomir Blaškić* (Appeal Judgment) IT-95-14-A (29 July 2004), at para. 102; *Prosecutor v Dragoljub Kunarac et al* (Appeal Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002), at para. 85.

236 Chapter 4, ICC Elements of Crimes document, Art. 7 para 2.

237 ICC EOC doc, at para. 2, above, making clear that 'knowledge of all characteristics of the attack or the precise plan or policy' is unnecessary.

238 Rome Statute Art. 25(3)(a).

239 Rome Statute Art. 25(3)(b).

240 Rome Statute Art. 25(3)(c).

241 Rome Statute Art. 25(3)(d).

242 ICTY jurisprudence is replete with cases of joint criminal enterprise and has described it as established in customary law: see, e.g., *Prosecutor v. Milutinovic*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, ¶ 18 (May 21, 2003).

It flows from the obligation to investigate and prosecute serious crimes, set out in relation to IHRL above and reflected in international criminal law, that certain legal norms that purport to preclude accountability for serious violations or crimes under international law are invalid. Thus, immunities, amnesties, and statutes of limitations have been held to be invalid in respect of these crimes.[243] These issues may become relevant in states investigations into the ERP that are currently stalled or extremely slow to progress, and which have statutes of limitations for certain crimes: if crimes are appropriately charged, e.g. as torture rather than 'abuse of office,' domestic law may not recognise the bar on prosecution in any event. However if states attempt to apply such limitations to the ERP they are likely to be challenged as invalid in face of the nature of the crimes under international law. The same arguments will arise if immunities are pled in forthcoming cases: when the issue of immunity arose in the Milan case concerning the abduction of Abu Omar, it was rejected.[244]

The ERP also, undoubtedly, violates multiple provisions of domestic criminal law. While national laws obviously vary, many states have incorporated the international crimes referred to above in their own systems, particularly because of widespread domestic incorporation of crimes covered by the Rome Statute of the International Criminal Court, and the obligations under Article 4 CAT.[245]

10.4 Applying the Law: State and Individual Responsibility in various 'Rendition' Scenarios

This section questions the extent to which the multiple states and individuals involved in the ERP might bear responsibility for different aspects of the programme.

10.4.1 Abduction and Black Site Detention on the State's Territory

In some cases, territorial states' organs or agents carried out the arrest, detention, interrogation/torture, or ill-treatment albeit in conjunction with or at behest of US authorities, for which they have direct responsibility for wrongs

243 See expert opinion in the case *Garzón v Spain*, available at: www.interights.org/garzon, which surveys national and international practice.

244 See 10.5.

245 CAT Art. 4 obliges states to criminalize all acts of torture, including any act by any person which under domestic law constitutes complicity or participation in torture.

arising.[246] An example of an operation that raises such questions is the case of Abu Omar, the Egyptian national with refugee status in Italy who was abducted from a street in Milan by CIA officers, apparently with the assistance of several Italian agents.

In the cases of secret prisons,[247] such as those allegedly housed on Lithuanian, Polish, and Romanian soil, facts continue to come to light raising questions as to the extent of the involvement of territorial states, in the establishment, running or facilitating of those sites. It is difficult to conceive of such prisons existing without some degree of consent and cooperation of 'host' states. In any event the legal question is whether, at a minimum, the state knew or *should have* known of violations and failed to take reasonable measures to prevent them. In light of the scale and nature of the secret prison and ERP operations, and the extent of information as to arbitrary detention and abuse by the US authorities and the CIA itself, it is difficult to see how states can hide behind ignorance.

States may seek to hide behind the autonomous functioning of CIA prisons. A case in point may be the Djiboutian state's response to a case brought against it for its role in the ERP currently before the African Commission, in which it asserts US control over its Camp Lemonier site and lack of knowledge of US activities.[248] In some cases at least, preliminary enquires may support the view that the CIA was given free reign without close oversight or engagement by local authorities.[249] However, as the framework makes clear, the state is assumed to exercise jurisdiction throughout its territory,[250] and it will be responsible for violations on its territory to which it turned a blind eye, or

246 *El-Masri v Tenet* Complaint (providing information about the rendition flight), available at: http://www.aclu.org/national-security/el-masri-complaint (hereinafter '*El-Masri v Tenet* Complaint').

247 See, for example, UN Report paras 112, 114, 120; Abu Zubaydah applications to the ECHR, available at: http://www.interights.org/abuzubaydah/index.html.

248 Al Asad v Djibouti, above, note 119; the author is one of the applicant's counsel in the case. Para 38 of the respondent state's submissions on admissibility (public document, on file with author) states: 'Djibouti has no knowledge of the United States ever violating this provision [prohibiting detention and violation of human rights] of the Lease Agreement. The United States has assured Djibouti that it was in full compliance with the Lease Agreement at all times.'

249 See eg public comments of the chairman of the Lithuanian Parliament's Committee on National Security and Defence (CNSD) that U.S. partners were able 'to carry out activities without VSD control and to use the place however they liked.' The CNSD concluded that it was 'evident that the SSD did not seek to control the [CIA's] activities. The SSD did not monitor and record cargoes brought in and out and did not control the [CIA's] arrival and departure ... . In addition, the SSD did not always have the possibility to observe every person arriving and departing.' Seimas CNSD Report, below, note 327, p. 6; *Abu Zubaydah v. Lithuania*, above, note 29.

250 *Ilascu v Moldova and Russian Federation* Application 48787/99 (ECtHR, 8 July 2004); *Ivantoc v Moldova and Russian Fed*. Application 23687/05 (ECtHR 15 November 2011); *Catan &Ors v Moldova and Russian Federation*, Application 43370/04, 8252/05, 18454/06 (ECtHR, 19 October 2012).

where it failed to take reasonable measures to know, and to protect. Assertions of complete lack of knowledge may therefore incriminate, not protect, the state.

10.4.2 Keeping them Airborne: Staging, Stopover, and Logistical Support

As regards the many states accused of providing logistical support to the renditions programme in the form of, for example, refuelling at airports and allowing use of airspace,[251] slightly more complex issues arise. One question is whether planes landing on the state's territory or passing through its airspace provides sufficient link between the violations and the state for the 'jurisdictional' requirement of human rights treaties. Where an individual is present on the aircraft on the state territory, however briefly, the obligations of prevention of violations on that territory, and particularly of non-refoulement to violations elsewhere, would however appear to arise, provided knowledge of the risk can be proved or inferred.[252] Another approach might be to see the ERP as encompassing on-going violations, part of which took place within the territory used for refuelling or other purposes.[253]

In some cases, airports and airspace were used in circumstances where it was disputed whether the territorial state knew of the nature of the flights.[254] Inherent in its positive obligations to protect, a state has a reasonable duty of enquiry as to how its territory is to be used and for what purpose. Moreover, a state's lack of knowledge would not excuse it from its positive obligation to take all reasonable measures to investigate, prosecute, and provide redress in the event of plausible allegations of breach.

Where it is unclear whether detainees were on the flights that came through the states territory (and therefore fell within its jurisdiction for IHRL purposes), most relevant may be secondary rules on 'aiding and assisting' which do not require any territorial or physical control nexus. Aiding and assisting would not arise from the failure to prevent or from providing moral support or political cover; it is likely to arise, however, from concrete support such as providing airports, airspace, or other logistical support without which rendition

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251 See, e.g., Marty 2011 report, UN Joint Study at 84. Scheinin Report 2009, above note 53, para 54. J.M. Irujo, 'La CIA vuela bajo, muy bajo' *El País*, 10 October 2010, available at: http://www.elpais.com/articulo/ reportajes/CIA/vuela/elpepuint/20101010elpdmgrep_4/ Tes. See also 'Portugal: Evidence of illegal CIA rendition flights surfacing', *Statewatch*, October 2006, alleging that 150 CIA rendition flights landed in Portugal. On 6 Sept 2006, the Government admitted knowledge of flights passing between Guantanamo and another destinations.

252 IHRL courts often rely on 'concordant inferences' to prove violations where information lies within the exclusive control of the state. See Zubaydah brief v. Lithuania or Poland.

253 This is consistent with the continuing nature of enforced disappearance; see Convention for Enforced Disappearance art 8.

254 Scheinin Report 2009, at para 54.

programme could not have operated as it did, in circumstances where knowledge of a risk of violations is established or can be inferred.

10.4.3 Transnational Intelligence Cooperation

The ERP is an enormous transnational intelligence operation. It has given rise to difficult questions concerning the responsibility of the state in respect of certain forms of 'intelligence cooperation' with other states, in light of the nature of the violations involved and the legal obligations set out above.[255] It has contributed to a renewed consideration of states' policies and their implications, as reflected in for example the UK Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas and on the Passing and Receipt of Intelligence Relating to Detainees.[256] This may prove to be one of the most significant developments to arise from the exposure of the ERP. It is worth considering briefly some forms of cooperation and whether they may give rise to legal responsibility under current law.

10.4.3.1 Presence at Interrogations and Questioning Detainees?

While the nature and extent of their involvement remains unknown, it appears that foreign intelligence officials have been present during interrogations in CIA secret prisons, and have themselves questioned prisoners in the ERP, as they have in Guantanamo. Evidence suggests that British, Canadian, and Australian intelligence agents questioned persons held by US, Pakistani, and other intelligence services during incommunicado detention (e.g. Mohammad, el Masri).[257]

In addition to factual questions regarding the role of foreign personnel are legal questions as to what form of responsibility such presence might give rise to. In the circumstances, was there a joint operation, or was there sufficient causal connection between the participation of foreign officials and the wrongs to amount to 'aiding and assisting'? Presence certainly limits plausible deniability on the nature of the programme, and would appear to imply a level of

255 UN Joint Study, above, note 3; ICJ Eminent Report, above, note 52.

256 Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees (Consolidated Guidance) 2010.

257 E.g., el Masri alleged a German was present, Mohamed that UK officials were present, during their interrogation/arbitrary detention Scheinin Report 2009, above note 53, fn. 63: 'Evidence proves that Australian, British and United States intelligence personnel have themselves interviewed detainees who were held incommunicado by the Pakistani ISI in so-called safe houses, where they were being torture". Many states have sent interrogators to Guantánamo Bay, see Chapter 8.

condoning of the conduct that is on its face inconsistent with any obligation to cooperate to end the wrong. The Special Rapporteur on Terrorism for his part has described the involvement of foreign officials as amounting to 'condoning', 'encouraging', or 'even support' for unlawfulness which, in his view, constitutes as an 'internationally wrongful act'.[258] He concludes that "the active or passive participation by States in the interrogation of persons held by another State constitutes an internationally wrongful act if the State knew or ought to have known that the person was facing a real risk of torture or other prohibited treatment, including arbitrary detention." In this vein, the Supreme Court of Canada has likewise found that the presence of Canadian interrogators in Guantanamo fell foul of the Canadian Charter.[259]

10.4.3.2 Provision of Intelligence?

A secondary form of cooperation is the provision by foreign states of intelligence information that is relied upon to subject individuals to the ERP, or used during abusive interrogation. Examples of information transmission include Arar's case, where the Canadian intelligence agents handed what transpired to be erroneous information to their US counterparts, leading to Arar's detention and torture.[260] In Binyam Mohamed's case, the UK government was found to have 'facilitated interviews … by or on behalf of the US government in the knowledge of what had been reported to them in relation to his detention and treatment.'[261] Several other cases have been reported of lesser forms of engagement, such as authoritative sources reporting western governments providing questions to interrogating governments.[262]

Where the intelligence contributed directly to the programme, perhaps without which an individual may not have been identified, located and their rights violated, this would constitute concrete support. Where the knowledge of its purpose was or should have been accessible to the state, and its causal link apparent, allegations of 'aiding and assisting' in the commission of an international wrong would seem well founded.

States must exchange intelligence to fulfil their obligations to protect against serious crime, including terrorism. The principle of effectiveness demands that

258 Scheinin Report 2009, above note 46, at 20

259 Omar Khadr case, Supreme Court of Canada 2010, found Canadian officials participating in interrogations was a breach of Charter.

260 Arar Commission; ICJ Report, at 84.

261 *R (B Mohamed) v Foreign Secretary* [2008] EWHC 2048 (Admin) (21 August 2008).

262 Scheinin Report 2009, note 46, at para. 54, fn. 63 states: 'German and Canadian intelligence agencies provided questions to Syrian Military Intelligence in the cases of Muhammad Zammar and Abdullah Almalki. Both detainees were tortured afterwards while in Syrian custody.' He concludes that '...the active participation through the sending of interrogators or questions, or even the mere presence of intelligence personnel at an interview with a person who is being held in places where his rights are violated, can be reasonably understood as implicitly condoning such practices.'

the law is not interpreted so as to impede such intelligence cooperation. As such, not every act of intelligence sharing that may ultimately contribute to a violation can be accountable to the source state. However, the 'Eminent Jurists Panel' suggested that where 'intelligence and other agencies are systematically sharing information with countries and agencies with a known record of human rights violations it is difficult to resist the argument that States are complicit, wittingly or unwittingly, in the serious human rights violations committed by their partners in counter-terrorism.'[263]

10.4.3.3 Receipt of Intelligence?

Particular complexity surrounds the legal responsibility of states for the receipt of intelligence information obtained from other states, including from the ERP. This could implicate many states that rely on intelligence from states engaged in international wrongs, notably extraction of information under torture.

Article 15 of the Convention against torture makes explicit that information obtained through torture cannot be used in legal proceedings.[264] Less clear however is the situation in respect of other, operational, uses of such information. In some contexts, it has been suggested that a distinction might be drawn between the admissibility of evidence and reliance on information for other purposes,[265] though whether a sharp distinction is justified is open to question. The House of Lords in *A&Ors* suggested that the principled basis for the ban to torture evidence was, that the reliance on such evidence in legal proceedings has the effect of 'encouraging' torture.[266] So far as this rationale of prevention applies, the same encouragement, assistance or complicity arises, whatever the nature of the use to which the information is put.[267]

Undoubtedly, however, the idea of a ban on receipt of certain intelligence information raises tensions, including between the duty to obtain information to protect citizens from violence on the one hand, and the obligations to prevent the practice on torture on the other.[268] (A separate but related ques-

263 ICJ Report, at 85. See also Scheinin Report 2009, above note 46, at 20.

264 Admissibility of torture evidence is specifically proscribed in Art. 15 CAT, as well as part of the general prohibition on torture in international law. Art. 15 CAT, Chapter 7A5.2.

265 See the A & Ors (torture evidence) case, in Chapter 11 and H. Duffy, 'Human Rights Litigation and the "war on terror"', 90 (2008) *International Review of the Red Cross* 871. This has since been upheld in *R v Ahmed* discussed in Chapter 4.

266 The Lords found that states could not condemn torture while making using for torture confessions as 'the effect is to encourage torture' A & Ors, p. 30.

267 Chapter 4B4. Cf where preservation of the 'integrity of proceedings' is given as rationale for the exclusion of torture evidence.

268 The UK's Intelligence and Security Committee Report of 2005 describes as 'for debate' whether such intelligence should be rejected as a matter of principle. 'Intelligence and Security Committee, The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq', 2005, para. 32.

tion is of course whether such information is, in any event, reliable.)[269] It has been described as a 'debatable' legal matter whether information that may be obtained through TCIDT should be rejected as a matter of principle, not merely in court proceedings, and if so in what circumstances.[270] It would certainly have to be assessed in light of particular facts whether there was 'concrete support' as required for aiding and assisting. Particular practical challenges arise as regards proof of the 'knowledge' of a state as to its assistance in the wrong, and the extent of any effective duty to enquire.

It has been suggested by Special Rapporteurs and other expert groups that receipt of intelligence in such circumstances may amount to complicity or to aiding and assisting under the rules of state responsibility,[271] though outstanding controversy was highlighted by an English court recently rejecting this as an expression of current law.[272] Where intelligence is sought and obtained from a state known to engage in serious rights violations, such that states become 'consumers of torture'[273] or create a 'market' for human rights violations, it has been suggested with some force that the state may contribute to the occurrence of torture.[274] Whether this amounts to aiding and assisting (as opposed to highlighting the gap between these rules and a looser approach to 'complicity',[275]) may remain a matter of dispute. The scope of complicity, and its implications in this context, may well be an area ripe for further development through evolving law and practice in the counter-terrorism field.[276]

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269 ISC Report 2005, para. 32, *id*., ends: 'There are separate questions as to whether intelligence obtained under torture is likely to be reliable, and whether principled refusal would deter those who might use such methods.' See also Davis, 'Consign Bush's "torture memos" to history', note28, noting that 'Torture is counter-productive. Professional interrogators – Ali Soufan of the FBI, Matthew Alexander of the Air Force and Glenn Carle of the CIA – have said this clearly.'

270 UK Parliamentary Joint Committee On Human Rights, 'Nineteenth Report', 18 May 2006 Supra.

271 Scheinin Report 2009, note 53; UK Joint Committee on Human Rights.

272 In *R v Ahmed* where the applicant had allegedly been tortured in Uzbekistan and Pakistan, the Court was asked (and refused) to stay proceedings. Its justifications included that there was no link between the alleged torture and his trial, including that there was no evidence of wrong doing by UK authorities. See Chapter 4.B.4.

273 ICJ Eminent Jurists Panel, 2009, para 85.

274 See Scheinin Report 2009, ICJ Report, and UK Joint Committee on Human Rights Report, above.

275 See eg S Fulton, *Cooperating with the enemy of mankind,* note 246, arguing that a broader approach to complicity is required than that covered by aiding and assisting enshrined in current law, and referring to eg passive acquiescence as part of complicity as understood under the Torture Convention.

276 Eg Juan Mendez, Special Rapporteur on Torture, identifies this as an area for future attention. See also Chapter 4B4 on implications for the criminal process.

In any event, the creation of markets for torture information and reliance upon it would certainly seem to fall foul of positive obligations to safeguard against, and to cooperate to stop, egregious violations of international law.[277]

10.5 The Pursuit of Truth and Justice for Extraordinary Rendition

The legal framework, considered alongside the facts concerning the ERP, indicates the commission of a range of crimes under national and international law, for which a range of states have obligations to investigate, where appropriate to prosecute, and to provide victims with reparation. How does international state practice to date measure up to these obligations? The following section highlights developments in the pursuit of justice, and illustrates some of the impediments faced by victims and their advocates.

10.5.1 Investigation and Prosecution in Practice?

The provisions of the legal framework on investigation, accountability and reparation contrast starkly to the lack of investigation and accountability in practice. This is most striking in the US, given its leading role in the ERP. While in its communications to the HRC for example,[278] the US has cited provisions of its domestic law that make relevant prosecutions possible, it has yet to rely on these laws.[279] To date, no indictments have been filed in the US against CIA agents, other officials, or government contractors for their role in ERP, and at the time of writing there is little concrete prospect of accountability.[280]

Under the Bush administration, the CIA Inspector General referred a few specific incidents to the Department of Justice and federal prosecutors, reportedly including incidents involving the use of death threats and torture

277 See Art 1 Geneva Conventions, 10.3.2, so far as applicable, and 10.3.4.4 above regarding duties in respect of gross violations of peremptory norms. The principle is reflected in IHRL positive obligations also, even if not treaties are not strictly applicable.

278 'Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: United States of America', UNHRC, 18 December 2006, UN Doc CCPR/C/USA/CO/3/Rev.1, available at: http://www.unhcr.org/refworld/docid/ 45c30bec9.html.

279 At least two U.S. statutes appear to provide U.S. courts with criminal jurisdiction over ERP. One statute criminalizes violations of Common Article 3 Geneva Conventions committed by U.S. personnel abroad. U.S. Code, War Crimes Statute, 18 U.S.C. 2441, available at http://www.law.cornell.edu/uscode/18/usc_sec_18_ 00002441----000-.html.

280 See, e.g., S. Ackerman, 'CIA Exhales: 99 Out of 101 Torture Cases Dropped', *WIRED*, 30 June 2011, available at: http://www.wired.com/dangerroom/2011/06/cia-exhales-99-out-of-101-torture-cases-dropped. On accountability for rights violations in the WOT more broadly see Chapter 7 'Justice and Accountability'.

that resulted in deaths, but prosecutors declined to prosecute in each instance.[281] The two out of 101 cases of suspected detainee abuse that were reportedly being taken forward ended with the closure of the investigation by the Attorney-General Holder.[282] The extent of impunity is perhaps illustrated by the former head of counter-terrorism office in the CIA promoting his book on the ERP[283] by admitting to authorising waterboarding and the destruction of 92 videotapes of interrogation session,[284] prompting the comment that 'We look forward, and not back, and we don't put our torturers on trial. We put them on book tours.'

While they have not gained prominence in practice due to the lack of accountability in the US, issues such as potentially broad-reaching defences or immunities that conflict with international law obligations may yet become contentious if the tide changes on accountability in the war on terror.[285]

Investigation and accountability obligations arise also in the many other states alleged to have participated in the CIA programme.[286] In some, the authorities continue to simply deny any role without enquiries or investigation, but developments in a number of states, suggest momentum towards investigation and accountability may be gathering. Progress is particularly apparent in numerous European states accused of involvement in the ERP, impelled by regional reports such as by the Parliamentary Assembly of the Council of Europe reports or the European Parliament which have contributed to clarifying facts and generating pressure for greater transparency and accountability.[287] Several states have responded by carrying out some form of investigation, and in a few cases moving towards prosecution. While the nature and progress of such proceedings is constantly in flux, and opaque given the extent of secrecy, the following illustrate these developments as well as some of the challenges and limitations.

– *United Kingdom:* In the UK, investigations were opened into M16's role in unlawful interrogations abroad, including in relation to the UK intelligence

281 See U.S. Office of the Inspector General, 'CIA OIG Special Review of Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)', note 32.

282 See Chapter 7B.14.

283 J. Rodriguez, *Hard Measures* (Threshold Editions, 2012); P. Taylor, '"Vomiting and screaming" in destroyed waterboarding tapes', Interview with Jose Rodriguez, *BBC Newsnight*, 9 May 2012, available at: http://www.bbc.co.uk/news/world-us-canada-17990955

284 C. Pierce, 'Waterboards, Drones, and the Drones Who Love Them', *Esquire Politics Blog*, 30 April 2012, available at: http://www.esquire.com/blogs/politics/jose-rodriguez-cia-book-8484289.

285 Chapter 7 on human rights obligations; Chapter 4 on criminal law principles and practice.

286 These would include e.g., Afghanistan, Egypt, Jordan, Libya, Morocco, Pakistan, Syria, and Thailand: see generally UN Joint Study, above, note 3.

287 Note 3 above. Regrettably some initiatives have been marred by lack of cooperation by national authorities; see report by the European Parliament's Special Rapporteur Helen Flautre, Report on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report,' DocRef (2012/2033(INI), and the Parliamentary Resolution of 11 September 2012.

agencies' role in the detention and interrogation of Binyam Mohamad.[288] These shone a light on the facts, findings for example that "members of the Security Service provided information to the US authorities about Mr. Mohamed and supplied questions for the US authorities to put to Mr. Mohamed."[289] In relation to both, however, the crown prosecution service concluded that there was insufficient evidence to pursue criminal charges against any identifiable individual,[290] in part due to lack of access to relevant witnesses and non-cooperation from the US.[291] The UK's failure to conduct adequate enquiries, investigate and to hold to account have been criticised, for example by the UN Committee against Torture.[292] Demands for information and accountability as to what the UK knew and when (in light of information that the authorities knew of the ERP from the outset),[293] and its role in the 'improper treatment of detainees' post

288 See 'UK investigations guide into Torture and Rendition', http://www.guardian.co.uk/world/2012/jan/12/uk-investigations-torture-rendition-guide, for details on Operation Hinton. The police investigation lasted two and a half years as detectives attempted to trace responsibility up the chain of command, but concluded there was insufficient evidence to press charges. See 'Joint statement by the Director of Public Prosecutions and the Metropolitan Police Service', 12January2012http://www.cps.gov.uk/news/press_statements/joint_statement_by_the_director_of_public_prosecutions_and_the_metropolitan_police_service (hereinafter 'DPP and MPS Joint Statement'). Another inquiry concerned interrogations at the notorious Baghram facility in Afghanistan See 'UK investigations guide', supra note 295, for details on Operation Iden.

289 'DPP and MPS Joint Statement', *id*.: 'Having reviewed the further evidence carefully, the CPS has concluded that there is sufficient evidence to show that: (a) members of the Security Service provided information to the US authorities about Mr Mohamed and supplied questions for the US authorities to put to Mr Mohamed while he was being detained between 2002 and 2004, including at times when Mr Mohamed's precise whereabouts was not known to them; (b) that Mr Mohamed was held in Morocco for at least some time between July 2002 and early 2004. In relation to the interviewing of Mohamad in Pakistan in 2002 it had already been decided in October 2010 that there was not a realistic prospect of a conviction for any criminal offences arising out of that conduct.'

290 The CPS concluded that there is insufficient evidence to prove to the standard required in a criminal court that any identifiable individual provided information to the U.S. authorities about Mr Mohamed or supplied questions for the U.S. authorities to put to Mr Mohamed, or was party to doing so, at a time when he or she knew or ought to have known that there was a real or serious risk that Mr Mohamed would be exposed to ill treatment amounting to torture. See 'UK investigations guide', supra note 288.

291 See 'DPP and MPS Joint Statement' referring to the refusal of eye witnesses to speak to the police or CPS.

292 CAT Concluding Observations on the Fifth Periodic report of the United Kingdom, 31 May 2013.

293 See. e.g., allegations in I. Cobain, *Cruel Britannia: A Secret History of Torture* (Portobello Books Ltd, 2012)., reported on 22/10, that within days of 9/11, the CIA told British intelligence officers at the British embassy in Washington of its plans to abduct al Qaida suspects and fly them to secret prisons where they would be interrogated.

9/11 generally,[294] and in identified incidents specifically,[295] continue to grow.

– *Italy*: The first convictions in this field arose in Italy, where CIA agents and some of their Italian counterparts were found guilty of aiding and abetting the kidnapping of Abu Omar.[296] As the Italian court could not obtain an extradition request, still less the presence of the accused CIA officials,[297] nine Italians agents and 26 Americans, mostly CIA agents, were however tried *in absentia*.[298] The Italian prosecution is an example of tenacious investigative work, but also of the challenges to effective criminal prosecutions: much of the evidence was deemed inadmissible on state secrecy grounds,[299] and some cases were dropped on this basis[300] or because US individuals were considered to have diplomatic immunity from prosecution.[301] The fact that prosecutors were themselves charged with violating

294 In July 2010, Prime Minister David Cameron announced an inquiry to 'look at whether Britain was implicated in the improper treatment of detainees, held by other countries, that may have occurred in the aftermath of 9/11' but the Inquiry was criticized by NGOs for its lack of independence and its secrecy, and ultimately suspended pending Scotland Yard police investigations into UK-led rendition of individuals and their families to Libya. 'Torture Claims: Cameron announces enquiry', *BBC News*, 6 July 2010, available at: http://www.bbc.co.uk/news/ 10521326.

295 See 'DPP and MPS Joint Statement', above, note 295,on the investigation of two further cases of rendition of named individuals to Libya and their alleged ill-treatment. It also deals with 'the setting up of an advisory panel for scoping other complaints about ill-treatment by detainees in similar circumstances.'

296 J. Hooper, 'Italian court finds CIA agents guilty of kidnapping terrorism suspect', *Guardian*, 4 November 2009, available at: http://www.guardian.co.uk/world/2009/nov/04/cia-guilty-rendition-abu-omar.

297 The prosecutor asked the Minister of Justice to submit an extradition request to the US but it declined.

298 Twenty three were convicted, including Robert Seldon Lady, the CIA station chief in Milan sentenced to eight years imprisonment. Trials in absentia arguably fall short of providing a suitable rule of law based criminal response, and they individuals would have to be retried if they ever were to appear in Italy. The scope of charges was also limited as the prosecutor did not originally pursue charges against Italian nationals;see Messineo, 'Extraordinary Renditions', above, note 14, at 1023 and 'CoE Rendition Report (7 June 2007)', note 3, at para. 316. However, further prosecutions look set to unfold, see below.

299 The Constitutional Court ruled that the interests of state security took precedence over any other interest, and deemed inadmissible much of the evidence on which the case had been built, including material seized from Italian and American intelligence operatives. See CoE Rendition Report (12 June 2006), above, note 3, para. 162; R. Donadio, 'Italian Court Upends Trial Involving C.I.A. Links', *New York Times*, 11 March 2009, available at: http://www.nytimes.com/2009/03/12/world/europe/12italy.html?_r=3. Messineo, 'Extraordinary Renditions', above, note 14, at 1039-40.

300 'Italy Prevents Trial of Intelligence Agents over Abu Omar Rendition', *Amnesty International*, 16 December 2010, available at: http://www.amnesty.org/en/news-and-updates/italy-prevents-trial-intelligence-agents-rendition-abu-omar-2010-12-16.

301 'Open Secret: Mounting Evidence of Europe's Complicity in Rendition and Secret Detention', Amnesty International, November 2010, at 18-20, available at: http://www.amnesty.org/en/

state secrets through their investigation was condemned as an 'intolerable impediment to the independence of justice'.[302] A less broad-reaching approach to state secrecy appeared to emerge, however, when in 2012 the Italian Supreme court ordered the re-trial of several high level intelligence officials (whose cases had been thrown out by the court on state secrecy grounds).[303] It also upheld existing convictions despite US arguments, via the Italian Ministry of Justice, that the acts or omissions alleged arose from official duty, and that the US personnel were protected by SOFA agreements.[304]

– *Canada*: The Canadian government convened a commission of enquiry to explore Mahar Arar's case,[305] which vindicated Mr Arar by clearing him of any alleged al Qaeda links, and found that Canadian authorities had provided inaccurate information to the US authorities which, it could reasonably be inferred, had led to his capture and torture.[306] Somewhat uniquely in practice to date, the government apologised, awarded him compensation and set in train the implementation of the inquiry's wide-ranging recommendations. Mr Arar has, however, had no success in US courts, where his case has been dismissed on state secrets grounds.[307] Progress has also yet to be made in holding to account individuals responsible for wrongdoing.[308]
– *Germany*: Attempts to pursue accountability for the case of Khalid el Masri in Germany got underway with the issuance of arrest warrants for CIA agents in 2007.[309] However, the German Justice Minister announced that,

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library/asset/EUR01/023/2010/en/3a3fdac5-08da-4dfc-9f94-afa8b83c6848/eur010232010en.pdf.

302 Resolution of the Parliamentary Assembly, note 3, para. 14.

303 Supreme Court decision, 19 September 2012 in 'Italy/USA: Supreme Court orders re-trial of former high-level intelligence officials and upholds all convictions in Abu Omar kidnapping case' 21 September 2012. Former head and deputy head and three other high-ranking officials of the Italian intelligence agency (formerly Servizio per le informazioni e la sicurezza militare or SISMI), are to be retried.

304 The US also challenged Italian jurisdiction on the basis, inter alia, that the US had primary jurisdiction to try any criminal acts. Despite this, the convictions were upheld and the individuals affected, while still in the US, cannot leave the U.S. without fear of arrest and forfeiture of assets. AI Index: EUR 30/015/2012, 21 September 2012.

305 The Inquiry was established 5 February 2004 under Part I of the Inquiries Act 1985, to investigate and report on the actions of Canadian officials in relation to Maher Arar and to recommend review mechanism for the activities of the Royal Canadian Mounted Police with respect to national security. See Arar Commission, above, note 12.

306 A separate report found that collaboration between the Canadian police and Syrian officials had resulted in his torture.

307 *Arar v Ashcroft*, 532 F.3d 157 (2d Cir. 2008), paras. 162-3

308 See 'Message from Maher Arar', available at: www.maherarar.ca.

309 'Germany issues CIA arrest orders', *BBC News*, 31 January 2007, available at: http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/6316369.stm; see also 'CoE Rendition Report (7 June 2007)' note 3 at p. 57 on the limitations in that process including the lack of progress in identifying the German alleged to have been present.

as the US had made clear that it would not cooperate, the German authorities would therefore not be pursuing a formal request for the extradition of the 13 CIA agents involved in el-Masri's abduction.[310] Leaked cables indicate the extent of pressure from the US not to pursue the cases, and German responsiveness.[311] There has been a parliamentary inquiry into the role of German agents in several cases, including El-Masri's,[312] but the German government has been criticised for suppressing information.[313]

– *Poland:* An investigation was launched into the CIA secret prison at Stare Kiejkuty, Poland, in which rendition victims Abu Zubaydah and Abdal-Rahim al-Nashiri have been granted victim status.[314] The investigation has been criticised as protracted and untransparent, raising doubts as to the promptness, thoroughness and effectiveness required by the legal framework.[315] However, reports suggested that the former head of intelligence had been charged in relation to the secret prison, representing a first opportunity for significant accountability in relation to the secret prison system,[316] though the cloak of secrecy surrounding proceedings has rendered it difficult to assess the true nature and scope of charges and the real prospect for accountability in Poland.[317]

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310 See, e.g., J. Shawl, 'US rejects Germany bid for extradition of CIA agents in el-Masri rendition', *JURIST*, 22 September 2007, available at: http://jurist.org/paperchase/2007/09/us-rejects-germany-bid-for-extradition.php.

311 'Cables Show Germany Caved to Pressure from Washington', *de Spiegel*, 12 September 2010, available at: http://www.spiegel.de/international/germany/the-cia-s-el-masri-abduction-cables-show-germany-caved-to-pressure-from-washington-a-733860.html.

312 German Bundestag Report, above, note 12.

313 'CoE Rendition Report (7 June 2007), note 3, 'A German Constitutional Court decision which came out on the same day the parliamentary inquiry report, found the German government to have violated the Constitution by failing to disclose relevant information and failing to cooperate with the inquiry.'

314 The investigation is brought under Art. 231 of the Polish criminal code. See e.g. UN Joint Study, above, note 3, at para. 118. See *Abu Zubaydah v Poland,* INTERIGHTS, note 83.

315 See eg ECHR application, id.

316 See 'Supreme Court: UK unlawful rendition may have been war crime', *REPRIEVE*, 31 October 2012, available at: http://www.reprieve.org.uk/press/2012_10_31_rahmatullah_judgement_rendition.

317 See, e.g., 'List of issues to be taken up in connection with the consideration of the third periodic report of Poland (CCPR/C/POL/6)', UNHRC, 17 September 2010, UN Doc CCPR/C/POL/Q/6/Add.1, available at: http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.POL.6.Q.Add.1_en.doc. Uncertainty remains e.g. as to whether, in light of official statements, the investigations and prosecutions will be limited to Polish officials and to the question whether they 'abused their authority' in creating an 'extraterritorial zone' in Poland. Based on press reports charges may relate, erroneously, to 'war crimes' rather than e.g. torture or crimes against humanity.

– In a number of other states, such as *Romania*[318] and *Lithuania*,[319] also alleged to have housed secret prisons, there have been cursory 'enquiries,' followed by decisions not to proceed to prosecution, reflecting the pressure to respond in some way to allegations while plainly falling short of meaningful attempts towards accountability.[320] These processes and other initiatives, such as the Freedom of Information request referred to above, have however revealed crucial information on how the CIA operated with close cooperation of other states, using through false flight plans and other methods of cover-up.[321]
– *Spain:* The Spanish investigations into mistreatment of detainees, including one case against the so-called 'Bush 6' legal advisors whose advice is alleged to have paved the way for practices of torture and ill-treatment in detention sites around the world, have been discussed elsewhere.[322] An investigation was opened, but suspended, in deference to investigation

318 Confirmation by the PACE of the existence of a Romanian black site in 2007 prompted a cursory Romanian Senate committee investigation. Fava, 'Report on the alleged use of European countries by the CIA', above, note 6, at para. 157. 'CoE Rendition Report (7 June 2007)', above, note 3 at 25-6. European Parliament Temporary Committee, 'Working Document No. 9 on certain European countries analysed during the work of the Temporary Committee', 26 February 2007, at 44, available at: http://www.europarl.europa.eu/comparl/tempcom/tdip/working_docs/pe382420_en.pdf (citing Romanian Senate decision No. 29/2005).

319 The first report of a CIA-operated detention site in Lithuania emerged in 2009; an enquiry was conducted by the Lithuanian Parliament (the Seimas), which reported in January 2010 that there were high levels of cooperation between the CIA and Lithuanian State Security Department for the establishment of two buildings 'suitable' for housing detainees, but wound up concluding that it could not determine whether it actually held detainees: see Annex to the Resolution of the Seimas of the Republic of Lithuania, Findings of the Parliamentary Investigation by the Seimas Committee on National Security and Defence Concerning the Alleged Transportation and confinement of Persons Detained by the Central Intelligence Agency of the United States of America in the Territory of the Republic of Lithuania (hereinafter 'Seimas CNSD Report'), available at: http://www3.lrs.lt/pls/inter/w5_show?p_r=6143&p_d=100241&p_k=2. See also on-site visit conducted by the European Committee for the Prevention of Torture, 14-18 June 2010, available at http://www.cpt.coe.int/documents/ltu/2011-17-inf-eng.htm (hereinafter 'CPT Report'); see also *Abu Zubaydah v Lithuania and Poland.*

320 Eg. on 14 January 2011, the Romanian Prosecutor closed the pre-trial investigation, claiming: that "no data on illegal transportation of any persons by [CIA] aircraft was received during the pre-trial investigation"; Office of the Prosecutor General of the Republic of Lithuania, Resolution on the Termination of the Pre-Trial Investigation. *Abu Zubaydah v Lithuania*, above, note 29. The Lithuanian investigation addressed only 'abuse of official position' and was also closed within the year. See Amnesty International, 'Lithuania Must Reopen CIA Secret Prison Investigation' (18 January 2011) <http://www.amnesty.org/en/news-and-updates/lithuania-must-reopen-cia-secret-prison-investigation-2011-01-18> accessed 3 Nov 2012.

321 See official documents disclosed by the Polish government through FOIA requests in Poland. 'Explanation of Rendition Flight Records Released by the Polish Air Navigation Services Agency' above, note 58.

322 Those concerning Guantanamo were discussed in Chapter 8C and more generally 7B.14.

> by the Justice Department, but the timeliness of such deferral, and whether it should endure, may be open to question in light of inertia within the US itself.[323]

In several of the many other states that were involved in the rendition operation, in one capacity or another, enquiries have been lodged, investigations continue to unfold and demands for justice grow.[324] In such a dynamic area of practice, it is perhaps wise to avoid untimely conclusions. Undoubtedly the lack of accountability is striking, notably in the US, but also elsewhere.[325] Pressure to investigate and prosecute continues to mount, though whether the many 'investigations' or 'enquiries' underway ultimately represent a genuine attempt to uncover the truth, as opposed to themselves forming part of the 'cover up,' is open to question. What investigations and enquiries have undoubtedly done is to prise open information, contributing to building momentum towards fuller accountability.

They also expose the obstacles and challenges to justice and accountability (beyond the inevitable challenges of investigating in such an opaque area), including lack of cooperation from the US authorities, pressure by that state on others not to investigate, and the lack of political will within certain European states themselves.[326] The robust criticism of US non-cooperation or the OSCE parliament 'insistence' that the US improve cooperation with European investigations, for example, may be indications that indignation around these obstacles is, like the evidence of it, growing.[327] The record remains limited and it remains to be seen whether momentum towards criminal accountability continues to grow and bears fruit.

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323 Judge Velasco's decision of 13 April 2011. See Chapter 8.C.8. 'Justice for Guantanamo?'

324 See eg the 2012 decision of the Finnish Ombudsperson to investigate. For an overview of developments in Europe see Amnesty International 'Unlock the Truth' http://www.unlockthetruth.org/1/en/ or Reprieve http://www.reprieve.org.uk/investigations/eucomplicity/. Parliamentary enquiries were completed in Denmark and Portugal, see also Chapter 7B.14 on accountability more broadly.

325 'In almost no recent cases have there been any judicial investigations into allegations of secret detention, and practically no one has been brought to justice.' 'UN experts point to widespread use of secret detention linked to counter-terrorism, *UN NEWS Centre*, 26 January 2010, available at: http://www.un.org/apps/news/story.asp?NewsID=33586#.UKc6N-Oe_KA. UN Joint Study, above, note 3, p. 5 and para. 291.

326 Thomas Hammamberg then Council of Europe Commissioner for Human Rights described "*enormous pressure from Washington … [and] instructions from the CIA, with the support of the White House, are not to give any facts on this. Therefore, it is not easy to investigate....*" He refers also to 'concealment' and 'cover up' by European states, note 63..

327 On 9 July 2012, a unanimous resolution of the OSCE parliamentary assembly 'insists that the United States government cooperates with European investigations.'

10.5.2 Civil Accountability and Human Rights Litigation

Diverse obstacles have also been visible for victims seeking a remedy or reparation through civil litigation. As some of these are discussed in Chapter 11, suffice to recall briefly here that various obstacles have impeded victims claims for damages in respect of the ERP. Prime among them is the broad reaching approach to the state secrets doctrine, exemplified by the rejection of claims for damages brought by for example El-Masri,[328] Mahar Arar,[329] or Binyam Mohamad.[330] The Courts have held that the government's assertion of state secrets privilege required the court to dismiss the entire action, rather than simply withholding particular pieces of information or otherwise take measures to accommodate national security concerns while also recognising the victims' right to a remedy.[331] Petitions seeking leave to appeal to the Supreme Court have been rejected.[332] Other obstacles of relevance include the courts' approach to the acceptance of official immunities from civil suit, and findings that torture and rendition are part of official duties.[333]

The lack of effective investigations and prosecutions, and the obstacles that victims have encountered in national level litigation, underline the importance of international oversight and the availability of remedies outside national jurisdictions. It is unsurprising, therefore, that victims of rendition are increasingly turning to transnational justice alternatives, and beginning to bring their cases to human rights supervisory mechanisms.

Due to the extensive roles played by European states in the CIA programme, the ECtHR is set to play a particularly significant role in determining the extent to which European states breached their obligations in each of the ways outlined above. As noted above, a first international judgement[334] has been handed down by the European Court in *El Masri v Macedonia* condemning the state of Macedonia for its role in the rendition programme, by detaining

328 See *El-Masri v Tenet*, 437 F.Supp.2d 530, 532-4 (E.D. Va. 2006).

329 *Arar v Ashcroft*, 532 F.3d 157 (2d Cir. 2008), paras. 162-3

330 *Mohamed v Jeppesen Dataplan Inc*., above, note 55

331 *Id*.

332 *Id*., including third party intervention on international standards by INTERIGHTS, Redress, International Commission of Jurists, and World Organisation against Torture.

333 As noted in Chapter 8, in the Guantánamo related case of *Rasul v Myers*, 512 F.3d 644, 660 (D.C. Cir. 2008) (*Rasul I*), *vacated Rasul v Myers* 129 S. Ct. 763 (2008), *aff'd Rasul v Myers* 563 F.3d 527 (D.C. Cir. 2009) (per curiam), torture was held by U.S. court to fall within the scope of the employment of government officials who were as a consequence immune from civil suit. As explained by the Court of Appeal for the District of Columbia: 'the plaintiffs do not allege that the defendants acted as rogue officials or employees who implemented a policy of torture for reasons unrelated to the gathering of intelligence. Therefore, the alleged tortious conduct was incidental to the defendants' legitimate employment duties.' Paras. 658-9.

334 The first case brought to that Court by ERP victims was found inadmissible because Bosnia was not a party to the ECHR at the time that six detainees were transferred to U.S. custody: *Boumediene and Ors v Bosnia*, Appl. No. 38703/06 (ECtHR 18 November 2008).

at US behest and transferring to the CIA and to Afghanistan. This case is the tip of the rendition litigation iceberg, with numerous other cases having been brought to the Court against Lithuania,[335] Poland,[336] Italy[337] and Romania,[338] with others in preparatory stage.

Cases against the US are now pending in the Inter-American system, before the Inter-american Commission on Human Rights.[339] *Al Asad v Djibouti* was the first ERP case opened before the African Commission on Human Rights in respect of an African state's involvement in the CIA rendition programme,[340] while another case concerning Kenyan/Ugandan rendition before the East African Court of Justice,[341] and others are unfolding on the domestic level.[342]

A number of challenges arise for victims, however, and for the courts themselves, in these international and regional cases, as they do on the national level. In addition to normal admissibility challenges relating to time limits applicable before some courts, and the general requirement of exhausting domestic remedies, are other challenges of a less common nature.[343] Regional and international courts do not operate a doctrine of states secrets or defer automatically to states' own assessments of the need for restrictions on rights

335 *Abu Zubaydah v Lithuania, and Poland*, ECHR (pending) www.interights.org.

336 '*Al-Nashiri v. Poland*', *Open Society Foundations*, 17 July 2012, available at: http://www.opensocietyfoundations.org/litigation/al-nashiri-v-poland ; Abu Zubaydah v Poland, above, note 29.

337 *Nasr and Ghali v. Italy*, Appl. No. 44883/09 (ECtHR 22 November 2011).

338 '*Al-Nashiri v. Romania*', *Open Society Foundations*, 6 August 2012, available at: http://www.opensocietyfoundations.org/litigation/al-nashiri-v-romania.

339 E.g. *Khaled El-Masri v United States*, P-419-08, Inter-American Commission on Human Rights. See too American Civil Liberties Union website, http://www.aclu.org/national-security/el-masri-v-tenet. Given the U.S. refusal to accept the jurisdiction of the Inter-American Court, those cases will never proceed to judicial determination, though the decisions of the Commission may play a role in historical clarification and providing a degree of vindication for the survivors of the programme.

340 See, *al Asad v Djibouti*, above, note 117.

341 The petitioners accuse the Kenyan government of violating the rule of law by sending a number of its citizens, who were accused of involvement in the July 2010 Kampala bombing, to Uganda through extraordinary rendition rather than the normal extradition process.

342 These may proceed to the sub-regional bodies or African Commission and eventually the African Court on Human and People's Rights.

343 In some courts there are time limits that normally apply: e.g. under Art 35(1) ECHR limits admissibility to applications filed within a period of six months from the date on which the final domestic decision was taken. The particular challenges of these cases, including limited access to counsel and the trauma suffered by the victims, have tended to give rise to delays in submission but the Court may be assumed, in light of the ECtHR's emphasis on ensuring that remedies are 'practical and effective', that a flexible approach will be adopted to ensure access to justice is not precluded. Multiple challenges for victims to use domestic remedies in these sorts of cases, though applicants need only exhaust meaningful, available and effective remedies.

in the interests of national security,[344] and there is no risk of cases not being considered on national grounds. But there are early indications of states seeking to have blanket 'confidentiality' over cases as a whole, thereby excluding proceedings and arguments from public view, which the Court will need to continue to resist, while finding a way of considering documents confidentially where this is necessary and appropriate.[345] These cases remain in their infancy and time will tell whether the court will regulate future cases consistently with its existing rules and principles in relation to secrecy, confidentiality and publicity, and avoid the unnecessary secrecy that it has criticised on the national level.

Evidentiary challenges also remain, given the peripatetic, deliberately disorientating, and clandestine nature of the rendition programme and its associated cover up. The difficulties that victims inevitably face in cases of disappearance and detention in one state are multiplied in this context. Additional novel challenges arise for some victims from the ban on all communication by the high value detainees referred to above, who cannot therefore give direct testimony in support of their cases, which are therefore based largely on public source documents.[346] However, the rules of human rights courts are flexible enough to accommodate these realities within a fair process; for example legal presumptions and shifting burdens seek to ensure that litigants have the opportunity can establish their case even in circumstances where the evidence lies wholly within the grasp of the respondent state.[347] Where a *prima facie* case can be made against the state, in the circumstances of these cases, the onus is likely to shift to the state to demonstrate the steps it took to protect the rights of persons subject to their jurisdiction and to investigate as credible allegations of abuse came to light.[348]

International litigation is no panacea and no replacement for effective national courts. Among its many limitations are the lack of political support and a relatively weak record of implementation. But in the absence of a

344 Rather, as ECtHR jurisprudence demonstrates, they adopt a more nuanced approach to national security that seeks to respect genuine national security concerns but retaining the right to be the ultimate arbiter of the necessary and proportionality of any limitation on rights.

345 In eg. the cases *Al Nashiri v Poland and Abu Zubaydah v Poland,* the state has sought broad confidentiality as regards the case file and hearings, the implications of which remain uncertain.

346 *Abu Zubaydah v Lithuania, and Abu Zubaydah Poland* note 29.

347 See for example, *Carabulea v Romania* (App no 45661/99) ECtHR 13 July 2010.

348 See, for example, *Saadi v Italy* (App no 37201/06) ECtHR 28 February 2008 para 129; *Astamirova v Russia* (App no 27256/03) ECtHR 26 February 2009 paras 70-81 (applicants had made out a prima facie case that their family member was abducted by servicemen. In the light of the Government's failure to provide relevant documents, the burden of proof shifted to the Government to disprove the applicants' allegations. Drawing inferences from the Government's failure to produce documents or to provide a plausible explanation for the events, it was found that Mr. Astamirov had been arrested by state servicemen).

national remedy, these avenues may finally provide the opportunity for victims to state their case and obtain a measure of vindication and justice, to clarify the range of states responsible for the ERP. The ultimate value of these proceedings[349] may lie in further impelling national systems to address the violations themselves, to conduct thorough investigations, hold those responsible to account and to provide a measure of the recognition and redress that has thus far proved elusive.

10.6 CONCLUSION

A US driven and internationally supported practice of enforced disappearance of persons has unfolded in the name of security and counter-terrorism. The 'extraordinary rendition' programme may come to epitomise how far certain states have stooped, and how far others have been willing to cooperate, accommodate, support or turn a blind eye, without constraint by the rule of law.

Political dispute surrounds the programme's effectiveness and implications. In 2006, then President Bush described it as 'one of the most successful intelligence efforts in American history.'[350] This assessment has been challenged by others who note, consistent with victim's testimonies, that the programme of torture reaped false testimony and doubtful actionable intelligence. As one US representative put it to the US government:

> "We can't measure the accuracy of this program by saying we've gone out and brought hard and fast cases based on it. You cannot tell me whether any of these individuals or all of these individuals have lied. You conceded to me that someone facing extreme anxiety and pressure could yield false information. I add all that up and I come to one simple conclusion: We can't tell if this program is working… [W]e want to get the real terrorists and we don't know if you are succeeding in doing that or if you're unearthing a bunch of lies."[351]

The modus operandi of the ERP has certainly curtailed the use of intelligence gathered as evidence, as the military commissions process described at chapter 8 or other criminal trials at Chapter 4, illustrate. It has further tarnished a much

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349 See Chapter 11 on the various roles that human rights litigation can play.

350 President G.W. Bush, 'President Bush Signs Military Commissions Act of 2006', 17 October 2006, stating that the CIA detention and interrogation 'program has been one of the most successful intelligence efforts in American history ... . And the bill I sign today will ensure that we can continue using this vital tool to protect the American people for years to come.' (available at: http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061017-1.html.

351 Representative Artur Davis (D-AL), House Judiciary Subcommittee Hearing on the Justice Department's Office of Legal Counsel, 14 February 2008, responding to Assistant Attorney General Steven Bradbury's description of the CIA's interrogation program. 'Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects', Human Rights First, 2008.

damaged US reputation, and may well make it more difficult to achieve such cooperation in the future.

What is beyond doubt – in light of the legal framework set out in other chapters of this book and recalled above – is that the ERP involved flagrant violations of international law. The most basic human rights were flouted through prolonged, arbitrary, secret detention, involving techniques which fall foul of the ban on torture and cruel, inhuman or degrading treatment. Arbitrary extra-legal transfer was blind to the rules on refoulement and due process, making a mockery of the careful crafted norms and jurisprudence on international cooperation, the improvement of which appeared to be a priority post 9/11. It violated other obligations owed towards states as well as to the individual victims. In many ways, then, the ERP is not a scenario that pushes on legal boundaries or tests the framework as much as constitutes an alarming violation of it.

Where the ERP may nudge legal boundaries, and therefore lead to the development or clarification of legal standards, is in relation to the various forms of state responsibility for the spider's web of cooperation that planned, implemented, facilitated, supported or otherwise made possible the ERP. As the scope of the rendition operation – and the number of states 'deeply complicit' in it[352] – becomes clearer, so too does the importance of understanding and clarifying what level of support, what amount of intelligence information, what sort of cooperative relationships, should be considered to fall foul of states obligations in the future. Among the issues of state responsibility that are gaining currency as a result of the illumination of facts around the extradition rendition programme, for example, is the nature of aiding and assisting in the commission of human rights violations. Increased attention by a broad range of state and non-state actors, public enquiries, and judicial proceedings, is serving to give emphasis to – and may potentially clarify – legal standards in this respect.

Rendition exposes, in extreme form, the implications of the increasingly central and multifaceted role of intelligence agencies in the 'war on terror'.[353]

352 'Britain and European governments helped US commit "countless" crimes colluding with torture', *The Telegraph*, 1 September 2011, available at: http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8735518/Britain-and-European-governments-helped-US-commit-countless-crimes-colluding-with-torture.html .T. Hammarberg, the Council of Europe's rights commissioner, accused governments of being 'deeply complicit' in illegal activities carried out by the U.S. over the last 10 years, and noting that "Many of those crimes have been carefully and deliberately covered up." Likewise, see 'CoE Rendition Report (7 June 2007)', above, note 3.

353 On the problematic role of intelligence agencies arresting and detaining if they do not have law enforcement mandates under domestic law, see 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while

Those responsible were state agents, or acting under the direction and control of the state, and clearly come within the state's responsibility.[354] Yet it has been suggested that the legal framework is 'lighter' in respect of the governance of intelligence agencies than other arms of the state, which may contribute to a sense of a lack of international regulation, and ultimately impunity.[355] One by-product of the ERP has been increased attention dedicated to the need for greater oversight and accountability of intelligence agencies and agents.[356]

The ERP has shone a harsh light on the dark side of cooperation, however, and the need to ensure that state practices in international cooperation do not 'participate in, solicit, encourage or condone the use of torture or cruel, inhuman or degrading treatment or punishment for any purpose,' as reflected in the UK's 'Consolidated Guidance' to Intelligence officers in the field.[357] The regulation of cooperation in intelligence matters raises other difficult issues that raise tensions within the legal framework that need to be grappled with. These includes the limits on transparency in light of the 'control principle' on which much cooperation is predicated and which is often relied upon to limit disclosure of information that was supplied by another state.

Further debate and developments on law and policy in this area may be one of the positive developments to emerge from the rendition programme, bringing greater transparency and accountability into a notoriously im-

countering terrorism, including on their oversight' (hereinafter 'Good Practice Report'), Fourteenth session, 17 May 2010, UN Doc A/HRC/14/46, Practice 28.

354 Most relevant actors were intelligence agents, clearly part of the state apparatus. Where private actors were also employed, while this may help to shield the state, de facto, from accountability, so far as the private actors worked under the 'direction and control' of the state, they were clearly covered by the law of agency, and feel within the responsibility of the state. See Chapter 3 on the issues of state responsibility.

355 G. Staberock, 'Intelligence and Counter-Terrorism', in *Counter-Terrorism: International Law and Practice*, above, note 174, suggesting that international law is normatively 'light' on the role of intelligence agencies, compared to special detailed rules on lawyers, judges, prison service, law enforcement and fair trial, yet no comparable guidelines on intelligence agencies. While it may be doubted that there is any normative void, or even real lack clarity re legality in this case, it may be true to say as Staberock does that the lack of detailed provisions contributes to a false perception of exemption from the international legal oversight (p. 355).

356 Eg the Special Rapporteur on Terrorism and Human Rights' Framework Principles on Accountability for Counter-terrorism, March 2013, A/HRC/22/52, emphasise accountability for intelligence agents and agencies. ICJ Eminent Jurists Report, above, note 49, at 84 with recommendations as to the role of intelligence services and its separation from policing functions and the limits of international cooperation. See also UN Special Rapporteur Good Practice Report, A/HRC/14/46, 17 May 2010; above, note 341.

357 UK Consolidated Guidance 2010. The Guidance was welcomed by the otherwise critical CAT report of May 2013.

penetrable area of international practice. Renewed priority has to be afforded to enhancing cooperation within a rule of law framework.[358]

Given the excessive secrecy surrounding the ERP, the extent to which the facts have been, and continue to be, exposed is noteworthy. Information concerning the nature of the ERP and those responsible for sustaining it continues to be uncovered, documented, and made public, making possible both historical clarification of the facts, and appropriate reflections on lessons for the future. It may be a reminder to states that their ability to suppress information, even with the complex scheme and elaborate cover-up, is time limited.

Likewise, as obstacles to justice for victims continue to emerge, so too do innovations in pursuit of the truth, justice or reparation to which victims are entitled. The right of victims of rendition to information, redress and reparation, and the obligation to investigate and prosecute, is beyond dispute. Yet a generalized reluctance to treat them as victims deserving of recognition and redress – related apparently to lingering perceptions regarding the nature or activities of those individuals – compounds the original wrong. Payment of compensation has been rare, and unaccompanied by recognition of responsibility or regret.[359] The contrasting approach of the Arar enquiry – where investigation and clarification were followed by compensation and an unqualified apology – provides a model that others may be inspired to follow. All victims of serious rights violations, not least those associated with ERP, have the right to reparation, and public acknowledgement of their victimisation is long overdue. Bringing legal challenges where sensitive information is at stake is enormously challenging, as practice in this and other chapters shows.[360] The courts – national and where necessary international -have a crucial role to play in enabling victims to vindicate their rights, but also in restoring the authority of the state and the rule of law, as discussed in the next chapter.

As knowledge grows, so too does momentum towards accountability for a range of actors that drove and facilitated the rendition programme, including individual criminal responsibility. As discussed in Chapters 4 and 7, accountability norms are well established, developed through years of global

358 The question of political will is clearly key. As Commissioner Hammerberg noted, accusing Europe's governments of blocking investigations into rendition in line with Washington's wishes: 'The message is clear – good relations between the security agencies are deemed more important than preventing torture and other serious human rights violations.' 'Britain and European governments helped US commit "countless" crimes colluding with torture'.

359 Examples include al-Zery, compensated by the Swedish government, Mamdouh Habib by the Australian government (reportedly on condition that he not pursue legal proceedings against them), and Binyam Mohamed by UK authorities; see 'Compensation to Guantanamo Detainees "was necessary"', *BBC News*, 16 November 2010, available at: http://www.bbc.co.uk/news/uk-11769509.

360 See eg the novel 'closed material proceedings' and impediments on courts disclosing 'sensitive information' in the UK Justice and Security Act 2013 at Chapter 7B7 and other challenges in Chapter 11.

experience in addressing, among other things, state responsibility for enforced disappearances and torture, and international criminal law. Whether these norms can be brought to bear to ensure a measure of truth, justice, and accountability for ERP remains unclear, but may prove a key test of the rule of law and the extent to which states are determined to learn and move on from the worst excesses of the war on terror.

11 The Role of the Courts: Human rights Litigation in the 'War on Terror'[1]

Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.

National Defense Strategy for the United States of America, 2005

On 12 June 2008, the Supreme Court of the United States decided that persons detained by the US in Guantánamo Bay have the constitutional privilege of habeas corpus. The recognition that all detainees are entitled to this basic right, irrespective of their nationality, designation as "enemy combatants," or offshore location, was hailed as a victory for the rule of law. Jubilation was somewhat tempered by the fact that it took six years to decide that detainees are entitled to a protection that would normally guarantee judicial access within hours, days, or maybe weeks.[2]

Whether you see the *Boumediene* judgment as a historic victory for justice or a reminder of its woeful failure, it tells a story. It provides graphic illustration of how far executive violations of human rights have gone in the name of security, but also of the nature of the judicial response: deferential and perhaps faltering at first, gradually ceding to a more invigorated role as a matter of last resort. This judgment is only one part of a burgeoning mass of litigation worldwide, each component of which tells its own story. Cases vary vastly in their nature and goals -ranging from challenging unlawful practices and preventing wrongs to gaining access to information and securing reparation or judicial oversight itself, for example – as they do in their processes and outcomes. They occur in and reflect the vastly different political and cultural contexts as well as the diverse legal and constitutional systems from which they emerge. This chapter will present a necessarily brief survey of some

1 An early version of this chapter was delivered as the Annual Public Lecture in International Law at the School of Law, London School of Economics, 2007 and published in IRRC 2008. The author was involved in several of the cases cited as counsel or third party/amicus curiae intervener.

2 On questions regarding the effectiveness of the remedy in practice see below and Chapter 8.

of this diverse body of practice of human rights litigation to date on the national, regional and international levels.[3]

An enquiry into current litigation practice can serve several purposes. First, it illustrates some of the key human rights issues arising in the so-called "global war on terror" discussed in this book,[4] as they affected specific individual victims. Looking at issues through cases necessarily gives a limited perspective: a case concerns a particular individual and particular set of facts as assessed against the particular legal issues within the jurisdiction of the particular court. The number of affected individuals that make it to court is a tiny minority. But taken together, the practice of litigation in relation to international terrorism over the past few years provides a prism that displays quite vividly some of the key characteristics of the global war on terror, its objectives, modus operandi, and human impact.

Second, and more critically for the purposes of this chapter, the brief survey of litigation practice may provide a comparative framework for assessing the impact and limitations of that litigation itself. What is the role of the courts in responding to the human rights challenges posed by the war on terror, how has it been discharged, and to what effect? What role has there been (or should there be) for the courts as a bulwark against executive overreach? How have regional and international courts and processes upheld or advanced international law where national courts have failed to do so? It remains early days for any such assessment given the lengthy time frames often involved in the cycle of litigation, but the extent of judicial responses in recent years suggest that it is timely to enquire into the role of the courts in responding to the war on terror.

The role the judiciary has played as guardian of human rights post 9/11 has to be considered alongside the impact of post 9/11 practices on the judicial role. As a preliminary matter, it is therefore worth recalling the extent to which laws and practices have curtailed the judicial function itself; a recurrent theme running through many of the human rights concern post 9/11 addressed in other chapters.[5] The most notorious illustrations (addressed more extensively later) are the divestiture of the right of 'habeas corpus' review of the lawfulness of detention,[6] the denial through legislation or practice of the right of access

3 This note focuses on select human rights litigation brought by victims against the state before national, regional and international courts and bodies. It is noted that cases that serve human rights ends can and have taken many other forms, from civil cases against corporations to criminal cases against individuals (see eg. Chapter 10)

4 The underlying issues are addressed more comprehensively in Chapters 7 (Human Rights), 8 (Guantanamo), and 10 (Rendition).

5 *See* R. Weich, 'Upsetting Checks and Balances: Congressional Hostility Towards the Courts in Times of Crisis', in 'Report of the American Civil Liberties Union', November 2001, available at http://www.aclu.org.

6 This will be addressed in relation to Guantanamo detainees (Chapter 8) or other prisoners held in Afghanistan and beyond (Chapters 6 and 7.3).

to courts to seek damages,[7] or the lack of judicial oversight of targeted sanctions.[8] Examples discussed in Chapter 4[9] reveal further restrictions in the area of international cooperation,[10] where developments purportedly designed to streamline extradition have limited the judicial function,[11] for example by limiting the grounds on which cooperation can be refused,[12] preventing courts from looking behind the executive's assessment of risks in the receiving state,[13] or removing the requirement of minimum evidentiary showings in extradition proceedings.[14] 'Expedited' procedures have also led to "emergency deportations" proceeding even when the outcome of appeal proceedings is pending, in clear disregard for the judicial process.[15]

In some scenarios, the interference with the judicial role has been more dramatic in effect, such as resort to 'special' or military courts to judge terrorist related offences, undermining the cardinal notion of judicial independence from the executive.[16] Attacks on judiciaries where they have shown independence have been more common, as given graphic illustration by the Pakistani President's condemnation of the Supreme Court for "working at cross purposes with the executive and legislature in the fight against terrorism and extremism" and thwarting intelligence agencies' activities, by questioning the

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7 E.g. Patriot Act 2001 which provided that certain categories of detainees would have no right to seek relief before US courts; see also broad government claims of state secrets and national security below or the UK Justice and Security Act 2013 on closed material proceedings.

8 E.g. for UN terrorism-related sanctions see UN Doc. S/RES/1267 (1999), paras. 4(a), 4(b) and 6, which has successively been extended.

9 *See* Chapter 4B on enhancing cooperation post 9/11 and Chapter 7B on violations of the rule of non-refoulement.

10 At one extreme, the judicial role has been bypassed entirely through extraordinary rendition, including where extradition proceedings were pending or had been dismissed, see Chapter 10.

11 *Ibid.*

12 Some undermine the extent to which judges can look behind the extradition request and assess human rights concerns that may arise from its nature, motivation, or effect; *see* Chapter 4B.

13 *See Kiyemba II* litigation in US courts, noted in Chapter 8; See also *Munaf et al. v Geren, Secretary of the Army*, et al. No.06-1666 (12 June 2008).

14 *See* e.g. Article 8(3)(c) US-UK Extradition Treaty 31 March 2003); *see also* Article 8 'European Arrest Warrant' and case of *Lofti Raissi* in Chapter 4B.2.

15 E.g. in *Conka v. Belgium*, no. 51564/99, ECHR 2002-I, available at www.echr.coe.int, paras. 82-83, in which the EctHR found that Belgium had violated Article 13 of the Convention because national law allowed authorities to carry out an expulsion while an appeal was pending. Within the French system see e.g., *Affaire Gebremedhin v. France*, no.25389/05, available at <www.echr.coe.int>, paras. 65-66, UN Committee Against Torture, Decision: *Brada v. France*, CAT/C/34/D/195/2002, May 24, 2005, and Human Rights Watch (here inafter HRW), 'In the Name of Prevention', available at: <http://www.hrw.org/en/reports/2007/06/05/name-prevention> accessed on 15 August 2012.'

16 *See* Chapter 7A 'Fair Trial' and discussion of US military commissions in Chapter 8B.4.5.

government on the practice of forced disappearances.[17] Other examples of harsh criticism of judges for applying human rights law to counterterrorism appear in other contexts too.[18] Needless to say the role of the courts can only meaningfully be realized where there are courts of sufficient independence, impartiality and capacity to discharge that function. These challenges are coupled with a broader range of legal, political and practical obstacles facing victims in bringing human rights actions in a climate of excessive secrecy and securitization, some of which have been discussed in previous chapters while others will be highlighted below.

Despite these impediments to, and limits on, the judicial role, and their undoubted impact, a vast volume of litigation has been brought by victims and adjudicated by the courts. In some (but not all) cases, this litigation has addressed precisely these issues concerning the judicial role – the lawfulness of measures seeking to curtail judicial engagement – alongside a broad array of other human rights issues. The following is a selection of cases that have arisen post-9/11 addressing five groups of issues (which are illustrative of key characteristics of the war on terror as it affects human rights explored in other chapters). These issues are: arbitrary detention; extraterritorial application of human rights obligations; torture and related safeguards; extraordinary rendition; and the spreading reach of the "terrorist" label and notions of guilt by association. After a summary of the cases, the conclusions return to the question of the role of courts and the impact of human rights litigation in the war on terror.

11.1 *Issue 1:* Arbitrary detention

11.1.1 Guantánamo

Probably the most notorious issue, and certainly the one giving rise to the most voluminous litigation, is the Guantánamo anomaly. The facts related to the detention of hundreds of enemy aliens by United States personnel in Guantánamo Bay are addressed in Chapter 8.

17 President Musharraf took exception to Supreme Court's requests to the Interior Ministry for answers on enforced disappearances: *see* Human Rights Watch, *Destroying Legality: Pakistan's Crackdown on Lawyers and Judges*, 2007, page 19.

18 In the UK, see comments on Lord Bingham in *A & Ors* in the UK House of Lords below. Statement by Home Secretary Teresa May to the Conservative party conference, in 'Tories promise to scrap HRA,' *Guardian* 30 September 2013: "Some judges chose to ignore parliament so I am sending a very clear message to those judges… Parliament wants the law on people's side, the public wants the law on the people's side…".

Detentions at Guantánamo have spurred a litany of litigation in US courts (as well as beyond),[19] focusing mainly on two issues: the right to habeas corpus and the lawfulness of trial by military commission.[20] It is worth recalling the development of these cases in US courts and the curious game of legal ping-pong that played out between the judicial and political branches in the years leading up to the 2008 *Boumediene* judgment referred to earlier.

Round One: In 2004 a series of cases made their way through US courts challenging the denial of the right of access of detainees to a court to challenge the designation of the individuals in question as "enemy combatants" and the lawfulness of their detention.[21] This led to two judgments handed down in June 2004. In *Hamdi* v. *Rumsfeld,* the Supreme Court held that US nationals had certain constitutional rights, including having "a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker."[22] Justice Sandra Day O'Connor famously cautioned on behalf of the Court that "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[23] This 2004 case was seen to represent an important marker of executive accountability, albeit in the limited cases where the detainees are US nationals.

In respect of the right of habeas corpus of the vast majority of detainees who were non-nationals detained outside the US, in *Rasul & Ors v. Bush*, the Supreme Court took a notably distinct and far more cautious approach. It refrained from addressing the issue as a constitutional rights issue (and indeed from even recognizing international law despite copious *amicus curiae* briefs).[24] Rather, the Court found, by reference to a statute conferring jurisdiction on

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19 *See* Chapter 8.C.3 on attempts to secure accountability in foreign courts. Another line of litigation has concerned the role of other states in transferring to, or failing to support nationals detained in, Guantánamo: see e.g. *Boumediene and others v. Bosnia and Herzegovina*, Application Nos. 38703/06, 40123/06, 43301/06, 43302/06, 2131/07 and 2141/07 (held inadmissible in the European Court of Human Rights (ECtHR) as the transfer was before Bosnia ratified the ECHR) or *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598. See also *Al Rawi and Ors v The Security Service & Ors* [2009] EWHC 2959 (QB) (18 November 2009) in UK courts (*Al Rawi & Ors*).

20 Litigation seeking damages for violations in Guantánamo (and elsewhere) has encountered greater obstacles and borne less fruit than the habeas litigation: *see* Chapters 7B14 and 10.

21 The first of these cases – *Yaser Esam Hamdi and Esam Fouad Hamdi as next friend of Yaser Esam Hamdi, Petitioners v. Donald H. Rumsfeld, Secretary of Defense, et al.* 542 U.S. 507 (2004), 536 decided June 28 2004. *Shafiq Rasul, et al., Petitioners v. George W. Bush, President of the United States, et al.* No. 02-5288 (2002), Decided July 30, 2002*; Fawzi Khalid Abdullah Fahad al Odah, et al., Petitioners v. United States, et al.* 542 U.S. 466 decided June 28 2004. The third case – *Padilla v Rumsfeld* 352 F.3d 695 (2d Cir. 2003) U.S – is less relevant as it concerned a U.S. citizen who was ultimately transferred to the regular criminal justice system within the U.S., charged with conspiracy and found guilty before a federal court.

22 *Hamdi v. Rumsfeld*, *ibid*.

23 *Hamdi v. Rumsfeld*, *ibid*.

24 *Rasul*, *supra* note 21.

courts, that there was nothing to prevent the courts from exercising jurisdiction in these cases.

The government responded to these judgments, but not as the plaintiffs or lawyers might have hoped. As regards US nationals, one had already been released and the other was transferred to regular courts.[25] For the hundreds of non-nationals detained at Guantánamo, the response was again quite different. First the executive introduced the Combatant Status Review Tribunals and Administrative Review Boards in an apparent attempt to provide a habeas corpus substitute, despite these being non-judicial mechanisms that lacked basic procedural rights associated with the right of habeas corpus.[26] This provided cover for congressional follow-up with the Detainee Treatment Act 2005 (DTA), which – in addition to some positive provisions on treatment of detainees – responded to the judgment by making explicit that there is *no* right of habeas corpus for Guantánamo detainees.

Round Two: This led to a second round at the Supreme Court in the form of *Hamdan* v. *Rumsfeld*.[27] The US government claimed that the DTA had stripped Hamdan of his right to habeas corpus. In its June 2006 judgment, the Court again refrained from addressing the question whether there was a constitutional right to habeas corpus that rendered the DTA's purported habeas corpus stripping unconstitutional. It found instead that the Act did not apply to Hamdan anyway, as his case was ongoing at the time the DTA was adopted.

Having determined that it had jurisdiction, the Court went on to find that basic due process guarantees contained in Common Article 3 of the Geneva Conventions, incorporated into US law by the Uniform Code of Military Justice (UCMJ)[28] statute, applied to all detainees. The decision that the military commissions were unlawful because they violated these basic provisions was an important and positive decision in terms of rights protection. It is noteworthy though that *Hamdan* is not framed in terms of "individual rights," but as a separation of powers issue, addressing whether the President has acted in a way that exceeded congressional limits.

Nonetheless, there had been a finding by the Supreme Court that the executive's conduct violated international and domestic law. The US government again faced the quandary of how to respond to this judicial slight. With the 2006 Military Commission Act, Congress responded in two ways. First, it determined that the relevant international law – the Geneva Conventions – could no longer be relied upon as a source of rights in habeas corpus or other civil proceedings against US personnel. Secondly, it provided that courts would not have jurisdiction to hear habeas corpus applications (or any other action)

25 *See* notes on *Padilla* and *Hamdi*, in Chapter 8.
26 For an analysis of current review procedures *see* Chapter 8.
27 *Salim Ahmed Hamdan, Petitioner v. Donald H. Rumsfeld & Others*, 548 U.S. 557 (2006).
28 Uniform Code of Military Justice, UCMJ, 64 Stat. 109, 10 U.S.C. ch.47.

by any person determined to be an enemy combatant or awaiting such determination, thus extending the jurisdiction stripping provisions of the DTA beyond Guantánamo to detentions anywhere.[29] Rather than a response that would seek to deal with the problem by bringing policy in line with law, the law was identified as the problem, and international sources of law and judicial oversight of them were removed.

Despite several Supreme Court judgments, the basic question whether constitutional due process and habeas corpus protections apply to non-nationals detained outside US territory remained unanswered until June 2008.[30] With no further possibility of constitutional avoidance, in *Boumediene* v. *Bush*[31] the issue was finally resolved in the affirmative. The US Supreme Court ruled that "enemy combatants" held by the US at Guantánamo Bay have the right under the US Constitution to challenge their detention before regular courts. The procedures for review of the detainees' status under the 2005 Detainee Treatment Act were not an adequate and effective substitute for habeas corpus, and it therefore declared unconstitutional Section 7 of the 2006 Military Commissions Act, which denied habeas corpus to any detained foreign "enemy combatant".

The importance of this ruling should not be underestimated. Ultimately the Supreme Court addressed the issue of habeas corpus as the fundamental rights issue it is, without artificial distinctions based on nationality or geographical location as determinative of the existence of rights and obligations.[32] It symbolized the willingness of the judiciary to engage and fulfill their democratic mandate and reinforce the legal and constitutional limits on executive action.

At the same time, the judgment itself was a close 5:4 decision, with some strident dissents that graphically demonstrate the extent of the antipathy of certain judges to step into what they see as issues of security properly for

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29 Sec. 7(1) MCA: "(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination''.

30 District courts reached different decisions in eg *Al Odah* and *Boumediene* and on 20 February 2007, the D.C. Circuit Court of Appeals ruled 2-1 that the Guantánamo detainees have no constitutional right to habeas corpus in federal court.

31 *Lakhdar Boumediene, et al., Petitioners v. George W. Bush, President of the United States, et al.* 553 U.S. 723 (2008).

32 See however, determinations in other cases where these principles are not followed.

executive determination.[33] Of real concern, of course, is simply the time it took to reach this decision. Litigation is a time-consuming business, and due process of law and respect for the judicial function require that it be allowed to run its course. Undoubtedly, some gains have been made at each stage of this judicial marathon (as discussed when looking at the question of impact later). One has to ask, however, whether the judicial process has not been characterized by undue constitutional avoidance, as well as excessive judicial deference to the executive and congressional decision-making role, in the refusal to address the constitutional question at an earlier stage. Unfortunately the political organs did not repay the democratic compliment when it came to the judicial suggestion about the need to bring policy into line with law.[34] Whether this was a miscalculation as to how the political branches would respond, or a strict approach to the judicial doctrine of constitutional avoidance, is open to question. But the somewhat anomalous result is a decision six years down the line that the right to habeas corpus applies, theoretically guaranteeing access to a court within hours or days of arrest and detention. One must question the extent to which this constitutes a meaningful judicial response for this sort of emergency remedy.

As regards the impact of the *Boumidiene* decision on detainees, a few comments are merited. In many cases, the government's position vis-a-vis particular individuals took a surprising volte-face. For example, in some cases exorbitant allegations were dropped once confronted with the prospect of legal review[35] – a reminder of the importance of procedural safeguards including access to the court – even before that oversight actually takes effect. Less positively, reports suggest that individuals were transferred out of Guantanamo and to other areas where there was no right of habeas, in anticipation of the *Boumidiene* decision.[36] This manoeuvre to avoid the human rights effects of litigation is both a troubling circumvention of the role of the courts, and a testament to the importance of that review from the government's perspective.

The limited geographic scope of the decision must also be borne in mind. It applied only to Guantanamo detainees, rather than having established a broader point of principle as regards the right to habeas of detainees wherever detained. It quickly became apparent that the hard fought *Boumidiene* results

33 This was graphically demonstrated by the tone and content of some of the dissents, notably J. Scalia's assertion of the "disastrous consequences" of the majority judgment, which he claimed, "will almost certainly cause more Americans to be killed." Dissenting judgment of Scalia J, p. 2.

34 E.g. as noted earlier, Congress reacted to the *Hamdan* judgment by divesting the courts of jurisdiction and of 'inconvenient' sources of law, rather than taking the judicial lead and bringing policy into line with law.

35 E.g. A case in point is that of Abu Zubaydah, one of a number of people publicly proclaimed to have been the 'number three' in al Qaeda, yet these allegations and indeed those that alleged membership of al Qaeda, were dropped when he could access a lawyer and the prospect of legal review materialised. See eg *Abu Zubaydah v Poland*, in Chapter 10.

36 *See* Chapters 8 and 10.

would not necessarily be replicated for US detentions elsewhere in its 'global war on terror'. The same day that the US Supreme Court handed down its judgment in *Boumediene* it also handed down *Munaf v. Geren*,[37] in which it acknowledged that persons detained in Iraq also had the right to habeas corpus, but found that in the Iraqi context it was Iraqi courts that should exercise jurisdiction, therefore denying the jurisdiction of US courts (and effectively denying the right) on that basis. The right of habeas corpus continues to be denied to Guantánamo "alternatives" such as detentions in Afghanistan, as discussed further below.[38]

Where there *have* been habeas proceedings for Guantanamo detainees, their process and outcome have been telling. In the first few years of habeas review, in the clear majority of habeas cases the lawfulness of detention was successfully challenged.[39] The habeas proceedings and results indicated both the lack of justification for detentions by the executive and the importance of the judicial review function. However, concern has been voiced that this trend has been reversed, as a result of criticism by superior courts of the high rate of successful habeas challenges and the lower courts' willingness to question the government's assessments of fact.[40] In *al Adahi v Obama* of 2010 the appeals court did not change the test for evaluating evidence (a 'preponderance of evidence' test which neither of the parties contested), but it suggested *propio motu* (and *obiter*) that a more restrictive test requiring 'some evidence to support the order' was appropriate.[41] Subsequent decisions have shown a

37 *Munaf et Al. v. Geren, Secretary of the Army, et Al.* Certiorari to the United States Court of Appeals for the District of Columbia Circuit No. 06-1666,. Argued March 25, 2008 – Decided June 12, 2008.

38 *Al Maqaleh et al. v. Gates*, *Secretary, United States Department of Defense*, 605 F.3d 84, (D.C. Cir. 2010). Argued Jan 7, 2010 – Decided May 21, 2010. In a February 15, 2011 decision Judge Bates issued a ruling in favor of Mr. al-Maqaleh, allowing him to file his Amended Petition and to present additional facts and arguments regarding the Court's jurisdiction. *See* 'War and Human Rights' in Chapter 7.

39 A 'scorecard' maintained by the Centre for Constitutional Rights as of Sept. 2011, indicated approximately 75% of success. Human Rights First also holds a table of habeas cases in the US District Court of DC (March 2011) where 39 of 59 detainees saw their habeas granted. However, see shift in 2010 discussed below.

40 Some suggest the turning point was *Mohamad al Adahi v Obama*, Case No. 09-533 (Court of Appeals, DC Circuit) 3, 13 July 2010. Appeals from the United States District Court for the District of Columbia (No. 1 :05-CV-00280-GK); Seton Hall 'No Hearing Habeas,' D.C. CIRCUIT Restricts Meaningful Review, 1 May 2012 (Seton Hall 'No Hearing Habeas' Report); see also Seton Hall press release quoting Professor Mark P. Denbeaux: "Since *Al-Adahi*, judges are effectively robo-signing denials and rubber-stamping government allegations. The Supreme Court gaveth and the Appeals Court taketh away.", available at http://law.shu.edu/about/news_events/releases.cfm?id=289524 (accessed on October 26, 2013).

41 *See Mohamad al Adahi v. Obama*, supra note 40, at, p 5: "For years, in habeas proceedings contesting orders of deportation, the government had to produce only "some evidence to support the order." *INS v. St. Cyr*, 533 U.S. 289 (2001), at 306; *Bakhtriger v. Elwood*, 360 F.3d 414, at 421 & n.7 (3d Cir. 2004). This may seek to avoid similar criticism or being overturned on appeal in the future.

far more deferential approach to the government, with only one successful case having been decided since 2010.[42] This apprach, together with preexistent procedural concerns regarding admissible evidence and the difficulty of challenge[43] has led some to question whether litigation on this basis provides any meaningful review at all.[44]

The judicial engagement of the US courts in protecting the right to judicial review in detention has undoubtedly been important (just as has the related judicial role in the criminal process discussed in Chapter 4). Gains have been made in recognizing the principle of habeas corpus, and if there was any doubt as to why such judicial oversight is needed it should be promptly dispelled by regard to the many habeas proceedings which have revealed that there was little real evidence on which people described as the worst of the world's worst were held in arbitrary detention for many years. The experience will also continue to raise questions as to the nature of the judicial role and due deference however. It was too little too late for many detainees who we now know had their most fundamental rights violated for years while the protection of judicial review was being adjudicated, and less still for those captured or shipped off to detention in Afghanistan or elsewhere who continue to have that protection denied to them altogether. Even in respect of Guantanamo detainees themselves, questions remain as to whether *Boumidiene*'s hard won promise of 'meaningful' review will be given real effect in future cases.

11.1.2 Baghram

Hundreds of individuals have been detained by the US administration in Afghanistan since the military intervention of 2001. Many of them were captured in Afghanistan but substantial numbers having been detained elsewhere and transferred into Afghan detention centres, where they have been denied due process rights including review of detention and in some cases been

42 Seton Hall 'No Hearing Habeas' Report, *supra* note 40.

43 The reliance on hearsay, on evidence allegedly obtained under torture was contested unsuccessfully in *al Adahi*. It has been described as 'almost impossible' for detainees to question intelligence use by the government. See also Linda Greenhouse, 'Goodbye to Gitmo,' New York Times Opinionator Blog, May 16, 2012, available at http://opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo/ (accessed on October 26, 2013).

44 *See* e.g. Seton Hall 'No Hearing Habeas' Report, *supra* note 40; see N. Nesbitt, "Note, Meeting Boumediene's Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation", *Minnesota Law Review* (2012), available at http://www.minnesotalawreview.org/articles/meeting-boumediene-s-challenge-the-emergence-of-an-effective-habeas-jurisprudence-and-obsolescence-of-new-detention-legislation/.

subject to torture and ill treatment. As one judge put it (in familiar terms), they are held in, 'a 'black hole,' in a 'law-free zone.'[45]

The approach of the US Courts in the 'Baghram litigation' to date is instructive. Petitions for habeas relief were brought in April 2009 by a Tunisian and two Yemenis who alleged that they were captured outside Afghanistan, far from combat zones, mistakenly identified as terrorists and transferred for imprisonment to the Baghram Air Base military prison in Afghanistan.[46] The federal district court judge ruled that while habeas did not operate in an area of war, as these detainees were not *captured* in an area of war, they had the right to challenge their detention; by contrast, those others captured in Afghanistan and held there did not.[47] The federal appeals court for the District of Columbia overturned this decision however, finding that as the site of their *detention* was in an 'active theatre of military combat,' and in light of 'pragmatic obstacles' stemming from the detention being within the sovereign territory of another state, detainees held at Baghram, regardless of where they were captured, have no constitutional right to challenge their detention in a US court.[48] Surprisingly, perhaps, given that the cases raised substantially the same fundamental issues as the Guantanamo litigation, the Supreme Court has again recoiled, denying *certiorari* to review that decision.[49]

The net effect of these cases is that years after the Guantanamo cycle of litigation, there still exists a judicially endorsed void into which detainees captured anywhere in the world can be deposited to avoid judicial oversight. The black hole is not now an island but an amorphously defined and potentially permanent state of armed conflict of global reach, in which the government's actions, including detention anywhere in the world, are purportedly not subject to judicial oversight.[50] The principle often associated with the *Boumidiene* judgment- that all human beings are entitled as a minimal guarantee to habeas corpus – has not in fact held true.

The District Court decision was however noteworthy in so far as the judiciary was willing to look past the government's assessment of armed

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45 J. Bates reviewing the lawfulness of the mens' cases in January 2009. *See* Editorial, "Backward at Baghram", *N.Y. TIMES*, June 1, 2010, at A26. This description resonantes with that of Guantanamo; *see* 'black hole' and 'legal limbo' discussed at Chapter 8.

46 The individuals allege they were captured in Thailand, Pakistan and another location beyond the Afghan border, all far from hostilities.

47 *See* Bates, *supra* note 45.

48 *Al-Maqaleh, et al., supra* note 38 finding that 'the *Boumediene* analysis has no application beyond territories that are, like Guantanamo, outside the *de jure* sovereignty of the United States but are subject to its *de facto* sovereignty'. It also denies the applicability of GCIV guarantees. See R. Goodman, Editorial Comment 'The Detention of Civilians in Armed Conflict' 103 AJIL 48-74 (2009).

49 *Ibid.*

50 *See* Chapter 6 for the government's very broad interpretation of armed conflicts, which the courts have thus far appeared to accept. *See* e.g. *Hamdan*'s acceptance of the relevance of enemy combatants.

conflict, to the particular circumstances within that conflict, and whether in reality they precluded the application of certain guarantees or not. Also of potential future significance is the fact that the Appeals Court, while denying the right to habeas, acknowledged that its decision may have been different if the applicants had been transferred into Afghanistan *deliberately* to preclude judicial oversight. The applicants set out to prove just that in subsequent litigation. It remains to be seen whether the courts' reach may ultimately follow the government, as it seeks to move further offshore and beyond judicial oversight, in its war with al Qaeda of global reach.[51]

11.2.3 Belmarsh (and from there to Control Orders and Other Measures…)

In 2004 parallel cases made their way through the English courts, resulting in the famous *A & Others* derogation case before the House of Lords (Belmarsh judgment).[52] The case concerned the detention of non-UK nationals in Belmarsh Prison on the basis of their suspected involvement in international terrorism, pursuant to the 2001 Anti-Terrorism, Crime and Security Act.[53] In order to allow such a measure, the UK had derogated from its obligations in respect of the right to liberty under Article 5 of the European Convention on Human Rights (ECHR).

The case raised different issues from those before US courts. The UK Act itself provided for regular independent review by the Special Immigration Appeals Commission, which is a court of law, albeit in the context of limited and controversial rules and procedures.[54] The right of habeas corpus was

51 *Al-Maqaleh* case, *supra* note 38; Chapters 6 and Chapter 7B6 on allegations of on-going proxy detentions and interrogations, further offshore and beneath the judicial radar; see eg A. McCoy, 'Impunity at Home, Rendition Abroad', *Huffington Post*, 14 August 2012, regarding allegations of US supported Somali run prisons..

52 *A and others v Secretary of State for the Home Department, X and another v Secretary of State for the Home Department* [2004] UKHL 56 ('A &Ors (Derogation)').

53 *See* sections 21 to 32 of the UK's Anti-terrorism, Crime and Security Act 2001 which: "allow[s] the detention of those the Secretary of State has certified as threats to national security and who are suspected of being international terrorists where their removal is not possible at the present time. These provisions change the current law, which allows detention with a view to removal only where removal is a realistic option within a reasonable period of time…".

54 Controversial rules related, for example, to access to counsel – the use of special advocates – and to evidence. See e.g. the report of the UK's Parliamentary Constitutional Affairs Committee "The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates", Report of Session 2004/5, HC 323-II, available at http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmselect/cmconst/323/323ii.pdf. *See also* e.g. 'Ian Macdonald QC resigns from SIAC', 1 November 2004, available at <http://www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=268. *See also* Chapter 7B.7.3

not, as such, in dispute in the UK and the case that made its way to the House of Lords concerned the lawfulness of the derogation and of the detention itself.

When the matter went before the House of Lords, then the supreme court of appeal in the UK, the court found that the UK's derogation from the European Convention on Human Rights to enable it to detain people on national security grounds, potentially indefinitely, was not valid. The majority deferred to the government's assessment of the existence of an "emergency" justifying derogation. However, they found that the detention of non-nationals could not be justified as strictly required by that emergency. The judgment notes: "If derogation is not strictly required in the case of one group [nationals], it cannot be strictly required in the case of the other group [non-nationals] that presents the same threat."[55] The court therefore found a violation of the rights to liberty and to non-discrimination, provided for in law in the UK under Articles 5 and 14 of the ECHR.

The positive significance of this decision lies on many different levels. The first relates to the obvious importance of the strict approach to the protection of the right to liberty and the need for careful but challenging judicial oversight. Beyond that, the case did what much of debate and indeed litigation elsewhere – including the US litigation referred to earlier – had neglected to do, in signaling the centrality of the equality issue. This is particularly significant in a context of frequent reliance on divisions and distinctions based on nationality as well as other grounds as a basis for inferior treatment. While nationality does have some significance in the context of the application of certain aspects of international humanitarian law (IHL), it is a critical manifestation of the universality that underpins human rights law that nationals and non-nationals alike are protected.[56] The onus is on the state to demonstrate that discrimination is justified, which it was unable to do in this case.

The case is also constitutionally significant in its assessment of the proper judicial role and the limits of due judicial deference. In a powerful passage Lord Bingham famously rejects the Attorney General's submissions in this respect, noting:

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55 *A &Ors (Derogation),* Lord Bingham, para. 132: "The distinction which the government seeks to draw between these two groups – British nationals and foreign nationals – raises an issue of discrimination. But, as the distinction is irrational, it goes to the heart of the issue about proportionality also. It proceeds on the misconception that it is a sufficient answer to the question whether the derogation is strictly required that the two groups have different rights in the immigration context. So they do. But the derogation is from the right to liberty. The right to liberty is the same for each group. If derogation is not strictly required in the case of one group, it cannot be strictly required in the case of the other group that presents the same threat."

56 *See* e.g. UN Human Rights Committee General Comment No. 15: The position of aliens under the Covenant [1986], in UN Doc. HRI/GEN/1/Rev.6 (2003), at 140. *See also* Inter-American Commission on Human Rights, *Precautionary Measures in Guantánamo Bay*. *See* Chapter 7A22 and 7B9.

> "I do not in particular accept the distinction which he drew between democratic institutions and the courts… the function of independent judges… [is] a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatize judicial decision-making as in some way undemocratic."

The case has been lauded as "a powerful statement by the highest court in the land of what it means to live in a society where the executive is subject to the rule of law."[57]

The case proceeded to Strasbourg,[58] and the Grand Chamber of the ECtHR handed down a unanimous decision, significant both for its assessment of issues relating to derogation, the right to liberty and equality, but also for its own role in assessing politically sensitive issues such as those at issue in the case. As a preliminary matter, in a notable inversion of the arguments normally made by applicants and governments respectively, the UK appeared to be asking the ECtHR to overrule its own highest court's determination on the invalidity of the government's derogation, and the applicants questioned their entitlement to do so; the ECtHR rejected this and noted that the government, like the applicants, was perfectly entitled to question the determinations of its courts in this context.

As regards the grounds for the detentions in this case, the Court engaged in close scrutiny, considering each case in detail on its facts to reach an assessment of the true reason for the detention. It found the reason (in all but one case) not to be 'pursuant to deportation,' as the government argued, but in fact the perceived threat that the individual represented and the prevention of terrorism. As this was not a lawful ground of detention under the Convention, derogation was necessary.

As had been done on the national level, the ECtHR showed particular deference in this case to the national authorities' determination of the existence of an emergency justifying derogation. It noted:

> "it was for each Government, as the guardian of their own people's safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom's executive and Parliament on this question. In addition, significant weight must be accorded to the views of

57 Speech by Lady Justice Arden, Clifford Chance Lecture 27 Jan 2005, in Max du Plessis Terrorism and National Security: The Role of the Judiciary in a Democratic Society, *European Human Rights Law Review*, 2007, Issue 4, 327.

58 *A and others v. United Kingdom*, before the App. No. 3455/05. Eleven of the 'certified' individuals applied to the ECtHR as, despite their victory at the national level, the House of Lords had issued a 'declaration of incompatibility' but the offending legislation had not been struck down and their situation had not changed. See Sangeeta Shah, 'From Westminster to Strasbourg: A and others v United Kingdom', *Human Rights Law Review* (2009) 9 (3): 473-488.

> the national courts, who were better placed to assess the evidence relating to the existence of an emergency."[59]

But while deferential on the existence of an emergency and need for derogation, and noting the appropriateness of the national judiciary's deference, the Court was more rigorous in its approach to the necessity of *particular* measures taken in response. It rejected the government's claims of judicial overreach by the House of Lords in this respect. It noted that, "as the House of Lords held, the question of proportionality is ultimately a judicial decision, particularly in a case such as the present where the applicants were deprived of their fundamental right to liberty over a long period of time."[60] The Court agreed with the House of Lords that as the measures were limited to non-nationals, they could not be necessary and proportionate.

The Court also addressed the content of the right to challenge the lawfulness of detention. The domestic proceedings had been replete with procedural controversies, from use of special advocates to reliance on secret evidence.[61] While acknowledging the need for restrictions on 'fully adversarial proceedings', the Court considered whether, in all the circumstances of each case, there was in fact an opportunity to mount a meaningful challenge to detention.[62] This included the extent to which the detainee was given detailed information concerning the evidence, and was subject to procedural safeguards. It was necessary to look at the particularities of each case to determine whether there had been such a meaningful opportunity and sufficient countervailing protections; the court concluded that detention could be justified in five cases but not in another four.[63] Whether or not one agrees with the Court's conclusions as regards the SIAC proceedings, what emerges is a reinforcement of an approach which embodies a balance between deference to national authorities, notably government and parliament on political assessments, deference to national courts with primary responsibility for weighing up proportionality, with a cautious but fairly robust approach to its own oversight role.

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59 *Ibid*, para. 180.

60 *Ibid*, para 184: "In any event, having regard to the careful way in which the House of Lords approached the issues, it cannot be said that inadequate weight was given to the views of the executive or of Parliament."

61 The process before the Special Immigration Appeals Tribunal (SIAC) has been much criticized elsewhere, including by the 'special advocates' that have sought to work within it. See eg E. Metcalfe, 'Secret Evidence', Justice (2009), available at http://www.justice.org.uk/data/files/resources/33/Secret-Evidence-10-June-2009.pdf.

62 *A &Ors* (Derogation) para 220: It noted that "there may be restrictions on the right to a fully adversarial procedure … There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities." Among the pre-requisites was that the applicant have 'sufficient information' to be able to defend himself and to give instructions to the special advocates."

63 *Ibid*, 212- 224.

In respect of the Belmarsh litigation in general, the executive's response to the judicial process is also worthy of note. The UK government changed its law and practice in light of the Belmarsh judgment in the House of Lords. It withdrew the derogation and offending legislation, and adopted new legislation providing, *inter alia*, for "control orders" rather than imprisonment for persons suspected of involvement in international terrorism.[64]

These orders spurred their own controversy and their own litigation. Challenges to control orders led to judgments which provide, among other things, an interesting analysis of the stage at which not only physical limits but also the degree of control over aspects of daily life might amount to unlawful "detention".[65] The House of Lords found in one case that those orders that allowed for persons to be confined to specified areas for up to eighteen hours per day and cut off from contact with the outside world amounted to detention by any other name, and required derogation from Article 5 of the ECHR. In other cases, while restrictions on rights, the measures were not held to amount to detention, and could therefore be restricted where necessary in the public interest, in accordance with the adaptability of the human rights framework set out in Chapter 7.[66]

These cases demonstrated the willingness of the courts to engage, and seek to grapple with, the difficult issue of what balance is an acceptable one in a democratic society facing the challenge of international terrorism. Judicial review of requests to impose or amend control orders did in fact lead to refusals and amendments in many cases, consistently with the view that review 'though not always prompt, was thorough and careful.'[67] The control orders system was repealed and recast into its present form of temporary 'prevention and investigation measures'.[68] While UK policy has rightly been subject to

64 Control orders were preventative measures, intended to protect members of the public from the risk of terrorism by imposing restraints on those suspected of involvement in terrorism-related activity. They have now been replaced with Terrorism Prevention and Investigation Measures (TPIMs). For more on control orders, *see* Chapter 7B7.2.

65 *See* e.g. *Secretary of State for the Home Department (Appellant) v. JJ and others (FC) (Respondents),* House of Lords, [2007] UKHL 45, decided 31 October 2007; and *Secretary of State for the Home Department v AF [2009] UKHL 28* (no3). In some cases control orders were set aside as violation of fair trial rights – see eg *AT v Secretary of State for the Home Department* [2012] EWCA Civ 42 – while in others they were held to be lawful despite ;e.g. the interference with right to family life of relocation – *CD v Secretary of State for the Home Department* [2011] EWHC 1273 (Admin). On control order litigation in Australian courts, see *Thomas v. Mowbray* [2007] HCA 33 (High Court of Australia, 2 August 2007), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2007/33.html>, where, in a 5 to 2 decision, the High Court of Australia upheld the Constitutionality of a criminal anti-terror law under which the judge had issued an interim control order.

66 *Ibid*. and see Chapter 7A32 for the legal framework..

67 *See* Independent Reviewer 'Control Orders in 2011' above.

68 The PTA 2005 was repealed and replaced by the Terrorism Prevention and Investigation Measures Act 2011, imposing similar but less onerous measures to control orders: *see* 7B72.

much criticism, it has certainly been responsive to, and in significant measure shaped by, the decisions of the courts in this area.

The lawfulness of control orders has been subject to judicial review in Australia also, though perhaps to less effect.[69] A constitutional challenge was lodged in *Thomas v Mowbray*, challenging the legislation enshrining the process for approval of the orders as conferring a 'non-judicial power' on a court.[70] The courts could not question the validity of the orders on human rights grounds, as UK courts had, given the lack of a bill of rights or constitutional framework enabling them to do so.[71] On the question before it, the court upheld the law. The majority found (as other courts have in very different contexts[72]) that the judiciary was an appropriate forum for assessing 'risks' that emanate from terrorism and measuring the necessity and proportionality of the response.[73] In a notable dissent, a minority rejected the judicial power of review itself, on the basis that the law in question was so 'vague and inappropriate' as not to be susceptible to meaningful judicial application. As they could not strike down the law, they refused to be drawn into the judicial application of it.

The contrast between the UK and Australian litigation is a worthwhile reminder of the perhaps obvious fact that the constitutional or human rights legislative framework will often determine the potential of the judicial role.[74] In particular, the dissent prompts reflection on the question of whether at a certain point judicial oversight risks providing a veneer of legitimacy, without the ability to exercise meaningful judicial review.

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69 They were introduced in the *Anti-Terrorism Act (No.2)* 2005 and applied to David Hicks (following the end of his sentence, having been convicted by military commission) and to Jack Thomas – *see Thomas v Mowbray*, *supra* note 65.

70 *Ibid*.

71 'Anti-terrorism control orders in Australia and the United Kingdom: a comparison', Parliament of Australia Research Paper, 29 April 2008, no. 28, 2007-08, ISSN 1834-9854, available at http://gees.org/documentos/Documen-02968.pdf.

72 *See* e.g. *A &Ors* (derogation) and '*Belmarsh*', above.

73 *Thomas v Mowbray*, in Dezynhaus and Thwaites, 'The Judiciary in a Time of Terror', in *Law and Liberty*, Lynch Mac Donald and Williams, eds (Annandale, Australia: The Federation Press, 2007).

74 On Australian control orders and the judicial role see Dezynhaus and Thwaites, ibid. On the suggestions that Australia has lacked effective judicial scrutiny due to the absence of a bill of rights, see B. Saul, 'Criminality and Terrorism' in Counter-Terrorism: International Law and Practice, Salinas de Frias, Samuel and White, eds (Oxford: Oxford University Press, 2012) at p. 166-7.

11.2 *Issue 2:* Limiting the applicability of treaty obligations: extra-territorial application and action pursuant to Security Council authorization

11.2.1 Extra Territoriality

The rationale behind the Guantánamo anomaly referred to earlier was that, due to its offshore location, the constitutional human rights obligations that normally apply on US soil would not apply there. As a constitutional matter, the fallacy of such distinction seemed to be clarified by the *Boumediene* and *Munaf* cases, but was then brought back into focus in the *Baghram* cases, discussed above. As a matter of international human rights law, the proposition was always straightforwardly wrong.[75]

The complete control exercised by the US over the part of Cuba where Guantánamo lies, as well as over the detainees themselves, meant that the US exercised jurisdiction and control to satisfy the criteria for applicability of human rights treaties.[76] As the Inter-American Commission on Human Rights observed when requesting that the US adopt precautionary measures to protect the detainees (a request ultimately unheeded): "[t]he determination of a state's responsibility [for human rights violations] turns not on the individual's nationality or presence within a particular geographic area, but rather on whether, under the specific circumstances, that person fell within the state's authority and control."[77]

While the US position is so stark as to provide an easy target, a narrow view of extraterritorial application was mirrored in government positions elsewhere, albeit in slightly less caricatured form. A clear manifestation of this was the case of *Al-Skeini & Ors* v. *Secretary of State for Defence*,[78] concerning the applicability of the ECHR to the conduct of British troops in Iraq. The case concerned six appellants, the first five of whom had been killed by UK "patrols" in occupied Basra, for example while eating a family evening meal, during a raid on a family member's house or while driving a minibus. The sixth, Baha Mousa Baha, was tortured and died in UK custody in Iraq. The object of the litigation was to compel the government to carry out an investigation into these violations as required by the ECHR, incorporated via the UK Human Rights Act.

At first the government argued that the ECHR did not apply to its actions in Iraq. In the course of litigation the government's position changed (providing an example of how the process of litigation can itself quite directly shape policy, and/or articulations of it) and it argued that the ECHR did apply

75 *See* Chapter 7A21.
76 *See* decisions of human rights courts and bodies in Chapter 7A21 and 7B.2.
77 *See* IACHR, *Precautionary Measures in Guantánamo Bay*, supra note 55.
78 *Al-Skeini v. Secretary of State for Defence* [2007] UKHL 26, 13 June 2007.

to persons in UK custody in Iraq but not to persons killed or injured on the streets of Basra.[79] When the case made its way to the highest UK court, the House of Lords, the court accepted the government's view. It found that while individuals killed or mistreated within UK "custody" were entitled to the protection of the ECHR, those on the streets of Basra – including those directly shot or mistreated by UK soldiers patrolling streets – were not.

The strength of the Lords *Al-Skeini* judgment lay in its confirmation that for individuals detained by UK authorities anywhere in the world, the ECHR and the Human Rights Act giving effect to it in the UK apply. This was a step forward from the more restrictive approach argued by the authorities of the US and at an earlier stage of the UK. The House of Lords formalistic distinctions based on custody would, however, have had the somewhat anomalous result that an individual's ability to achieve redress would depend on whether his abusers were courteous enough to arrest him beforehand, or whether his abuse occurred inside or outside prison walls.

The litigation may reveal a range of policy concerns that creep into judicial consideration, including the desire not to impose unrealistic burdens in the context of a chaotic situation on the ground in Basra. It may also reflect uneasiness as regards the interplay of IHRL and IHL.[80] But in large part, as is clear from the face of the judgment, the British Court's narrow approach reflected the fact that it considered itself bound by a previous decision of the ECtHR Grand Chamber (in *Bankovic v Belgium).* In an example of the national to international judicial dialogue, the UK courts called on Strasbourg to clarify the important question of the extra-territorial application of the ECHR.[81]

In a seminal Grand Chamber judgment of July 2011 the ECtHR clarified that the states human rights obligations under the ECHR may arise where it controls territory abroad *or* where its agents act abroad. It stated that, in the latter case, "w*hat is decisive in such cases is the exercise of physical power and control over the person in question."*[82] The Court underscored the need for a

79 At all stages the Government denied the extraterritorial applicability of the Human Rights Act (as opposed to the ECHR). The government did not challenge the fact that, if the Convention and the UK Act were applicable, there existed an obligation to carry out an investigation.

80 *See* Chapter 7B.3 'War and Human Rights' on interplay. Questions of jurisdiction and responsibility (whether rights were in fact violated) have to be distinguished however. The latter may depend on as assessment of whether the quite different IHL rules on lawful killing were respected.

81 *See* Chapter 7A.2.2. The Court had found the aerial bombardment of the Belgrade TV station not covered by the Convention as it lacked control of the territory of Belgrade, an approach that was effectively departed from in other cases including *Al-Skeini and Ors v United Kingdom (*App no. 55721/07), ECHR 7 July 2011.

82 *Al Skeini and Ors*, *supra* note 78, para. 136. Even before the Court decided in the *Al-Skeini* case (and since then) it was broadly recognized – including by the UK government in the *Bankovic* and *Al-Skeini* cases and by UK courts (*Al-Skeini and Ors v Secretary of State for Defence for the United Kingdom* [2007] UKHL 26) – that individuals detained abroad are

purposive approach to interpreting human rights conventions to avoid a 'vacuum' of legal protection.[83] As such, the war in Iraq and subsequent litigation has led to clarification of legal standards in respect of when states obligations apply extra-territorially.

Likewise, the Committee against Torture (CAT) has certainly made clear that the Convention against Torture and Cruel, Inhuman and Degrading Treatment does apply extraterritorially, and has been implicitly critical of both the UK and US for taking an approach limiting the Convention's applicability in Iraq or Afghanistan.[84] The CAT has stated, for example, that "[t]he State party should recognize and ensure that the provisions of the Convention expressed as applicable to 'territory under the State party's jurisdiction' apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world."[85]

It is increasingly clear that the many operations carried out beyond a state's borders in the context of the 'war on terror' 'of global reach'[86] undoubtedly fall within the purview of the IHRL framework. The global 'war on terror', and its myopic approach to national boundaries, has over time lead to clarification as regards the applicability of human rights norms beyond the state's territory. Early reticence by certain human rights bodies to incorporate proactively such an approach into their everyday work[87] has given way to a series of decisions and reports which have served to underscore the thesis presented years ago,

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covered by the detaining states human rights obligations; prior to the *Al-Skeini* judgment, this scenario was distinguished from the lethal use of force in non-detention settings. See also *Al-Saadoon and Mufdhi v United Kingdom* (App no 61498/08) ECtHR 02 March 2010 and others at 7A22.

83 *Al-Skeini and Ors*, *supra* note 78, para 142.

84 *See* e.g. Conclusions and recommendations of the Committee against Torture: United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006. *See also*, Conclusions and recommendations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, UN Doc. CAT/C/CR/33/3 (10 December 2004).

85 CAT Conclusions, *ibid*; see also UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee on the United States of America' (15 September 2006) UN Doc CCPR/C/USA/CO/3.

86 The 'global' character of the war against terror has been underlined by the U.S. administration since 9/11; see Chapter 6B112 'The Global War'.

87 Some reports of some human rights bodies and specialists post-9/11 failed to address the question of extra-territoriality (with the exception of the principle of non-refoulement/extradition): *see* e.g., Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, 22 October 2002, OAS Doc. OEA/Ser.L/V/II.116; Council of Europe, Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies; OSCE Charter on Preventing and Combating Terrorism, 7 December 2002. By engaging on issues in eg Iraq and Afghanistan, the issue has been given greater prominence and developed the jurisprudence.

but more relevant now than ever, that the key factor is not where, but whether, the state exercises its power and responsibility.[88]

The extraterritorial application of human rights treaties has potentially important implications for accountability in the war on terror, a large part of which is being executed extraterritorially. It is critically important to clarifying the lack of legal voids in the war on terror. A purposive approach, focused on ensuring rights protection rather than strict territorial limits certainly finds support in the spirit of the human rights instruments and their interpretation in this area post 9/11. It is also critical in giving effect to the victims' right to a remedy. In defence of a restrictive approach to the scope of application of treaties, governments have on occasion argued that states continue to be bound normatively by customary law and IHL in any event, therefore there is no void created by non-applicability of treaty obligations. But, the *Al-Skeini* case is a reminder that the extraterritorial application of human rights treaties is critically important in practice where this provides the only way of accessing a court of law and ultimately of securing a remedy.[89]

11.2.2 Applicability of HR treaties and their relationship with Security Council Resolutions?

Just as *Al-Skeini* raised questions about the applicability of human rights treaty obligations extraterritorially, subsequent cases provoked questions about the impact of such obligations where the state acts under a Security Council resolution. In *R (on the application of Al-Jedda)* v. *Secretary of State for Defence*, decided on 12 December 2007,[90] a cautious and arguably restrictive approach to human rights protection was again apparent on the domestic level, which led to an important ECtHR judgment.

The case concerned Mr. Al-Jedda, a British national, detained by British troops (acting as part of a UN force) in Iraq, allegedly on the basis of his association with and recruitment for a terrorist group involved in attacks in Iraq. He challenged his detention before British courts on the grounds that it contravened the prohibition on arbitrary detention.[91] The first question the House of Lords addressed on appeal was whether the appellant's allegedly wrongful detention was attributable to the state, as opposed to the United

88 *See* IACHR, *Precautionary Measures in Guantánamo Bay*, *supra* note 55; *see also* early extraterritoriality cases at Chapter 7B.2

89 In the UK, human rights protections are part of domestic law. The lack of an enforcement mechanism for IHL violations, and the fact that neither the US nor the UK have made the declaration required for individual petitions under CAT are both relevant to the significance of the applicability of the ECHR.

90 *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* judgment of 12 December 2007, [2007] UKHL 58.

91 European Convention on Human Rights, Article 5.

Nations, as a result of Security Council resolutions authorizing the Multinational Force in Iraq. The Lords, and the ECtHR in turn when the case proceeded internationally, determined that the relevant question of fact was whether the UK, or the UN, exercised 'effective control' over the conduct in question.[92] The court had no difficulty in distinguishing this mission from previous (controversial) cases where states actions had been held attributable to international organisations,[93] on the basis that the allegedly wrongful conduct was de facto within the control of the UK.[94] The courts refused to accept attempts to hide under the organizational umbrella to shield them from any responsibility or accountability for human rights violations.

The House of Lords was then faced with the more difficult question of whether the UK's obligations under the European Convention on Human Rights were qualified by those that arise under the UN Charter, particularly under relevant binding Security Council resolutions under Chapter VII. The House of Lords found that as the detention of individuals like Mr. Al-Jedda had been authorized by Security Council resolution, in light of Art 103 of the Charter these resolutions prevailed over any conflicting treaty obligations.[95] It concluded that the authority to detain was not therefore subject to human rights treaty obligations. While cautiously deferential to the Council's authority, the judgment sought to mitigate the effects of this by noting that the authorities must still "…ensure that the detainee's rights under Article 5 [the right to liberty under the European Convention] are not infringed to any greater extent than is inherent in such detention."[96]

This judgment was described as having potentially 'disastrous results for international human rights law if applied in the future'.[97] If it were to be understood as exempting the whole range of activity carried out pursuant to Security Council resolutions from human rights obligations (or indeed those under IHL), the result could be a serious protection gap, particularly in light

92 As the Lords noted, the UK had never claimed before the case that the UN exercised control over these operations.

93 The majority distinguished the admissibility decision of the Grand Chamber of the European Court of Human Rights in *Behrami v. France*, *Saramati v. France, Germany and Norway* (Application Nos. 71412/01 and 78166/01, May 2, 2007), which attributed the acts of KFOR to the United Nations and not to the individual countries that contributed forces to that mission.

94 A purposive approach is apparent in ECtHR decisions interpreted to avoid any 'vacuum' of legal protection. The alternative view that responsibility lay exclusively with the UN would have put the issue beyond the jurisdiction of any court or human rights forum.

95 *Al-Jedda v. Secretary of State for Defence* (Opinion of Lord Bingham), *supra* note 90, at para. 36. *See* Chapter 7B1

96 *Ibid*.

97 Tomuschat, "Case note: R (on the application of Al-Jedda) v Secretary of State for Defence. Human Rights in a multi-level system of governance and the internment of suspected terrorists". *Melbourne Journal of International Law*, Vol. 9 , at 403.

of Council activism post 9/11 discussed in Chapter 7B.[98] But the House of Lords judgment was not the last word and the issue proceeded to the ECtHR, which judgment was handed down on 7 July 2011.[99]

Unlike its domestic counterpart, the ECtHR accepted the applicants' argument that a distinction should be drawn between clear *obligations* under Security Council resolutions, and other activities that might be authorized by, or indeed broadly carried out pursuant to, such resolutions. It found that as the Security Council resolutions did not *oblige* the state to detain, and there was a 'presumption' of compatibility of legal regimes allowing for harmonious interpretation.[100] As a result, the UN resolutions should, and could, be interpreted consistently with human rights obligations.[101] The case is not uncontroversial on various grounds (including its failure to grapple fully with IHL and the interplay with IHRL),[102] and it certainly falls short of clarifying how any genuine conflict that could not be 'harmonised' away might be dealt with by the Court.[103] The case is, however, one of a number in which courts have interpreted human treaties to avoid gaps in protection or accountability, while avoiding the sort of normative conflicts often invoked by states to escape human rights responsibility in the war on terror.[104]

11.3 Issue 3: Litigating Torture protection: *Refoulement* and the Use of Torture Evidence

Practices of torture and cruel, inhuman or degrading treatment (TCIDT) have come to light in recent years with increasing regularity and, as discussed in Chapter 7, have regrettably been coupled with attempts to redefine torture

98 Lord Bingham noted that while the United Kingdom had the authority to detain the appellant pursuant to Security Council resolutions, despite conflict with human rights treaty obligations, it must still "…ensure that the detainee's rights under Article 5 [of the European Convention] are not infringed to any greater extent than is inherent in such detention."

99 *Al-Jedda v. United Kingdom*, Application no. 27021/08, [2011] ECtHR.

100 *Ibid*, para. 102

101 *Ibid*, para. 109: 'in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations.'

102 As noted in Chapter 7, the Court's myopic approach to IHL has been criticised: J Pejic, 'The European Court of Human Rights' Al-Jedda judgment: the oversight of international humanitarian law', ICRC Resource Centre, 30 September 2011.Volume 93 Number 883

103 *See* interrelationship of legal regimes in Chapter 7B.4 The 'War' and Human Rights'.

104 On the interpretation of human rights treaties to avoid 'vacuums' of protection, *see* e.g. *Al Skeini* above and Chapter 7A Conclusion. On potential conflicts with obligations pursuant to peace and security see also 7B1

according to obscenely high thresholds of barbarity,[105] to "justify" it, *inter alia* as a matter of "executive privilege", or to undermine procedural safeguards associated with it. While much of this practice has been US focused, this section highlights a couple of cases from the other side of the Atlantic that fall into the last category and illustrate attempts to erode, indirectly, the prohibition.

11.3.1 Deportation to Torture or Ill treatment

One of the most voluminous areas of litigation post 9/11 for international courts and human rights bodies relates to the transfer of persons suspected of being in some way prejudicial to national security from one state's control to another where there is a real risk that they will be subject to torture and ill-treatment. A series of cases that made their way to the European Court of Human Rights (ECtHR), provoking firm responses from governments and at times the public outcry, are worthy of note.

The first set of cases of note are *Ramzy* v. *Netherlands*[106] *and Saadi* v. *Italy*,[107] related to the deportation of individuals to states where, the applicants allege, there is a real risk of them being subject to torture and ill treatment. When the *Ramzy* case appeared before the Court, the Dutch government's case related, as many in Strasbourg do, to the difficult and not uncontroversial question of whether there was a real and personal risk to Mr Ramzy in Algeria. But several other governments, led by the UK, changed the face of the case by taking the unusual step of presenting a third-party intervention.[108] They argued that in light of the growth of "Islamist extremist terrorism" the Court should re-examine the relationship between protection from ill treatment and "national security" interests. In effect, they argued that, through introducing a "balancing" test, national security could justify exposing persons to real and imminent risk of torture if those individuals were deemed by the government to represent a risk. Numerous international NGOs intervened, based on the absolute nature of the *non-refoulement* rule (the ban on forcible return), and the standard for assessing risk.[109]

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105 Memorandum for Alberto R. Gonzales, Counsel to the President from Jay S. Bybee, Assistant Attorney General, on 'Standards of Conduct for Interrogation under 18 U.S.C. Sns. 2340-2340ª'.

106 *Ramzy v. the Netherlands*, Application no 25424/05, pending. <http://www.echr.coe.int/eng/press/2005/oct/applicationlodgedramzyvnetherlands.htm>.

107 *Saadi v. Italy* (Appl. No. 37201/06), ECtHR, Judgment of 28 February 2008.

108 The intervention was presented by the governments of Lithuania, Latvia, Portugal, and the UK. See the 'refining' and limiting of the UK government's position to cruel and inhuman treatment in the Parliamentary Joint Committee on Human Rights Thirty Second report: <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/27808.htm>.

109 For the intervention in the *Ramzy* case submitted on behalf of several international NGOs, see <www.interights.org>.

When the case of *Saadi v Italy* case then came before the court addressing similar issues – Mr Saadi claimed that he would be at risk of torture and ill-treatment in Tunisia, where mistreatment of alleged terrorists is well-documented – the UK government again seized its opportunity to argue in favour of the "balancing" test on the same terms as it had in *Ramzy*. The *Saadi* case leapfrogged the *Ramzy* case and the Grand Chamber of the Court handed down judgment on 28 February 2008.

In a unanimous judgment, the European Court remained resolute in upholding the approach established by its earlier decisions and followed by other international courts and bodies. The judgment reaffirmed that the prohibition on transfer of individuals to countries where they face a real risk of torture or other ill treatment is part of the absolute prohibition on torture. The Court was emphatic in recognizing the difficulties states face in countering terrorism, but categorical in its rebuke of the notion that there are exceptions to the absolute nature of the prohibition of torture or ill-treatment or any room for balancing: "States face immense difficulties in modern times in protecting their communities from terrorist violence. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3 [of the European Convention, prohibiting torture and other ill treatment]."

Although unsuccessful, the very fact that governments made these interventions, despite the odds of success being seriously stacked against them (in light of clear and on-point jurisprudence from the Court itself,[110] quite apart from any of the principles at stake), is telling. It may reveal a shift in the approach to rights protection by certain states at least, and a questioning and undermining of even the most sacrosanct human rights protections.

Both governments and courts alike have at times been drawn into using the deceptively attractive notion of striking a 'balance' between protecting human security and the rights of those suspected (in the broadest sense) of terrorism. Yet properly understood, balancing is appropriate language in the context of some rights but not in relation to the absolute right to be free from torture.[111] Such a balancing approach is present in the Canadian Supreme Court's decision in the *Suresh* case,[112] which met with firm criticism from international bodies such as the Human Rights Committee and CAT.[113] The

110 *See*, most notably, *Chahal v. United Kingdom*, Application no. 22414/93, ECtHR, Judgment of 15 November 1996.

111 *See* Ch. 7A52 for the legal framework and 7.B.6 'Torture and inhuman treatment' in counter-terrorism practice.

112 *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada*, 2002, SCC1 File no. 27790, January 11, 2002. *Othman (Abu Qatada) v. The United Kingdom*, Application no. 8139/09, ECtHR, 17 January 2012. Though ultimately the Court rejected the possibility of transferring the individual.

113 Conclusions and recommendations of the Committee against Torture: Canada. 07/07/2005, CAT/C/CR/34/CAN (Thirty-fourth session, 2-20 May 2005).

resolute rejection of this approach by the European Court in the cases addressed above, and others that followed shortly thereafter, is an example of the important role of the courts in reaffirming fundamental principles, in this case the absolute prohibition of torture or ill treatment and transferring an individual to the risk of such practices.[114]

Although in these and numerous other cases, the ECtHR is firm on the founding principles at stake – in this case regarding the absolute nature of the prohibition[115] – it is more flexible in its approach to the application of those principles in particular situations. One controversial example is the question of whether 'diplomatic assurances' – received from the receiving state to the effect that individuals sent there will not be subjected to abuse – can be relied upon in an evaluation of risk, and to what effect.[116] Courts and bodies have taken different approaches as discussed in Chapter 7B and though there is strong authority in support of the view that where violations are systematic, assurances should not be used, the *Othman* judgment of 2012 exemplifies a more flexible approach requiring the state (and in turn the ECHR in oversight function) to weigh up the reliability of assurances in the particular situation in light of a complex array of factors.[117] While there is no compromise on the absolute ban, there is considerable flexibility on determining whether there is a risk of such TCIDT in the first place.[118] It remains to be seen whether such flexibility and accommodation ultimately amounts to a way of circumventing the protection in practice.

The *Othman* case was also significant in other ways, with the Court not only reiterated the principle of the absolute ban on transfer to torture but

114 *See Othman (Abu Qatada) v. The United Kingdom*, *supra* note 114 and *Babar Ahmed & Others v UK,* Applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, ECtHR, 24 September 2012. In the latter case the Court found that individuals could be transferred to the U.S. as there was no established risk of a violation of Art 3.

115 *Othman*, *supra* note 114, para. 185 "Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion". *Babar Ahmad and others v. The United Kingdom, supra* note 114.

116 *See* e.g. Chapter 7A5.10 and B.10. Eg UNCAT, Conclusions and recommendations of the Committee against Torture: U.S.A., Thirty-sixth session, 1-19 May 2006; UNCAT, *Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005). UN Human Rights Committee, *Mohammed Alzery v. Sweden,* CCPR/C/88/D/1416/2005, 10 November 2006.

117 *Othman (Abu Qatada) v The United Kingdom*, *supra* note 114, at 187-189, asking "whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time (see *Saadi*, at § 148)". The factors are set out at paras 188-9 of the judgment.

118 The increasing openness to reliance on diplomatic assurances which is subject to considerable criticism; *see* e.g. Amnesty International, <http://www.concurringopinions.com/archives/2012/01/echr-on-diplomatic-assurances.html>. *See* e.g. the suggested high threshold in the interpretation of what amounts to TCIDT in the counter-terrorism extradition or deportation context, in *Babar Ahmad and Others v UK*, *supra* note 114.

progressively developing the scope of the non-refoulement rule. It found that the absolute ban on transfer also applied to transfer to a 'flagrant denial of justice,' including (but not limited to) the risk of reliance on evidence obtained through torture in criminal proceedings. While the precise content of the flagrant denial of justice norm will continue to evolve case by case, this contribution to developing or clarifying the refoulement rule through litigation may be one positive by-product of war on terror litigation.

11.3.2 A & Ors – admissibility of torture evidence

A second issue related to safeguards against torture, which has arisen in several states in the context of the fight against international terrorism in recent years, is the reliance on, and admissibility of, evidence obtained through torture and ill treatment.

In the UK again, the issue played out in the case of *A and Others* v. *Secretary of State for the Home Department (No. 2)*.[119] The case concerned the admissibility, before the UK Special Immigration Appeals Commission, of evidence that may have been obtained through torture by foreign states. The UK government advanced the argument – anomalous perhaps, yet accepted by the Court of Appeal – that evidence obtained through torture at the hand of a UK official would be inadmissible, whereas evidence obtained through torture at the hand of foreign officials, for whom the UK is not responsible, is admissible.

In its judgment of 8 December 2005, the House of Lords rejected this rationale, finding that torture is torture no matter who does it, and that such evidence can never be admitted in legal proceedings. It also noted the link between the safeguards against torture and the incidence of torture, finding that the state "cannot condemn torture while making use of the mute confession obtained through torture, because the effect is to encourage torture".[120]

The judgment is again a strong reassertion of principle, seeing the admissibility of evidence not only as linked to fair trial issues but as an inherent aspect of the positive obligations around the torture prohibition itself. In other respects it is worth flagging that the judgment is somewhat more limited. First, while clear on the principle of inadmissibility, it is less clear – and the court was more cautious – on how the rule would operate in practice. The court found that evidence is inadmissible where the tribunal had "established" on a balance of probabilities that it had been obtained under torture. If that is not "established" – as presumably happens not infrequently in view of the opacity and uncertainty surrounding intelligence – but there remained a real

119 *A v.SSHD (No. 2)* [2005] UKHL 71.
120 *Ibid*, p. 30 citing McNally J.

risk that such was the case, the court found that evidence could be admitted but afforded less weight.[121]

Second, the court focused on the issue of admissibility in 'proceedings', but in so doing indicated what may be an overly sweeping inclination to accept the lawfulness of the use of torture evidence for other purposes, such as arrest, search or detention. Without grappling with the difficult legal issues this raises, the Court's judgment has been cited in support of the proposition that reliance on, solicit or trade in evidence obtained through torture for purposes outside the courtroom is not covered by the prohibition.[122]

This decision was followed by a seriesof other decisions in recent years on the national, regional and international levels which have affirmed the prohibition on the admissibility of evidence obtained through torture. These include ECHR decision in *Othman v UK* referred to above and others[123], the African Commission HPR decision in *Sabbeh & Ors v Egypt*, or the Committee against Torture's decision in *Ktiti v Morocco*.[124] As in the A&Ors case above, some uncertainty around the edges of the prohibition, as regards whether evidence might be admitted exceptionally but afforded less weight for example,[125] may over time come to undermine the rule, but there has been a powerful reassertion of principle by courts and bodies across the regional and international spectra in respect of this issue.

11.4 *Issue 4:* Damages Litigation for rendition victims

The practice of "extraordinary rendition" – kidnapping and transfer of individuals without any process of law to secret detention and torture – is addressed in detail in Chapter 10. The extraordinary rendition programme (ERP) plainly involves the most serious violations of international norms discussed in preceding chapters, including the right to remedy and reparation.[126]

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121 In contrast to the majority finding, see the test proposed by Lord Bingham, according to which evidence should be regarded as inadmissible if the executive had been unable to show that it was not obtained by torture (*A v. SSHD (No. 2)*, paras. 54-56). This has been criticised in the CAT Concluding Observations on the Fifth Periodic report of the U.K., 31 May 2013.

122 While cited in this way in UK courts, as noted in Chapter 10, the issue has been differently considered by UN special rapporteur and other experts who suggest that creating a 'market' for torture, like admitting such evidence in proceedings, falls foul of the prohibition. See also Chapter 3 on state responsibility e.g. for aiding and assisting violations.

123 *See also* e.g. *El Haski v Belgium*, Chapter 7.

124 CAT, Communication No. 419/2010, *Yousri Ktiti v Morocco*, 5 July 2011, CAT/C/46/D/419/2010.

125 *Ibid*; *see also* arguments advanced in *el Haski*, Chapter 7.

126 *See* Chapter 7.B14 'Justice and Accountability' and Chapter 10.

As foreshadowed in Chapter 10, rendition litigation poses particular challenges for litigators, which can euphemistically be grouped as "access" issues of various types: access to victims, to evidence and to courts. First and most obviously, the cases often concern disappeared persons. Despite the excellent monitoring work done by NGOs, journalists and investigators, we often do not know who or where the victims are, at least not at the point when they most need protection. While jurisdictions vary, the ability to bring "public interest" cases without identified victims is extremely limited. Secondly, access to information or evidence is inevitably extremely challenging, given the clandestine nature of operations, but made even harder by what has been described as a 'systematic cover-up' to preclude such access.[127] The third group of access issues relate to effective access to courts. In the rare situation where a person emerges and is willing to put his or her head above the parapet again despite past abuses, various legal obstacles have presented themselves and often led to the cases being thrown out, as discussed briefly below.

Among the grounds that have led to cases being thrown out in US courts is the doctrine of 'state secrecy'.[128] A case in point, discussed in Chapter 10, is that of Khalid el-Masri, the German citizen arrested by Macedonia border officials in December 2003, apparently because he has the same name as the alleged mentor of the al-Qaeda Hamburg cell and on suspicion that his passport was a forgery.[129] After over a year of interrogation and torture at several international locations, during which time he was prevented from communicating with anyone outside the detention facility, including his family and the German government, it became apparent to his captors that his passport was genuine and that he had nothing to do with the other el-Masri. He was finally set free but given no apology, help in re-establishing his life or offer of compensation. When questioned in Germany over the el-Masri affair and refusing to comment, the US Defense Secretary Condoleezza Rice stated: "I believe this will be handled in the proper courts here in Germany and if necessary in American courts as well".

When a suit *was* brought before a US court, the government invoked the so-called "state secrets" privilege, which applies in US law when there is a 'reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged.'[130] The government argued that the "entire aim of the case is to establish state secrets," and the case was dismissed in its entirety by the US District Court, affirmed

127 *See* Marty reports e.g. Information Memorandum II, above, available at <http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf.>.

128 The state secrets privilege applies in US law when there is a 'reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged' *United States v Reynolds* 345 US 1, 10 (1953).

129 Information on the case is available at <http://www.aclu.org/safefree/torture/29868res20070524.html>.

130 *United States v Reynolds*, *supra* note 128.

by the US Court of Appeals for the Fourth Circuit.[131] It ruled that the protection against disclosure was absolute, including against *in camera* or even *ex parte* inspection, and rejected any role for the Court in balancing of the need for confidentiality against el-Masri's need for the information and right to a remedy.[132] In October 2007, the Supreme Court decided, without giving reasons, to refuse to review the case.[133]

The same approach has been adopted in several other cases since then. One case brought by Binyam Mohamed and four others against Jeppesen Dataplan, Inc, a Company accused of providing false flight plans and other logistical support for the CIA rendition flights.[134] Although this time in a narrow decision,[135] the Court held that the Obama administration's assertion of state secrets privilege required that the court dismiss the case in its entirety,[136] and the Supreme Court again denied *certiorari*.[137]

Canadian Maher Arar's case followed a comparable pattern.[138] Although a Canadian investigation exonerated Arar of all wrongdoing and found he had been tortured at US hands, his case before US courts was dismissed on state secrets grounds. The DC Circuit's decision en banc to dismiss the case has been said to reveal an interesting difference of view between the majority which suggested that the 'separation of powers' doctrine required such deference to the executive, and a strong dissenting decision which suggested, on the contrary, that it is because of the separation of powers that courts must uphold the law and challenge the executive in situations such as this.[139] As Judge Guido Calabresi wrote in his dissent "I believe that when the history

131 *El-Masri v United States*, No. 06-1667, March 2, 2007 (U.S. Ct. Appeals 4th. Cir.), at 305.

132 *El-Masri v United States, supra* note 131, at 312. 310 dismissal as his claims and the Government's defenses could not be fairly litigated without disclosure of secrets absolutely protected by the state secrets privilege. In the district court: *El Masri v Tenet*, Case 1:05-cv-01417-TSE-TRJ.

133 In the Supreme Court: *El Masri v United States* Case No. 06-1613. For details of the petition lodged before the Inter-American Commission on Human Rights; http://www.aclu.org/pdfs/safefree/elmasri_iachr_20080409.pdf; see below ECtHR decision 2012.

134 *Mohamed v Jeppesen Dataplan Inc* 614 F.3d 1070 (9th Cir 2010) (*en banc*) <http://www.ca9.uscourts.gov/ datastore/opinions/2010/09/08/08-15693.pdf>.

135 Eg: U.S. Court of Appeals for the Fourth Circuit affirmed on January 23, 2012 confirmed the dismissal of Jose Padilla's civil suit against Rumsfeld and others for their role in his unlawful detention. The U.S. District Court for the District of South Carolina ruled on February 17, 2011 that an American citizen designated an "enemy combatant" by the executive branch and tortured by government officials could not bring suit to vindicate his constitutional rights. See legal documents on <http://www.aclu.org/national-security/padilla-v-rumsfeld-legal-documents>.

136 *Mohamed v Jeppesen Dataplan Inc*., *supra* note 134.

137 *See* Supreme Court website: <http://www.supremecourt.gov/orders/courtorders/051611zor.pdf>. The Court declined without reasons to review the Court of Appeals decision.

138 On November 2, 2009, the Second Circuit Court of Appeals *en banc* affirmed the district court's decision dismissing the case. On June 14, 2010, the Supreme Court denied Mr. Arar's petition for *certiorari*. For relevant documents *see* <http://ccrjustice.org/arar>.

139 *See* Judge Guido Calabresi's dissent in the *Arar* case, which was decided one of four.

of this distinguished court is written, today's majority decision will be viewed with dismay."[140] The Appeals Court upheld and the Supreme Court once again refused, despite the constitutional implications for human rights and the judicial function, to consider the case.[141]

These are not proceedings in which courts settled on (or even considered) excluding particular documents, evidence or sources, holding parts of the hearing in camera, or taking other special measures. There has been no consideration of underlying material, difficult balancing of competing concerns, but rather the wholesale vacation of proceedings alleging government misconduct, on the basis of the government's own assessment that those proceedings might *per se* damage national security.[142] There is no apparent consideration of the rights of victims in the decision to dismiss the case,[143] and no further avenue for redress. Rendition victims are effectively left, once again, beyond the protection of the law.

State secrecy is not the only impediment to judicial review or access to civil accountability for rendition victims in US courts, should any of them ever get past the state secrets barrier. A further problem that has arisen in relation to claims for relief by victims of torture has been functional immunities. For example in the case of Shafiq Rasul before the US courts, in which several former Guantanamo detainees sued Defence Secretary Rumsfeld and others for alleged torture at Guantanamo Bay, the Courts accepted the government's argument that torture could come within the scope of employment and as a consequence afforded immunity from civil suit.[144] In this way the court not only precluded access to justice, but lent respectability to the government's notion that torture can be part of the official functions of a state official, at least in the context of counter-terrorism.[145]

While the US courts approach to these issues has been particularly extreme, they are not the only courts dealing with the handling of claims of national security in the face of victims' claims for justice or reparation or accountability.

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140 *Ibid*.

141 *See* 'Arar v. Ashcroft et al: Synopsis', Center for Constitutional Rights, available at <http://ccrjustice.org/arar>.

142 E.g. In *el Masri*, the US Court of Appeals held that the information was subject to the privilege on the sole basis of reviewing a confidential government affidavit, without response from El-Masri and without inspecting the privileged information itself. *El-Masri v United States, supra* note 131, at 305.

143 *See Mohamed v Jeppesen Dataplan Inc*, INTERIGHTS <http://www.interights.org/mohamed/index.htm> accessed 12 March 2011, including third party intervention on international standards by INTERIGHTS, Redress, International Commission of Jurists, and World Organization against Torture.

144 *Rasul v Myers* 512 F.3d 644, 660 (DC Cir 2008) (*Rasul I*), *vacated Rasul v Myers* 129 SCt 763 (2008), *aff'd Rasul v Myers* 563 F.3d 527 (DC Cir 2009) (per curiam).

145 Cf Court of Appeals for the Fourth Circuit decision, 2 November 2012 on immunities in another (non-war on terror) context against former Somali General Mohamed Ali Samantar rejecting the absolute deference to the executive branch in determining immunity for "official acts."

The Parliamentary Assembly of the Council of Europe report on secret prisons criticizes six European states for undue resort to state secrecy or national security to impede investigations.[146] The Italian experience in the criminal case concerning the Abu Omar abduction in Milan exemplified a broad invocation of state secrets and the role of the courts in grappling, not always consistently, with how to balance such concerns in the public interest. The state secrets doctrine was originally invoked to seek the striking out of a rendition investigation in the criminal case. The Constitutional Court allowed the case to continue but struck out certain documents on the basis of their secrecy, and severely limited the scope of criminal prosecutions.[147] However, a few years later, Italy's Court of Cassation reversed part of the decision thereby ensuring that the prosecution of five senior Italian secret service agents can proceed, despite state secrets claims.[148]

In the UK there is no state secrets doctrine that would bar litigation, but there too concerns about an overreaching approach to national security emerge.[149] The introduction of a 'closed material proceeding' for civil cases involving classified information raise doubts about the impact on the judicial process, and also illustrate the ancillary negative effects that litigation can have. In the case brought by Bisher Al-Rawi and five other former Guantanamo Bay detainees against the UK government for its role in their overseas torture, the government asked the court to recognise a common-law rule such that all classified information would be heard in a 'closed material proceeding to which the plaintiffs would not have access',[150] other than through a 'special advocate', who at that moment is no longer allowed to have contact with the plaintiff.[151] The divisional court held that it is open to a court to order such a procedure[152] But the Court of Appeal reversed that decision and the

146 Marty Report, 11 June 2007, doc. 11302, at p. 1: criticizes the US, Poland, Russia, Romania, Macedonia. Italy, Germany for using national security and states secrets to impede justice.

147 *See* Abu Omar in Dick Marty, 'Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states', Report, 12 June 2006, Doc. 10957, Council of Europe, at para 162; *See also* "Italian Court Upends Trial Involving CIA Links", *New York Times,* 11 March 2009, available at http://www.nytimes.com/2009/03/12/world/europe/12italy.html?_r=3.

148 *See* Chapter 10.

149 Such concerns have been held to justify the refusal to allow the disclosure of information or documents despite the impact on human rights E.g. *Binyam Mohamad v. Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152.

150 A 'closed material procedure' is a procedure in which a party is permitted to rely on pleadings and evidence without disclosing it to the other(s), and the court may hear the party and consider evidence without one of the parties. *See Al Rawi & Ors*, *supra* note 19, Justice and Security Act 2013 (c. 18) UK, and *Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) (No. 1)* [2013] UKSC 38 ('Bank Mellat').

151 *Al Rawi & Ors, supra* note 19, para 2.

152 *Al Rawi & Ors. supra* note 19.

Supreme Court upheld the reversal.[153] The Supreme Court ruled that courts could not order a "closed material procedure," allowing the government to rely on secret material in closed sessions of the court without statutory authority. Just as has been seen in the habeas litigation, cases can act as a catalyst for better and for worse in terms of rights protection. In this case it prompted the executive to seek such statutory authority, and the Justice and Security Act incorporates a broad procedure for closed civil proceedings in national security cases to which only one party has access to the court or to the evidence, and potentially also closed judgments that can be seen only by one of the parties.[154] Such procedures, and the government's inclination to over-use of what should be exceptional procedures, has been widely criticised, including by the Supreme Court.[155]

Developing practice towards justice and accountability in respect of renditions, set out at Chapter 10, are likely to spawn a more developed body of practice in the years to come. One encouraging example of a decision that served to clarify the true nature of rendition, confronting the government's dismissal assertions that it was simply a deportation of an unlawful alien, was the case of Khalid Mahmood Rashid before the Supreme Court of South Africa.[156]

In the first few years after victims of the ERP emerged, attention focused on national courts (in a range of states including the US, UK and Egypt), often to no effect.[157] Where rendition cases have failed in domestic courts, notably in the US, or where states have failed to investigate and hold individuals to account as they are required by human rights law to do but as few European states have yet to do,[158] victims have pursued justice elsewhere, using a range of transnational litigation possibilities.[159] Such regional and international

153 *Al Rawi and Ors v Security Service & Ors* [2010] EWCA Civ 482 (04 May 2010), para 70. On 13 July, in the case of *Al Rawi and others v. The Security Services and others*. See Amnesty Annual Report 2012: United Kingdom, available at https://www.amnesty.org/en/region/uk/report-2012 (accessed on October 26, 2013).

154 *See* Justice and Security Bill 2013 in Chapter 7B.

155 *See Bank Mellat*, *supra* note 150.

156 *Jeebhia & Others v Minister for Home Affairs & Anr*. 2009 (5) SA 54, in the Supreme Court of South Africa. See Max du Plessis, 'Removals, Terrorism and Human Rights – Reflections on Rashid', (2009) 25 *SAJHR*. The applicant had been rendered from South Africa to Pakistan.

157 Habib was awarded an undisclosed sum of money from the Australian government, reportedly in exchange for not pursuing legal action. See Egypt Independent 'Ex-Gitmo Australian sues Former Egyptian officials' AFP April 15, 2011, available at <http://www.egyptindependent.com/news/ex-gitmo-australian-sues-former-egyptian-officials>.

158 *See* in Chapter 10 and stinging criticisms from international human rights experts and bodies. *See* Ch 10 for detailed examples of what states have and have not done and the range of forms of responsibility by states..

159 Criminal court responses, including initiatives investigating and potentially prosecuting US agents and officials in foreign courts is not addressed here; *see* e.g. Ch 8 on the role of Spanish and other courts.

cases have begun in earnest in recent years. As noted in Chapter 10, the first judgment was handed down in the *el Masri v Macedonia* case,[160] while international proceedings are now pending before most human rights fora, including the Inter-American Commission on Human Rights,[161] the African Commission on Human Rights,[162] and, in particular volume, the ECtHR[163] among others.[164] Given the extent of the obstacles in the domestic context, these regional or international bodies may represent a unique opportunity for victims to have their case heard and ultimately to secure some vindication of their rights.

11.5 *Issue 5:* Litigating 'Terrorist' Listing and Labeling

The terrorism label has been applied liberally since 9/11, without clarity as to its scope (the term being undefined or ill-defined), often without due process, and with serious consequences for those thus branded or others associated with them.

Perhaps the most obvious manifestation of this phenomenon are the various terrorism "lists" established at the national, regional and (under the Security Council's watchful eye) international level. While systems and safeguards vary, key human rights concerns emerge from the lack of transparency around the reasons for inclusion on them, and the lack of meaningful opportunity to challenge such inclusion.[165] Litigation has had a crucial role to play in calling governments – and to some degree, at least indirectly, the Security Council – to account and to provide a degree of judicial oversight to this potentially arbitrary practice.

Significant success, with wide ranging impact, was had by litigants before the European Court of Justice (ECJ). In 2006 the Court held that individuals

160 *El Masri v The Former Republic of Macedonia*, Application no. 39630/09 ECtHR, 13 December 2012.

161 *Khaled El-Masri v United States* P-419-08, Inter-American Commission on Human Rights (2008). *See* too American Civil Liberties Union website <http://www.aclu.org/national-security/el-masri-v-tenet>.

162 *See* INTERIGHTS, 'al-Asad v Djibouti' <http://www.interights.org/al-Asad/index.htm>.

163 These include El-Masri's detention by Macedonian border officials, Abu Zubaydah's torture at a secret site in Lithuania, Abu Omar's abduction in Italy, al Nashiri's detention at the Polish and Romanian secret detention site; *El-Masri v Macedonia* (App no 39630/09) ECtHR 8 October 2010; *Nasr and Ghali v. Italy* <www.interights.org/zubaydah>; *al Nashiri v Poland and Romania*, <http://www.opensocietyfoundations.org/litigation/al-nashiri-v-romania>.

164 E.g. for HRC comments on the *El-Masri* case see Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant Concluding Observations Of The Human Committee, The Former Yugoslav Republic Of Macedonia 17 April 2008 HRC, Ninety-second session New York, 17 March – 4 April 2008.

165 *See* Chapter 7B.1 'Security v Human Rights Post 9/11' or and Chapter 7B.8 'Listing and Delisting'.

associated with a banned organization had the right to reasons for their listing, to effective judicial protection and to be heard.[166] Though disputed by the respondent state, the ECJ confirmed that while the common EU position which had led to the listing in the first place could not be reviewed by the Court, the decision to include a particular organization on the list could. This robust approach was maintained by the Grand Chamber of the ECJ in respect of listings authorized by the Security Council in the seminal *Kadi* decision where the ECJ rejected the argument that it could not review the lawfulness of EU sanctions on the basis that they were intended to give effect to SC resolutions.[167] The ECJ found that the EU decision to give effect to the SC resolution's sanctions list, without affording individuals the opportunity to challenge, was inconsistent with fundamental rights of judicial oversight and struck it down.[168] The Court recognized the need for the judiciary to 'accommodate on the one hand legitimate security concerns… and, on the other hand, the need to accord the individual a sufficient measure of procedural justice."[169]

The *Kadi* case provoked controversy and acclaim in perhaps equal measure for its wide-reaching implications, effectively introducing a measure of judicial review (albeit indirect) of measures taken pursuant to Chapter VII obligations.[170] A further indirect outcome of the litigation has been the improvement in the delisting procedures,[171] including the establishment of an ombudsperson to recommend delisting under 1267 sanctions regime. Although her appointment may have been an attempt to avoid further judicial oversight by having an 'alternative' mechanism, without judicial powers, she has recom-

166 Case T.228/02, *Organisation des Modjahedines du peuple d'Iran, v Council of the European Union, United Kingdom of Great Britain and Northern Ireland.* Judgment Of The Court Of First Instance (Second Chamber) 12 December 2006.

167 *Kadi* and *Yusef* were unsuccessful challenges at first instance, 29 Case T.306/01 *Yusuf and Al Barakaat International Foundation* v *Council and Commission* [2005] ECR II-3533, ('*Yusuf*'), paragraph 73, and Case T.315/01 *Kadi* v *Council and Commission* [2005] ECR II-3649, ('*Kadi*'). The challenges were won on appeal: Cases C-402/05 P and C-415/05 P, judgment of Grand Chamber 3 September 2008, at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-402/05>. The Court refers to the standards of the ECtHR judgment in *A & Others v United Kingdom* cited earlier to conclude that the applicant was not in a position to mount an effective challenge.

168 It provided certain benchmarks for ensuring meaningful opportunity to challenge. See paras 342-344.

169 *Yassin Abdullah Kadi v European Commission* Case T-85/09 [2010] ECR 00 para 134. *Kadi v Commission* 30 Sept 2010, in Allan Rosas, 'Counter-Terrorism and the Rule of Law: Issues of Judicial Control', in: A-M Salinas de Frías, KHL Samuel and ND White, eds., *Counter-Terrorism: International Law and Practice* (Oxford, Oxford University Press 2012), at p. 99

170 *See* Chapter 7B.1, 'Security v Human Rights Post 9/11' and Ch 7.B.8 'Listing and Delisting'. Note the discussion on Art 103 and the pre-eminence afforded to obligations under Chapter 7 over other obligations under the Charter. This decision appears to require EU states to meet their human rights obligations even where it may conflict with the obligations under SC resolutions by considering the two as separate regimes. For those in favor and against see Rosas in de Frias Samuel and White, *supra* note 169, at p. 99-100.

171 *Kadi* also lead to enhancing the 'de-listing' procedure, *See* Ch 7B.1.

mended and brought about significant delistings in practice,[172] and enhanced transparency considerably.[173] The due process deficit of sanctions regimes remained stark,[174] however, and when the *Kadi* case came back before the Court a second time the ECJ had not changed its position that the sanctions orders were invalid, despite certain improvements and the existence of the Ombudsperson's position.[175]

The rationale of the *Kadi* case has been followed on numerous occasions since then,[176] as similar issues have come before human rights courts and bodies. For example, the case of *Sayadi & Vinck* before the Human Rights Committee "exposed the problems of wrong listings and the glaring deficiency of the delisting procedure" for the 1267 sanctions regime.[177] The Belgian couple alleged to have provided financial and other assistance to individuals associated with Al-Qaeda were added to the 1267 sanctions list in 2003 at the Belgian government's behest, but when the Belgian government requested delisting (in one case following a court order) the request was declined. The matter then went before the HRC, which found Belgium responsible for the action that lead to them being on the list.[178]

Most recently, in *Nada v Switzerland*, the European Court of Human Rights[179] found that Switzerland had violated a listed applicant's rights under Article 8 (respect for private and family life and for the home).[180] The Court found that, despite the Council resolution imposing sanctions on the individuals in question, there were steps the state could have taken to avoid or minimize the violations arising from Council-imposed sanctions and by failing

172 Chapter 'Fair process and the Security Council', a case for the Office of the Ombudsperson', K. Prost, in Frias, White and Samuel, Counter-terrorism, note 177.

173 *See* Chapter 7B.1 'Security v Human Rights'.

174 The ombudsperson applies only to the 1267 sanctions list, relevant to counter-terrorism but note that although 1267 has been subject of most debate, other lists have no ombudsperson and less accountability.

175 *See Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, ECJ, Appeal Judgment, 18 July 2013. On the nature, scope and questionable legitimacy of some of those measures *see* Chapter 7B.1 and 7.

176 Cases have also been lodged before the European Court of Justice eg Case T-306/01, *Abdirisak Aden and Others* v. *Council and Commission*, 16 February 2002, OJ C 44, pp 27-8; Case T-318/01, *Omar Mohammed Othman* v. *Council and Commission*, 6763/02, 27 February 2002.

177 H. Keller and A. Fischer, 'The UN Anti-terror Sanctions Regime Under Pressure', 9:2 *H.R.L.Rev.* (2009) 257 at 260.

178 *Sayadi v. Belgium*, Human Rights Committee, UN Doc. CCPR/C/94/D/1472/2006 (Dec. 29, 2008) The HRC communication following a judicial decision in their favor from the Brussels Court of First Instance and two unsuccessful delisting requests by the Belgian government on their behalf; *ibid*.

179 *Nada v Switzerland*, Application no. 10593/08, ECtHR, Grand Chamber Judgment, 12 September 2012.

180 For the majority, the state had discretion in the implementation of the resolution, but this was controversial – *see* Joint Concurring Opinion of Judges Bratza, Nicolaou and Yudkivska at para. 5 – but not germane to the findings.

to do so the state had infringed on rights in a manner that was not necessary and proportionate.[181] It was suggested that Switzerland could have 'adapted' the sanctions regime to the applicant's individual situation[182] thereby mitigating the effects on the applicant. Building on the ECJ case, it found that the state could and should have provided mechanisms for review of the measures[183] and the failure to do was an unlawful denial of the right to a remedy.[184]

Domestic courts have also given insight into the shape of this domestic judicial review, and have on numerous occasions ordered the delisting, or measures to bring about delisting.[185] In 2008 for example the UK Court of Appeal upheld a decision of the Proscribed Organisations Appeal Commission requiring the removal of an Iranian opposition group from its blacklist of terror organizations.[186] The case illustrates the willingness of the courts, assessing in detail the facts and evidence available, to challenge the Secretary of State's determination that the organization was concerned in terrorism. The Court was satisfied that the organization was no longer engaged in violence, and it confirmed that proscription could not be justified on the basis that an organization had been engaged in violence and might at a future date reacquire the capacity and intent to so engage.

Another national decision that showed the national courts willingness to reject measures despite their having been authorized by the Security Council is *Abdelrazik v Canada*[187] where a Canadian court found the refusal to allow the applicant to return to Canada a violation of his rights under the Canadian Charter of Rights and Freedoms. One judge was so forthcoming in his rebuke of the UN listing regime as to describe 'the 1267 Committee regime as a denial of basic legal remedies and untenable under the principles of human rights', which he described as 'a situation for a listed person not unlike that of Josef K in Kafka's The Trial…".[188] This and other cases provides an example of courts

181 E.g. the state could have informed other states and the Security Council's Sanctions Committee that it had closed an investigation years previously concluding that there was no reasonable suspicion against the applicant.

182 *Nada*, *supra* note 179, para. 196.

183 *Ibid*, para. 212: "…. there was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions."

184 The Court criticized the fact that "the applicant did not have any effective means of obtaining the removal of his name from the list … and therefore no remedy …" in violation of Article 13 of the ECHR. *Ibid*, para 213. As noted in Ch7.B.1, it is unclear what will happen if domestic courts find that such a right would in fact conflict with obligations under SC resolutions.

185 On the latter, see *Sayadi* case discussed earlier where Belgian courts ordered the government to seek delisting at UN level.

186 *Secretary of State for the Home Department v Lord Alton of Liverpool and Others*, Judgment, 7 May 2008 Court of Appeal, EWCA Civ.

187 *Abdelrazik v Canada*, 2009 FC 580, (Federal Court of Canada).

188 *Ibid*, para. 51 and 53; see Rosas, *supra* note 169, at p. 100.

questioning the necessity of measures, willingness to enter into merits and exposes flimsiness in the basis for listing of individuals or groups or the inadequacies of the listing and delisting system.[189]

The terrorism label can have other far-reaching consequences beyond listing, not only for the alleged terrorists themselves, but for others associated with them.[190] Many manifestations are seen throughout this book. A case already explored is the case of *Holder v Humanitarian Law Project*, which upheld the notion that providing humanitarian support and education on IHL could constitute 'material support for terrorism' – an example of courts applying anomalous laws reaping anomalous results.[191]

Another unusual illustration is found in a case litigated in the ECtHR on behalf of the family of killed Chechen leader Maskhadov.[192] Laws in the Russian Federation that were applied in this case stipulate that if persons deemed to be terrorists are killed by the state in the course of counter-terrorist operations, their bodies will not be returned to their families. This draconian measure targets families who are deeply affected by being unable to duly observe a mourning period, pay their last respects and bury their family member in accordance with Islamic religious requirements, which according to their religious tradition may ultimately lead to the deceased being denied access to heaven. While there is no meaningful relationship between the prevention of terrorism and such a measure, it is justified by reference to the deterrence of terrorism. This case, which has been declared admissible by the ECtHR, provides an example of the blanket use of the "terrorist" label to justify otherwise unacceptable special forms of treatment, and to punish those "associated" with persons accused of ill-defined acts of terrorism.

A positive example of courts curbing the creeping effect of the notion of guilt by association arose in an Australian case of *Haneef v. Minister for Immigration and Citizenship* (Federal Court of Australia).[193] The case concerned Mohamed Haneef, whose visa was revoked by Australian authorities on the grounds that he was the second cousin of one of the men who had crashed a car into Glasgow airport's terminal building, had stayed in the same hostel and, on leaving the country, had left him his mobile phone.

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189 The principles to emerge from the courts' consideration of these cases are set out in Chapter 7B.1 'Security v Human Rights.'

190 *See* Chapter 4 on human rights issues also arising from attempts to criminalize membership of or association with listed groups or organizations. Criminal responsibility must be individual, not collective or objective. See SC Res. 1390 (2002), 16 January 2002, UN Doc. S/RES/1390 (2002), which modifies the sanctions regime originally imposed in SC Resolutions 1267 (1999).

191 *Holder* v. *Humanitarian Law Project*, 561 U. S. __ (2010) in Chapter 7B5 and Chapter 4.

192 *Kusama Yazedovna Maskhadova and Others v. Russia*, Application No. 18071/05, Judgment of 6 June 2013 (Final on 10 July 2013). The author is counsel with colleagues at INTERIGHTS on behalf of the family of deceased Chechen leader Aslan Maskhadov.

193 Haneef v Minister for Immigration and Citizenship [2007] FCA 1273, Federal Court Of Australia, Spender J., 21 August 2007.

In the Australian courts the authorities argued that any form of "association" (family or other) with persons accused of this sort of criminal activity was enough to fail the "character test" laid down in Australian immigration law. The courts rejected this contention and provided a fitting rebuke to the spreading notion of guilt by association and the dangers of it. One judge questioned whether he might also fall within the category of persons having associated with terrorists, given his former professional association as a barrister (answered yes). He held that, for the law to apply, the "association" must itself be of a criminal rather than of a family or innocent nature. The need to tighten up the approach to 'association' was upheld on appeal.[194] Ultimately Mr. Haneef was granted damages, and an enquiry into his case has been launched.[195]

Examples abound of the misplaced resort to the rhetoric of terrorism and the 'war on terror' in the context of a broad range of human rights litigation. Take the observations of the government of Botswana in a case before the African Commission on Human and Peoples Rights:

> "We wish to recall here the bombings that occurred in London, Madrid and the 2001 events in NY and more recently Egypt. It is against this background that Botswana reminds the Commission that the declaration of Mr Good as a prohibited immigrant was made 'in the interests of peace, stability and national security'. (…) We have given examples of traumatic results that occur once there is a lapse in dealing with national security issues (…) If the President visualizes a threat to national security, it is wrong for him to wait for the threat to materialize into a national disaster. It is right to state that decisions whether something is or is not in the interest of national security are not a matter for any organ other than the executive."[196]

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194 Minister for Immigration & Citizenship v Haneef, [2007] FCAFC 203, Federal Court of Australia – Full Court Decisions, 21 December 2007. In an appeal regarding cancellation of a visa that had been issued to Dr. Haneef permitting him to come to Australia and to work as a doctor. The Full Court has agreed with the lower court that a narrower interpretation of "association" than that applied by the government should be taken and have *some* bearing upon the person's character. The Court therefore dismissed the Minister's appeal.

195 In December 2010, Haneef returned to Australia to seek damages for loss of income, interruption of his professional work, and emotional distress. He was awarded compensation from the Australian government for labeling him a terrorist suspect. On 13 March 2008, an inquiry headed by former NSW Supreme Court Justice, the Hon. John Clarke SC was established into the 'arrest, detention, charging, prosecution and release' of Dr. Haneef. See http://www.ag.gov.au/Publications/Pages/AustralianGovernmentresponsetoClarkeInquiryintotheCaseofDrMohamedHaneefDecember2008.aspx.

196 Kenneth Good v Republic of Botswana, Decision on the merits May 2010 (47th Ordinary Session of the African Commission on Human and Peoples' Rights held from 12 – 26 May 2010), Communication 313-05. The government cites the decision of the Supreme Court of Botswana, the highest judicial authority in Botswana, in *Kenneth Good v Attorney General* Civil Appeal No. 28/2005. The author is one of Professor Good's counsel in the case on behalf of Interights; brief available at <www.interights.org/good>. The High Court judgment of Botswana is even more illuminating in this regard, referring directly to the importance

One might assume that this case concerned terrorism. In fact it concerned a professor deported for criticizing presidential succession in Botswana. The facts could not be much further removed from the terrorism context. Yet this case exemplifies the phenomenon discussed in Chapter 7 of the extent to which national security, the global terrorist threat and the exceptionalism of the war on terror are being relied upon to set aside human rights in contexts that have nothing conceivably to do with international terrorism.

11.6 Concluding observations: the Role of the courts and impact of human rights litigation

The war on terror has been a trying time for the courts. Judicial independence has been compromised, whether through expansion of military or special terrorism courts, or less directly through pressure and criticism of judges overstepping their role in security related cases. Practical and political challenges facing victims seeking to develop and present a case in a climate of secrecy, couple with legal challenges through changes in laws in the terrorism context, or the limited scope for review in the constitutional order itself, which remove or curtail judicial oversight. The judicial role has been variously stigmatized as 'undemocratic' or even as a strategy of the weak. In this context, and absent a national remedy, be it political and/or judicial, the availability of remedies outside national jurisdictions have proved increasingly significant as the only avenue towards a measure of justice and accountability. International litigation processes are replete with their own limitations and challenges,[197] though in some ways their rules are designed to ensure that it is possible for victims to challenge action by the state even in security-related contexts in which violations often arise in practice.[198] Clearly, international litigation is no panacea and no replacement for effective national courts; indeed

of avoiding the troubles of terrorism in a post 9/11 world through careful application of law.

197 These include excessive delays, varying but relatively poor record of implementation, and jurisdictional limitations that mean cases can be brought only against those states that ratify particular treaties or accept the body's jurisdiction, and in respect of wrongs within that court or body's jurisdiction. The individual has to be within the jurisdiction or effective control limiting the ability to adjudicate claims against states for 'aiding and assisting' violations by other states abroad. The first rendition case brought to that Court by ERP victims was found inadmissible because Bosnia was not a party to the ECHR at the time that six detainees were transferred to U.S. custody: Boumediene and Ors v Bosnia, Appl. No. 38703/06 (Eur. Ct. H.R. 18 November 2008).

198 Legal presumptions and shifting burdens are designed to ensure that litigants can establish their case e.g. where a prima facie case is established but further evidence lies predominantly within the grasp of the respondent state; see for example, Carabulea v Romania (App no 45661/99) ECtHR 13 July 2010; *Saadi v Italy* (App no 37201/06) ECtHR 28 February 2008 para 129; *Astamirova v Russia* (App no 27256/03) ECtHR 26 February 2009 paras 70-81. Courts also assess the genuine need for restrictions on national security grounds.

the objective of such litigation is very often, ultimately, to impel the national process.

In recent years, across diverse systems, there has been a burgeoning of human rights litigation on the national and international levels. As rights have been systematically violated and political solutions have proved elusive, it has been to the courts that victims have turned to give effect to their legal rights. Litigation pursues many goals, for the litigants and towards broader social, legal, political or institutional change, some of which may be achieved by the mere prospect of litigation, others in the course of it, while some will only be achieved long after judgment is rendered. While caution is due in trying to draw conclusions from such wide-ranging practice, pursuing different goals and addressing different issues in diverse legal systems and cultures, it is submitted that human rights litigation has had an important impact in the counter-terrorism field in recent years on a range of levels.

Impact may, of course, be positive and negative. If the courts have such a 'light' review function that they do not address the substance of the wrong, or meaningfully appraise the facts, the existence of judicial review may run the risk of providing an underserved veneer of legitimacy to governmental conduct, without rigorous judicial consideration or offering real protection. This may be seen most clearly in the cowed approach of the *habeas* courts in the US in recent years, which have been criticized for creating the impression of judicial review, thereby validating to a degree the detention regime, while failing to provide meaningful review in practice.[199] There were shadows of such concern in the dissent in the Australian courts' control orders case for example[200] and criticisms of the cowed approach of the habeas courts in the US in recent years prompt similar questions.[201]

Likewise, inevitably judges may err in their approach to the law, succumb to pressures referred to, or interpret laws so exceptionally in exceptional circumstances that they erode or set back the protection of human rights for others for years to come. As the President of the Israeli Supreme Court J. Barak has noted:

> "a mistake by the judiciary in times of war and terrorism is worse than a mistake of the legislature and the executive in times of war and terrorism. The reason is that the judiciary's mistakes will remain with the democracy when the threat of

199 Al Adahi v Obama above, *supra* note 40.

200 Thomas v Mowbray, *supra* note 65, dissent of J. Kirby

201 Al Adahi v Obama, supra note 40, and subsequent alleged refusal to engage with or challenge the facts. questioning whether the role of the courts is always meaningful or may give false sense of legitimacy to a process.

terrorism passes, and will be entrenched in the case law of the court as a magnet for the development of new and problematic laws."[202]

For victims too, litigation may be ineffective or counter-productive, simply generating unfulfilled expectations,[203] or contributing to the further stigmatization and potential re-victimisation in the politically charged debate on the human rights of 'terrorists'.[204]

Despite this, and despite the areas where justice for victims remains elusive, it is suggested that the practice of human rights litigation has reinforced the critical role for the courts in human rights protection in recent years. The following are some of the ways in which litigation may have had, or in some cases may yet have, a positive effect.

First and most obviously, litigation has had a very real effect on individuals' lives, including cessation or prevention of violations, for example by securing oversight of conditions in detention, preventing transfer to violations or seeking a stay of execution pending consideration of the individuals case.[205] The very fact of judicial oversight is a deterrent to abuse,[206] just as the mere prospect of litigation has forced governments to drop unfounded and unaccountable accusations made against individuals in the heat of the political moment.[207]

In this respect, simply taking a human rights violation to court may assist in the framing of an issue as a matter of law, not only politics. As such it reasserts the principle of legality and the rule of law in the highly politicized discourse around terrorism and security. Critically, the cases explored indicate, to varying degrees, the existence of a check on executive action, and the prospect of government accountability. This is seen in reminders that "a state of war is not a blank check for the President" or by the willingness of courts in cases such as *Belmarsh* or *Haneef* to subject the determination of what was necessary for national security to close scrutiny. As a rebuke to the executive

202 Aharon Barak, "The Supreme Court and the Problem of Terrorism", in Judgments of the Israel Supreme Court: Fighting Terrorism within the Law, Jan. 2005. See <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Fighting+Terrorism+within+the+Law+2-Jan-2005.htm#barak>.

203 E.g. this may emerge from unprincipled approaches to denying compensation to victims (eg McCann v UK or Makhadov v Russia) above, or through slow (or no) implementation.

204 On e.g. political backlash towards 'terrorist' applicants asserting their human rights that has afflicted some coverage and debate around certain ECHR cases in recent years (see for e.g., Othman v UK, supra note 114).

205 See e.g. *Interights and EIPR (on behalf of Sabbeh et al) v Egypt*, the Taba Bombings case where Egypt agreed to suspend the death penaty pending IACommHR proceedings, which ultimately found there had been no fair trial. A retrial is pending.

206 This is reflected in judicial review of detention being treated in international law as a safeguard inherent in the prohibition on torture itself.

207 As noted above, allegations against Abu Zubaydah the 'number three' in al Qaeda, yet these were dropped: see e.g. *Abu Zubaydah v Lithuania and v Poland*, ECHR applications at www.interights.org/zubaydah.

when it has failed in its role as primary protector of rights, this can be critical in reasserting the democratic credentials of the system, which are often lost through the illegitimacy of the conduct impugned. It is in the face of political pressure and public outcry, as has characterized the political debate around terrorism in many states, that a dispassionate judicial response is most needed.

Litigation can also serve as a catalyst to change law or practice. In some cases, such as the changes in law and policy following the *Belmarsh* judgment, this flows directly from the judgment condemning the violation.[208] In others, it is difficult to tell to what extent, if at all, the irritant effect of litigation contributed to shifts in practice, such as the return of UK nationals from Guantánamo following unsuccessful litigation seeking to obligate the state to intervene on their behalf.[209] Courts may serve as democracy alerters. The interplay between judicial and political branches is such that a signal from the former can be a catalyst to a more proactive approach by the latter. Ultimately, the result may be legislation with a positive or negative human rights impact, as seen in response to the litigation on the UK's 'closed material proceedings' or the right to habeas of Guantanamo detainees, which ultimately prompted rights-unfriendly legislation. Exposing the deficit forces the debate and consideration that is part of the democratic process. Courts can only provide the spectre of further review if the measures adopted go beyond the legal framework.[210] The course of litigation can also be significant in simply exposing the true nature of particular policies and practices, and may lead states to clarify their own policies or articulation of them as litigation unfolds.[211]

Litigation may also prompt or support the work of other complementary independent entities. In one UK case for example victims sought to use litigation to seek to compel the government to conduct an inquiry, ultimately without success.[212] In another German case, however, the court found that the rights of parliamentarians had been violated by the government's 'sweeping invocation' of state interests as a basis to refuse to answer questions of a parliamentary inquiry.[213] Unfortunately (and somewhat ironically), delays

208 Some other systems allow courts themselves to strike down legislation.

209 R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs, [2003] UKHRR 76.

210 See e.g. *Al-Skeini* case, *supra* note 78, in which the UK government shifted its position in the course of litigation, as regards the applicability of the ECHR to individuals detained by UK officials in Iraq and allegedly tortured in detention.

211 See e.g. *Al-Skeini* case, *supra* note 78, in which the UK government shifted its position as regards the applicability of the ECHR to individuals detained by UK officials in Iraq and allegedly tortured in detention.

212 See, e.g., 'High Court Challenge over Iraqi Civilian Deaths', *The Guardian*, 28 July 2004, available at: http://www.guardian.co.uk/Iraq/Story/0,2763,1270930,00.html, where the families of Iraqi civilians allegedly killed by British troops challenged the UK Government's refusal to order independent inquiries into the deaths.

213 A German Constitutional Court decision which came out on the same day the parliamentary inquiry report, found the German government to have violated the Constitution by failing

in rendering judgment limited any concrete impact on parliamentary access to the information in question, though the impact of the decision may be felt in the future. A different example of the catalytic effect of litigation on other processes lies in the establishment and extension of the of the office of Ombudsperson with powers to review the al-Qaeda Security Council sanctions lists and 'recommend' delisting.[214]

As discussed in Chapter 1, judgments may themselves develop or clarify the law through jurisprudence, for the better protection of human rights, as seen in several if the issues addressed above, such as in relation to the scope of *refoulement* obligations, extra-territorial application of human rights, or the nature of safeguards against torture. Or, as is often the case in the context of the war on terror, they may simply serve to reinforce established principles that have increasingly been cast in doubt, as in the *Saadi* judgment.[215] The challenge in many of the cases highlighted has been to hold ground rather than to advance the protection of human rights as such; in other words, to win back gains that were accepted years ago, once thought secure but rendered vulnerable in the course of the war on terror.

Persuasive inter-judicial messages can also be sent transnationally, as seen, for example, in the unusually robust judicial rebukes by the English Court of Appeals, of the US government's refusal to allow disclosure of information in the *Binyam Mohamad* case,[216] or of Guantánamo Bay detentions in the *Abbasi* case.[217] Litigation also opens legal systems to the cross-fertilization of international and comparative perspectives through amicus interventions, as seen the unprecedented level and nature of interventions before the Supreme Court in the Guantánamo litigation for example.[218]

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to disclose relevant information and failing to cooperate with the inquiry: http://www.bverfg.de/pressemitteilungen/bvg09-084en.html.

214 The Office of the Ombudsperson was created by SC Res. 1904, adopted on 17 December 2009, and its mandate was extended by Res. 1989, adopted on 17 June 2011. On the procedure and its positive effects, as well as limitations which fall far short of the requirements of human rights law, see Chapter 7B7, 'Listing and De-listing', below. Note other sanctions (not relevant to this study's focus on terrorism) lists have no such built-in process and less accountability.

215 This works both ways and can also weaken or confuse the framework of rights protection, as is suggested may have been the outcome of the Al-Skeini case for example.

216 The Appeals Court in Mohamand case: "we did not consider that a democracy governed by the rule of law would expect a court in another democracy to suppress a summary of the evidence contained in reports by its own officials or officials of another State where the evidence was relevant to allegations of torture and cruel, inhuman or degrading treatment, politically embarrassing though it might be."

217 R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs, supra note 19, where the English Court of Appeal criticized the system of Guantanamo detentions in unusually strident terms. *See also* e.g. the indirect call from UK courts to the ECtHR to clarify the law on extra-territoriality in *Al-Skeini*.

218 Amicus interventions appeared from such diverse quarters as the British House of Lords or Israeli military lawyers.

Moreover, practice in this area facilitates critical assessment of questions regarding the proper rule for the third arm of state on the protection of the rule of law and individual rights. Judicial deference has unsurprisingly been the order of the day, but to differing degrees and effect. One may ask whether the US Supreme Court could and should have decided whether detainees have the basic right to habeas corpus when the matter first came before it in 2004. At what price in terms of judicial efficiency in the administration of justice – and protection of individuals – came the virtue of judicial restraint? But so far as jurisprudence reflects and deliberates on the thorny issue of the role of courts in determining such matters, and on the relationship between political branches and the judiciary, it may ultimately contribute to and enrich our understanding of the separation of powers and the democratic judicial function.

In many other cases too, the judiciary has been deferential, resisting questioning the executive's determination of the existence of 'threats,' as exemplified by the finding that the existence of an 'emergency' or of 'terrorist threats' is in principle susceptible to judicial oversight, in practice the Courts have generally refused for example to question executive assessment.[219] However, when particular practices have come under scrutiny, the courts in diverse systems have often and increasingly proved themselves willing – in some cases promptly, in other cases after painstaking process – to criticize the legitimacy, necessity or proportionality of particular measures.[220] These processes have served to realign the balance between security and human rights, as well as between the executive and the judiciary's democratic functions.[221] It has been suggested that litigation of this type provides the 'potential for judges to educate the public about the real meaning of democracy'.[222]

Another level on which human rights litigation has had an impact is in securing access to information and in prizing open facts, sometimes in the face of a wall of state secrecy. The right to truth is increasingly accepted in international law, recently described by the European Court in the first extraordinary rendition case to be handed down (*el Masri v Macedonia)* as attaching to the individual and to society more broadly.[223] Litigation may have this as its goal. This has been the case for example in UK cases pursuing access to military files,[224] or confirmation of what the government knew about

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219 They have shown reluctance to make determinations that may impact on security, in deference to the political arms better positioning to assess security needs. See for example *A&Ors*, earlier on the existence of an emergency. Note L.Hoffman's dissent in the House of Lords that the nation was not under threat from al Qaeda. *See* Chapter 7B.3 'Derogation and emergency post 9/11'. See also *Thomas v Mowbray* in Australian courts, *supra* note 70.

220 See discussion under Arbitrary Detention, Control orders, and Listing and Labeling, earlier.

221 See e.g. careful and difficult 'balancing' by the judiciary in cases concerning access to secret evidence.

222 Max Du Plessis, EHRLR, supra note 164.

223 El Masri v Macedonia, supra note 168.

224 J. Aston, 'Lawyers in Basra death case win access to files', The Independent, 4 October 2007.

operations abroad,[225] and compelling the government to share information with the public[226] or with a criminal defendant.[227] Particularly noteworthy is the FOIA (Freedom of Information Act) litigation in several states[228] including the US which has had a measure of success,[229] and in Romania and Poland for example, which have revealed crucial information on how the CIA operated in close cooperation with other states, including through false flight plans and cover-ups.[230] Canadian litigation where the government was compelled to produce information or evidence in relation to proceedings in another state may be another example.[231] In many other cases this unearthing of information may be a by-product of legal cases, but particularly critical in counter-terrorism where victims may face a wall of secrecy, or indeed 'concerted cover-ups' as has been reported in relation to rendition. At a minimum litigation draws out government's positions – as seen, for example, in the shift in positions of the UK government in the course of the *Al-Skeini* case – as they engage as parties and adjust their positions in the course of litigation.

Attacks on the role of the judiciary, whether in the extreme form of punishing judges that find against the government and replacing them with more compliant variants, or the more nuanced pressure on governments not to

225 Cases of Omar Awadh Omar, Habib Sulieman Njoroge and Yahya Suleiman Mbuthia v Secretary of State in the High Court of England and Wales, [2012] EWHC 1737 (Admin), The plaintiffs were rendered from Uganda to Kenya, but the court upheld the UK government's right not to require its security services to disclose national security information.

226 Binyam Mohamed v Foreign and Commonwealth Office, 30 July 2009, revised judgment and on 16 October 2009, the High Court held that seven retracted paragraphs of their initial judgment containing summaries CIA documents relating to Binyam's 'treatment'should be made public. On the 10th of February 2010, the Court of Appeal dismissed David Miliband's appeal and ordered the publication of seven paragraphs that the Foreign Secretary had sought to suppress.

227 In the Mohamed case UK courts required the government to provide Mohamed with information that may have been relevant to any eventual trial by military commission planned at the time by the US.

228 See e.g. Romanian FOIA request that elicited important information on rendition flights and the covering up through false flights plans and other means.

229 See e.g. *Associated Press v. United States Department of Defense*, 498 F. Supp. 2d 707 (S.D.N.Y., 2007) and *Center for National Security Studies v. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (cert denied, 540 U.S. 1104 (2004)).

230 See e.g. official documents disclosed by the Polish government through FOIA requests in Poland. 'Explanation of Rendition Flight Records Released by the Polish Air Navigation Services Agency'. OSJI and HFHR, at http://www.therenditionproject.org.uk/pdf/PDF%20126%20[Flight%20data.%20Poland%20FOI%20-%20HFHR%20explanatory%20document].pdf.

231 Canada (Justice) v. Khadr, 2008 SCC 28,23 May 2008; the Canadian Supreme Court ruled that the government had violated Canada's Constitution and its international obligations by transmitting to U.S. officials information resulting from Canadian officials' interviews of Omar Kadhr at the Guantánamo Bay detention centre. The Court took the unusual step of ordering Canadian officials to allow Mr. Kadhr access to records of his interrogations with Canadian agents for use in preparing his defense before the Guantánamo Military Commission.

interfere in political or democratic processes despite their effect on human rights, are bad for the rule of law. But with them has come a reassertion of the essential role of the courts, and the importance of judicial independence, in times of crisis or emergency. Likewise one might say that the extent to which judicial review has been denied or curtailed, has led to a reassessment and an outpouring of recognition for the critical nature of judicial review, for the individuals affected and for the rule of law. It may ultimately be the case that the practices and the challenges of the war on terror lead to a reinforcement of the role of the judiciary in times of crisis and emergency.

Ultimately the impact of strategic litigation on human rights issues generally lies in its gradual contribution to social change. This level of impact eludes measurement. There has, for example, been a shift in public opinion (national and international) on Guantanamo, that preceded the policy shift, and it may be that litigation may have been an important contributor to that. What is undoubtedly true is that litigation has to be understood not in isolation but as one small piece of a much bigger and more complex puzzle. If it contributes to historical clarification of facts and responsibility, plays a role in enhancing our understanding of wrongs and enriching the democratic debate it may, if we are receptive to learn, contribute to guarantees of non-repetition in the future.

Finally and perhaps most importantly, real cases serve to tell the victims' stories. They provide often graphic illustrations of what euphemisms such as "extraordinary rendition" and "enhanced interrogation techniques" mean to human beings like you or I. Judgments validate those stories and experiences. They provide a vehicle for recognition of wrongdoing and 'reparation' – long recognized as fundamental yet drastically neglected as too controversial in the terrorism context.[232] One of the essential characteristics of the war on terror has been the attempt to put certain people beyond the reach of the law. Litigation can be a tool, as one English judge put it, not for transferring power from the executive to the judiciary, but for transferring power from the executive to the individual.[233] If any particular case can bring an individual back into the legal framework, and reassert the individual as a rights bearer and human being, then perhaps that is impact enough.

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232 See Chapter 7A on the diverse forms of remedy and reparation, including recognition. In other contexts we hear 'victims cannot be forgotten,' yet the stigmatization and the simplistic dehumanization of individuals into 'goodies and baddies' post 9/11 has meant that they are – even those erroneously – categorized as associated with terrorism.

233 Dame Mary Arden has stated that "the decision in the A case should not be misinterpreted as a transfer of power from the executive to the judiciary. The position is that the judiciary now has the important task of reviewing executive action against the benchmark of human rights. Thus, the transfer of power is not to the judiciary but to the individual", (2005) 121 *L.Q.R.* at pp. 623-624 in A. T. H. Smith, 'Balancing Liberty and Security? A Legal Analysis of United Kingdom Anti-Terrorist Legislation', *Eur J Crim Policy Res* (2007) 13: 73-83.

12 Conclusion

> It is of course acknowledged that international law is not an exact science, but it surely does not have to appear as bizarre as some of its practitioners have made it appear in recent months?
>
> Baroness Ramsay of Cartvale (Parliamentary Debates, Hansard, 17 March 2003)

> Any sacrifice of freedom or the rule of law within States – or any generation of new tensions between States in the name of anti-terrorism – is to hand the terrorists a victory that no act of theirs alone could possibly bring.
>
> Secretary-General Kofi Annan (Statement to the Security Council ministerial meeting on terrorism, 20 January 2003)

Since 9/11 the agenda of the international community has been shaped, and perhaps dominated, by the fight against terrorism. Preceding chapters have explored in detail particular areas of the relevant international legal framework, alongside particular responses to international terrorism post 9/11. This concluding chapter considers the legal framework and practice as a whole, reflecting on certain overarching characteristics of the war on terror and its approach to international legality. It then considers the legal framework itself, and the extent to which the experience of terrorism and counter terrorism have indicated – as some have asserted – gaps and inadequacies in the law, or led to a transformative shift in the international legal order. It suggests that there are no gaping holes in that framework, while highlighting pockets of legal development, tensions and areas where the law may yet be subject to development. The chapter ends by questioning the longer term implications of the war on terror for the rule of law.

12.1 9/11: Tragedy, opportunity and the 'war on terror' response

September 11 was an international tragedy. It was a crime under international law and, as the Security Council promptly determined, a threat to international peace and security. It was followed by widespread, perhaps unprecedented,

expressions of international solidarity with the United States. The Security Council expressed its willingness to act, and for the first time in history, NATO asserted the right of collective self defence. States and institutions committed their shared determination to cooperating more effectively to combat terrorism and to hold to account those responsible.

It is tempting to speculate that September 11 represented a moment of unique opportunity: for the reassertion of international order over the chaos that the attacks represented; for the consolidation of accountability norms and mechanisms, bolstered by improved multilateral enforcement and enhanced international cooperation in criminal justice; for collective international action to uphold international law and protect international peace and security, improving the credibility and effectiveness of the collective security system.

The 'war on terror', however, unfolded differently. Large scale and long term military interventions unfolded in Afghanistan and Iraq, which then gave way to a geographically limitless war on al-Qaeda and associated terrorist networks worldwide. There was overwhelming and uncritical international support for the Afghan intervention in the unique post 9/11 moment.[1] However the resort to self defence was the precursor to a stretching, beyond plausible elasticity, of the notion of self defence to cover pre-emptive action. This was glimpsed in US justifications of the Iraq intervention,[2] published as policy in the United States National Security Strategy,[3] and its on-going practical effect made glaringly clear through burgeoning drone strikes that by the eleventh anniversary of 9/11 were reported to have taken more lives than the 9/11 attacks themselves.[4] Meanwhile the UN collective security system has largely been undermined. The notorious invocation of a broad reaching 'war' paradigm has had profound and wide-reaching implications. It has purported to justify exceptional rules – the exclusion of normal standards of protection for detainees or criminal suspects for example, resort to special courts and legal regimes, as well as lethal targeting of persons that would otherwise be labelled extra-judicial executions – inflating and distorting the perceived relevance (and content) of IHL, while marginalizing the relevance of human

1 *See* Chapter 5B.1 on questions as to the lawfulness of the use of force, and whether the legal prerequisites of necessity and proportionality of self defence had been met in relation to the objectives of the campaign, in Afghanistan. Chapter 6 notes differing understandings of the objectives in Afghan among participating nations, and specific issues of compliance with IHL. On the acceptance of self defence against non-state actors, see also 12.3.2 below.

2 As Chapter 5B.1. explains, US justifications included reference to self defence while the UK relied on other legal bases.

3 There have been several such US National Security Strategies since 9/11, discussed in Chapter 5. The 2002 strategy was notably explicit in the promotion of a doctrine of pre-emption, which was subsequently deemphasised, though a broad preemptive approach to self defence remains as a matter of policy and in practice: see Chapter 4B.2. Cf the approach of the European Security Strategy adopted by the European Council on 12-13 December 2003, p. 4.

4 See Chapter 6B.2.2.

rights protections for all. More insidiously, it has framed the fight against terrorism as a conflict against an 'enemy' to be vanquished, at times apparently at any cost, rather than individuals and groups against whom the full force of the law should be brought to bear.

Alongside the banners of an uncertain 'war' against an ill-defined enemy, and of a 'self defence' that is no longer purely defensive, flies the ambiguous banner of 'terrorism' and 'associated' activities. Myriad practices have emerged across the globe, and old practices have continued with a renewed sense of legitimacy, in the name of terrorism prevention, many of which have fallen foul of or jeopardised international standards of protection.

The Security Council's novel 'quasi legislative' role provided the impulse for much of this 'counter-terrorist' activity, imposing a broad mandate on states to take measures against terrorism without providing clarity as to the 'terrorism' targeted, without emphasising the need for consistency with IHRL and IHL and without effective oversight.[5] Amorphous definitions of terrorism, jarring with principles of legality and certainty, have been used to detain political opponents, proscribe dissent, subvert legitimate free speech, or as a basis to prosecute human rights defenders, indigenous leaders, humanitarian organsiations, labour organisers, women's groups, poets, artists and others presumably far removed from the international terrorism the international community resolved to combat in the aftermath of 9/11.[6] The impact of the use of undefined and malleable terms such as 'terrorist' and states that 'harbour or support' them as the basis for wide-ranging prescriptions, has been multiplied over time by expansive approaches to those 'associated' with, providing various forms of 'material support' or 'encouragement' for terrorism.

The Security Council coupled its quasi legislative role with a ratcheting up of targeted sanctions against individuals and groups, with profound impact on individuals, communities and arguably on the Council's own reputation.[7] The 'draconian' lack of due process that has been said to characterize the Council's approach is reflected in national measures such as sanctions, expulsions and other 'preventative' orders of varying types which have infringed a wide range of rights without providing reasons or a meaningful opportunity to challenge.[8]

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5 See e.g. SC Res1373, mandating a host of measures aimed at, for example, preventing terrorism, criminalising it, cutting off funds to terrorists and denying them refugee status. The resolution, identifying terrorism as a threat to international peace and security, continues in force despite vocal opposition, discussed at Chapter 7B.1.2.

6 *See* Chapters 4B.2.1 and 7B.5 on the breadth of criminal laws and prosecutions for terrorism and 'associated' offences.

7 Chapter 7B.1.2 for the 'executive' and 'legislative' roles of the Council.

8 *See* eg Chapter 7B.7. 7B.8 and 7B.10 for various examples of the denial or limitation of the right to challenge orders that lead to detention, deportation or sanctions which have been criticized as 'draconian'; see also 12.3 below on 'arbitrariness.'

Despite the commitment in the wake of 9/11 to a multi-faceted counter-terrorism campaign that would utilise 'every instrument of law enforcement'[9] to ensure that 'justice' was done,[10] at least in the first few years following 9/11, there was not an enormous, coordinated international criminal law enforcement initiative.[11] The prospect of international jurisdiction was sidelined shortly after 9/11, in apparent deference to national courts, yet national prosecutions were limited and convictions scarce.[12] Failures of international cooperation, including as a result of the United States refusal to share intelligence with foreign courts, has further hampered prosecutions and processes, both for terrorism and counter-terrorism crimes.[13] Paradoxically, criminal prosecutions for terrorism related offences have been impeded in multiple ways by the unlawfulness of states' responses, rendering evidence inadmissible or of dubious reliability, impeding extradition or mutual legal assistance and with it access to evidence and to suspects,[14] or casting doubt on the legitimacy of criminal processes.[15]

A shifting criminal law paradigm over time – towards an emphasis on the preventive role of criminal law – has spawned new criminal laws, embracing an ever broader range of conduct that *inter alia* supports, facilitates or contributes to acts of terrorism. Alongside these laws, are expansive powers of investigation, novel criminal jurisdictions, adapted criminal procedures and initiatives to enhance and streamline international cooperation.[16] While developments have in some respects bolstered the normative and institutional framework for enforcing criminal law against terrorism, so far as they themselves fall short of basic principles of criminal law, such as individual responsibility, legality and due process, they in turn threaten to undermine rather than strengthen the rule of law framework.

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9 In late September 2001, President Bush stated: 'We will direct every resource at our command, every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war to the disruption and defeat of the global terror network.' J. Harris, 'President Outlines War on Terrorism, Demands Bin Laden be Turned Over', *Washington Post*, 21 September 2001.

10 *Bush, ibid. See, e.g.*, SC Res. 1368 (2001), 12 September 2001, UN Doc. S/RES/1368 (2001), para. 3, where the Security Council '[c]alls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks'. *See also e.g.*, the UK Prime Minister describing the UK's role as to 'construct a consensus behind a broad agenda of justice and security'. T. Blair, Speech in Sedgefield constituency, 5 March 2004. The Security Council, for its part, underscored the justice objective in the immediate wake of 9/11 and has reiterated it repeatedly since then.

11 *See* Chapter 4B.1.1.

12 Chapter 4B.1.3 on national versus international models of justice post 9/11.

13 See illustrations of non-cooperation, or hampering criminal processes, in Chapters 4 and 10.

14 See obligations of non-cooperation, including non-refoulement, in Chapter 7A.5.10.

15 Examples are provided in Chapter 4B.4 'The Strained Relationship between Human Rights, International Cooperation and Criminal Justice'.

16 Chapter 4B.2.3 'Modified Procedures and Principles of Criminal Law.'

The vast majority of 'war on terror' detainees have not been charged with criminal offences at all,[17] but held in 'despotic' detention regimes,[18] epitomised by Guantanamo Bay or CIA secret detention, but reflected much more broadly across multiple states practices. Fundamental questions arise recurrently as to the lawfulness of detention on preventative, security or intelligence gathering grounds, as well as the erosion of procedural safeguards.[19] As judicial and other forms of oversight have expanded their reach, such as through the hard fought habeas litigation of Guantanamo detainees, individuals have been moved further beneath the potential radar of protection, either into US overseas detention where they are denied basic due process rights, or into the captivity of other states for detention by proxy.[20]

The persistent prevalence of torture as a feature of the war on terror, as well as attempts to 'justify' it, to 'balance' it against national security interests or to erode its safeguards, illustrate how established values have been questioned, and basic standards have been jettisoned, in the name of intelligence gathering in the war on terror.[21] Notably the rendition programme's policy of enforced disappearance of persons, carefully coordinated across the globe through networks of willing individuals, private actors and state partners engaged in the denial of law's protection and a subsequent systematic cover-up,[22] illustrates the 'dark side' of international cooperation and the multiplicity of actors whose responsibility is engaged in the war on terror.[23] The obsessive pursuit of unfettered 'intelligence gathering,' reflected in the driving role afforded to intelligence agencies, and the reduction of individuals to mere objects of 'intelligence value' has been described as setting human rights back to a pre-Kantian era in which individuals could be conceived of as mere means to an end.[24] Far from the acts of isolated pariah states, the war on terror

17 Chapter 7B.7 'Restricting Liberty in Liberty's Name' and Chapter 8 on Guantanamo Bay.

18 'What makes the result a despotic regime is the sense that the detaining authority is presumed to be authorized to detain, yet gains that authority based on its claims about an individual but in the absence of a trial and conviction.' J. Resnik, 'War, Terror, and the Federal Courts, Ten Years After 9/11 Conference', Association of American Law Schools, Section on Federal Courts program, 2012 AALS Annual Meeting, Washington, D.C., 7 January 2012.

19 Arbitrary detention of alleged terrorist suspects remains commonplace in many sites and many states around the world. *See* Chapter 7B.7 and the limited gains in relation to *habeas* in Guantanamo (Chapter 8), which have not applied elsewhere, as evidenced by Baghram litigation, for example (Chapters 7B.3 and 11).

20 See eg Chapter 10.2 for an example of allegations of other states detaining unlawfully at the behest of the US, long after the CIA detention centres are reportedly closed.

21 See Chapter 7A.5.2 and 7B.6.

22 See eg Council of Europe Commissioner Marty's findings of 'systematic cover up' by European states, of the rendition programme, in Chapter 10.2.

23 Chapter 10 for the legal framework, including state and individual responsibility, and its application to rendition.

24 M. Scheinin, 'Terrorism', in D. Moeckli, S. Shah, et. al. (eds.), *International Human Rights Law* (Oxford: Oxford University Press, 2010), p 600.

reveals systematic and recurrent use of torture, complicity in torture, and turning a blind eye to torture, giving rise to the responsibility of many states, in many forms.[25]

It is perhaps the ultimate paradox of the 'war on terror' that the horrend ous acts of lawlessness witnessed on 11 September 2001 have been relied upon to justify repeated violations and further disregard for the international rule of law. Yet in the face of clear state and individual responsibility, as well as the countless lives that have been destroyed in the course of the long war on terrorism, reparation and accountability remain elusive.

Reaction to the War on Terror

In light of the foregoing, it may be difficult to see the 'war on terror' as other than an opportunity squandered and the 'catastrophe' for the rule of law foretold by some in the aftermath of 9/11.[26] Practice is, however, varied, it has evolved over time, and it remains very much in flux. A significant part of this practice is the extent of the reaction to the nature or excesses of the 'war on terror', albeit perhaps belated and, as yet, insufficient. Evidence has emerged over time of an approach which recognises the need for a shift back to a rule of law approach to countering terrorism, and the importance of strengthening rather than discarding the international legal framework.

First, are the indications of egregious violations of human rights and humanitarian law prompting an increasingly resolute reaction from the international community. Perhaps as plausible deniability of the existence and gravity of such violations has faded, criticism of specific practices has become more robust from states, international mechanisms and commentators. This is most striking perhaps in the context of the anomaly of Guantanamo Bay discussed in Chapter 8, where condemnation has become particularly strident over time, from states, international bodies and many other sources, some of them not normally known for human rights advocacy.[27] Condemnation of the extraordinary rendition programme discussed in Chapter 10 also continues to mount with the exposure of facts as to its nature and scope, contributing momentum towards a reluctant but steady reckoning as regards the responsibility of multiple states, and leaving a notable dearth of defenders of the programme or its tactics.[28] Practice has developed more recently, and reactions continue to emerge, in relation to widespread targeted drone killings of alleged terrorists.[29] While there may be little apparent support or acceptance, explicit or implicit, for the legitimacy of the practice, reactions have been distinctly

25 Chapter 3 on forms of responsibility and 7 and 10 for examples.
26 See A. Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law,* EJIL 2001.
27 *See* Chapter 8.C.
28 *See* Chapter 10.
29 *See* Chapter 6B.2.2.

muted. At time of writing, expressions of concern regarding the legality of such strikes were gathering pace, however, both within the US and internationally.[30]

A number of states have backed up their condemnation of war on terror violations of human rights and IHL with indications of their unwillingness or inability to cooperate, to avoid conflict with their international obligations.[31] Conditioning cooperation in criminal, military or intelligence matters on compliance with basic international law norms, for example, is one of the critical ways in which international legal obligations in this field can be given effect. What remains uncertain is whether condemnation will also be supported by action to hold to account those responsible.[32]

The shift of approach is perhaps most evident in the increasing emphasis given to the complementary nature of the obligations of combating terrorism and protecting human security, on the one hand, with respect for rule of law, democracy and human rights, on the other. This was epitomised in the 2006 UN Global Strategy which, like many other declarations and resolutions, describes human rights and security as 'not conflicting goals, but complementary and mutually reinforcing'.[33] This sentiment is amply reflected in international, regional and national level discourse by states since, epitomised perhaps in President Obama's famous statement that living our values 'does not make us weaker, it makes us stronger.'[34]

On the part of the Security Council, among others, apparent blindness to human rights concerns in the glare of security imperatives post-9/11 has given way to consistent reiteration of the complementarity of effective counter-terrorism strategies and respect for the rule of law, of which human rights and international humanitarian law are integral components.[35] Thus is reflected in institutional developments, national and international, that reflect the need to ensure effective counter-terrorism measures are consistent with international law, notably in the Security Council counter-terrorism committee's *volte face* to embrace, albeit tardily and reluctantly, a human rights dimension

30 Many initiatives are underway questioning the legal limits of such practices; some are referred to in Chapter 6.

31 *See* Chapter 7A.5.10 for the legal framework and B.14 for practice post 9/11; see also Chapter 4B on criminal cooperation.

32 For challenges, and developments, see eg Chapters 4B.5, 7B.14, 8C.3 or 10.5.

33 UN Doc. A/60/825, 2006. The global strategy is reflected in the approach across regional bodies, see e.g. ACHPR, Resolution on the Protection of Human Rights in the Fight against Terrorism, adopted at its 37th session, 2005. For more detail see Chapter 7B.1

34 'That is why I have ordered the closing of the detention center at Guantanamo Bay, and will seek swift and certain justice for captured terrorists – because living our values doesn't make us weaker, it makes us safer and it makes us stronger.' B. Obama, 'Remarks of President Barack Obama – As Prepared for Delivery, Address to Joint Session of Congress', 24 February 2009.

35 *See* Chapter 7B.

as an inherent aspect of its security agenda, echoing the integrated approach of other regional and international political organisations.[36]

A significant dimension of this shift is the emerging recognition of the full practical implications, and the counter-productivity, of much counter-terrorist activity in the post-9/11 context. On one level, this is seen in the acknowledgment of how abusive practices adopted in the name of preventing terrorism have served as a catalyst or sustaining influence for further terrorism. This is reflected for example in the assertion from the US President who, like others, has himself described Guantanamo as "probably the number one recruitment tool" for fledging terrorists.[37] More recently, drone killings have also been described as having "replaced Guantánamo as the recruiting tool of choice for militants."[38] The difficulty in securing suspects or evidence, issues of admissibility or abuse of process challenges in criminal trials, illustrated in chapter 4, are increasingly recognized as ways in which discarding the rule of law has hampered its subsequent enforcement through criminal justice.[39] The re-emergence of the international commitment to address 'conditions conducive to terrorism,' enshrined in the global strategy and reflected in international and national statements,[40] are also relevant here, suggesting a more holistic approach that recognizes the inter-relationship between the human rights and development agendas, on the one hand, and that of terrorism prevention on the other.

There may also be a reaction to the military emphasis of the "war on terror," both from within the US administration that championed the 'war on terror' and beyond. The concept of a "war" on terror or terrorism, once offered as a panacea by the US but rejected categorically by others, is now shunned both inside and outside the US administration.[41] While it holds fast to its assertion of a war on al Qaeda and 'associates,' this appears to have been rejected by other states.[42] Overwhelming and uncritical international support

36 See further below 12.3.3 highlighting areas of legal (including institutional) development and Chapter 7B.1.

37 Eg. B. Obama, 'News Conference by the President', South Court Auditorium, Eisenhower Executive Office Building, 22 December 2012; J. Napolitano, 'Guantanamo became a recruiting tool for terrorism: Napolitano', *AFP News*, 6 November 2009; Admiral M. Mullen, Chairman of the Joint Chiefs, 'Military Chief: Gitmo "Needs to Be Closed"', *ABC News*, 24 May 2009, available at: http://abcnews.go.com/blogs/politics/2009/05/military-chief/ last visited on 18 April 2013, and others at Chapter 8, note 14.

38 E.g. P. Alston, 'Press Statement', UNAMA Press Conference, Kabul, Afghanistan, 15 May 2008, available at: http://unama.unmissions, and Chapter 8 id.

39 Chapter 4B.4.

40 See Chapter 7B.1 on the global strategy, which is also reflected regionally. See eg "Why terrorism? Addressing the Conditions Conducive to the Spread of Terrorism" (Strasbourg, 2007). President Obama's National Defence University speech, 23 May 2013, reflects the importance of a 'comprehensive approach' addressing perceptions of injustice, poverty and other factors.

41 Chapter 6B.1.1.

42 Ibid.

for the Afghan intervention[43] contrasted starkly to strident and vocal international opposition to the Iraq war, or to the lack of support for the US assertion of the right to use self defence against terrorists worldwide.[44] The shift of reaction may well reflect shifting policies, that have strained legal principles and other states support or tolerance too far, but there is also greater recognition of the limitations and the dangers of a military-focused response to international terrorism.[45] In turn, the shift towards an invigorated role for criminal law, including an exploration of its preventive potential,[46] holds real promise of a shift towards a rule of law framework.

A critical component of the 'reaction' to the war on terror over time has been judicial, as challenges to the acts of other branches have been adjudicated.[47] While the judicial voice has perhaps been muffled or unduly deferential to the executive in many cases post 9/11, there is a vast body of practice in which the courts have asserted their role in reining government action back within the limits of the law, and ensuring a measure of oversight and accountability. The impact has been widereaching, including impelling legislative and policy change, reasserting and strengthening legal standards, as well as the broader rule of law implications of reasserting the principles of accountability and oversight.[48] While the post-9/11 legal landscape has undoubtedly been bleak, whether it amounts to the 'catastrophic' situation for the rule of law is questionable, and may require consideration through a longer time lens.[49]

12.2 THE LEGAL FRAMEWORK

The focus of this study has been on identifying the current state of the international legal framework on terrorism and counter-terrorism, against which the lawfulness of practice falls to be assessed. In identifying the legal framework, preceding chapters have set out the multi-dimensional legal infrastructure of terrorism and counter terrorism. Each of chapters 2-7 identified multiple primary and secondary norms, mechanisms and principles from numerous areas of law that are engaged in the fight against 'international

43 See Chapter 5B.1 on the acceptance of self defence against non state actors, and further below on legal development.

44 Chapter 5B.2; see 6B.2.2 on IHL issues arising.

45 See eg SC Res. 1963 (2010), fourth preambular paragraph..

46 Chapter 4B.1.2 'Terrorism Trials'.

47 This national and international litigation has been notably prolific in relation to the adjudication of human rights issues, which is the focus of Chapter 11, and to some extent IHL. Criminal law is addressed through the criminal process in Chapter 4. In other areas such as the use of force, the scope for adjudication is inevitably more limited.

48 Chapter 11.

49 See further below, 12.4. A. Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law,* EJIL 2001.

terrorism,' which together form the applicable legal framework. The case studies in chapters 8-10 then looked across that framework and illustrated how diverse areas of law co-apply and intersect. The practice highlighted has illustrated both the extent of non compliance with and obfuscation of the legal framework, as well as on occasion tensions or controversies within the framework itself.[50]

This study highlights the extent to which one phenomenon, international terrorism, is addressed through a multiplicity of areas of law, and myriad overlapping sources of law. The framework on terrorism and counter-terrorism has naturally included an overlapping and multidimensional group of treaties, including bilateral, regional and multilateral terrorism conventions, extradition treaties, human rights and IHL conventions, which bind parties to them, some of which constitute the broader reaching norm-making treaties with significance beyond the parties to them. In many places the obligations referred to reflect also customary international norms, identified through state practice and *opinio juris,* as well as through the role that the many other sources – international organisations, treaties, judicial decisions, the work of expert bodies inter alia – play as identifiers of customary international rules in this field. A number of the norms identified have also been consider to enjoy special *jus cogens* status, with implications both for the normative significance and opprobrium attach to the rules, and their resistance to change. While obligations inevitably vary, much of the legal framework on which the analysis in preceding chapters is based is therefore shaped around core, well established international norms, binding on all states.

This framework is fleshed out by reference to other sources. Judicial decisions of many national, regional and international courts have also been relied upon in various ways: they themselves provide examples of state practice, they impel such practice (as states and governments implement or respond to decisions and judgments), and they themselves shape the legal framework, through the application and development of the law.[51] 'General principles of law' have been drawn on to complete the legal framework, particularly in areas of uncertainty.[52]

Security Council resolutions have assumed special significance, bolstering the more traditional sources of international law with binding proscriptions

50 See e.g. Chapter 10 on issues arising regarding aiding and assisting and complicity in international law.

51 For developments in the legal framework post 9/11 see 12.3.2. below.

52 These are included as a source of law in Article 38 of the ICJ Statute. As noted in Chapter 1, these may be particularly important where there are perceived gaps, weaknesses or areas of uncertainty, and the principles of note in this study have included the presumption of innocence, nullum crimen sine lege, legality and proportionality. On proportionality, as a general principle, see "The Proportionality Principle, Counter-terrorism Laws and Human Rights: A German-Australian Comparison" City University of Hong Kong Law Review Volume 2:1; [2010] UNSWLRS 35.

in the post 9/11 world, with follow up and oversight from the Council's Counter-terrorism Committee.[53] The General Assembly has lent its imprimatur of universality to many of the obligations in this field, while the framework is considerably illuminated through soft law standards which, while not binding and inherently divergent in their roles and weights, assist as tools in the interpretation of binding standards, and potentially herald areas of future legal development.[54] The myriad activity in this field includes declarations and resolutions of international or regional bodies, the work of the International Law Commission, General Comments by human rights bodies including the HRC and CAT, the significant detailed work of UN entities and experts such as numerous special rapporteurs or working groups, and the 'softer' expert groups' recommendations ranging from high level summit outcomes[55] to detailed principles and standards on specific issues of law.[56] Many of the soft law sources relied upon have also been given close judicial consideration, thus firming up the soft law standards in the course of the legal dynamics of the international system.[57]The result is a detailed and growing body of law, which must be understood by reference to many branches of international law and multiple, overlapping and reinforcing sources, yet which is at its core based on basic principles of law.[58]

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53 Resolutions are referred to for different legal purposes: Chapter 2 and 7 discuss broad reaching obligations on state imposed through eg SC 1373 among others, whereas other resolutions effectively impose sanctions on individuals and create obligations for states in this respect. By contrast, as discussed in Chapter 5B.3 resolutions have been relied upon not for imposing obligations but providing a legal basis for the right to resort to force.

54 Soft law standards have also assumed significant roles in identifying practices, impelling legal debate by states, providing an expert view of legal obligations and assessments of the lawfulness of practices in a timely manner.

55 Eg The high level International Summit on Democracy, Terrorism and Security, Madrid, 2005 looking at causes of terrorism as well as democratic responses may be an example.

56 As noted in Chapter 1, a broad range of sources can be referred to as 'soft law' standards, and recognition is due of their differing degrees of authority and weight. Among those particularly relied upon include ground-breaking reports of Special Rapporteurs, UN working groups or regional bodies such as the Council of Europe, while regard is also had to e.g. the ICJ Eminent Jurists report; the Chatham House Principles on the Use of Force in Self Defence; the Leiden Principles on Counter-terrorism; Principles on the Right to Information and National Security; the Declaration of the Madrid Summit on Democracy, Terrorism and Security.

57 E.g. the ILC Articles on State Responsibility have been cited as relevant to human rights obligations in this area in national and international jurisprudence; see eg the *A and Others* case on admissible evidence (Chapter 11). See also the *Ahmed* case before English courts where reports of the Special Rapporteur on Terrorism and Human Rights and of the Joint Parliamentary Committee on Human Rights were closely analysed, though ultimately not followed (see Chapter 4B.4 and Chapter 10). Thie reflects what may a trend on the part of judges national and international to have regard to broader non binding but authoritative comparative and soft law standards.

58 See 'legal principles' in Chapter 1. Note that much of the controversy in this area since 9/11 has related to the denial of the basic principle of legality, or other underlying principles of law, though there have also been areas of complexity.

12.2.1 No Gaping Holes in the International Legal Framework

A common feature of discourse in the aftermath of 9/11 has related to the inadequacy of the international framework. Suggestions have emerged recurrently of normative gaps, or the ill-equipped, quaint or outmoded nature of the international legal order, as exposed by the challenges of international terrorism. The law examined in some detail in preceding chapters essentially belies this analysis. Inevitably as explored further below, in a dynamic area of practice, there are times where the law may not be clear, and areas where the law may be developing or where it would benefit from such development.[59] The suggestion that the war on terror practices discussed in this thesis occur in a normative void, however, or that what appear to be violations are in fact a manifestation of deficiencies in the legal framework itself, are not compelling.

Allegations of gaps, uncertainties and inadequacies in the law may of course reflect resistance to being constrained by the law, rather than the absence of applicable law. They may also stem, in large part, from the failure to consider, in its entirety, the full detailed and multi-dimensional range of norms, principles and processes that make up the legal framework.

One of the most noted 'gaps' in the international legal order in this area relates to the lack of a comprehensive terrorism convention. Yet while this has had significant implications in terms of the malleability and susceptibility of the terrorism label to abuse, and in terms of cooperation, it does not betray a significant normative gap, as explored in chapter 2. Sectoral conventions, ratification and implementation of which have been greatly strengthened post 9/11, cover many areas of terrorism. The rules regarding 'terrorism' in Chapter 2 must be understood not only by reference to specific terrorism related rules, but also by reference to: those existing norms in the criminal law field that provide individual accountability for serious crimes under international law and reflect the obligation of cooperation in the investigation and response to international crimes (Chapter 4); IHL where a specific form of terrorism in armed conflict exists and other norms prohibit the conduct we commonly refer to as terrorism, when arising in armed conflict (Chapter 6), norms governing whether a state can be held responsible for a range of acts and omissions (Chapter 3); obligations on states to protect the life and security of persons within their jurisdiction, which mandate state action against terrorism (Chapter 7); and to the law on friendly relations between states and the use of force (Chapter 5) that imposes obligations on states to prevent the use of their territory by terrorists and provides for (and limits) the possibility of resort to force to address the terrorist threat. The legal framework, significantly bolstered by the Security Council's quasi legislative role in this field, enables states to

59 See examples at 12.2.3 below.

take necessary measures to combat terrorism, and imposes wide-ranging obligations on them to do so.

A famous refrain of the war on terror has been the claim that the fight against terrorism is "a new kind of war," "not envisaged when the Geneva Convention was signed in 1949," and rendering 'quaint' or 'obsolete' the terms of IHL in favour of "a new paradigm" of conflict. IHL provides a definition of armed conflict and its application must be considered in light of concrete scenarios, in Afghanistan, Pakistan, Yemen, Mali or beyond. The refusal of the international community of states to embrace a global conflict with al Qaeda and associates groups, explained in preceding chapters, does not, however, reveal the inadequacy of that framework, but rather disagreement as to its content, purpose and the desirability of legal change to embrace a more nebulous concept of geographically limitless armed conflict with loosely defined groups or associates. While the debate on whether or not there can be or is a war with al Qaeda or others reveals substantial differences of view, notably on either side of the Atlantic, caution is due not to equate the existence of such differences with unsettled law, still less with gaps in the legal framework.

IHL makes provision for much of the allegedly virgin territory of the war on terror in its substantive provisions as well. Notably, novel resort to an allegedly unprecedented category of 'enemy combatants' belies the existence of long-standing rules on unprivileged belligerency, and on the targeting or treatment upon detention, of persons who take up arms and engage in conflict. While such rules are at times controversial and their implications in particular situations subject to dispute, the framework does not support the notion that the law is silent.

The rules on the use of force between states provide other examples where the adequacy of the legal framework has been questioned and, as noted below, where there may have been some movement in state practice and opinion, and of customary international law. Where the collective system proves insufficient, international law recognises the right of states to use force unilaterally in their own defence, while deliberately strictly limiting the circumstances in which such exceptional measures are permitted, to avoid unraveling the fundamental nature of the prohibition. If the international legal framework does not enable states to use force at times when the state determines it should do so, this may be indicative of the framework working, not the reverse.

International human rights law, marginalised in much political discourse around the 'war on terrorism,' and at times dismissed as ill-equipped to address the challenges of international terrorism, provides a detailed body of law, derived from decades of experience in responding to terrorism from Colombia to Chechnya, Ireland to Israel, Somalia to Sri Lanka and beyond. It has been further developed and consolidated in response to the legal and political challenges of the counter-terrorism post 9/11. IHRL does not straightjacket states in the fight against terrorism, but obliges effective counter-

terrorism and adjusts and accommodates in multiple ways to the challenges posed by terrorism, national security concerns, emergency or armed conflict.[60] It also provides limits to its flexibility, however, constraining responses within a broad rule of law framework that requires that restrictions on rights be governed by law, no more than is genuinely necessary, and subject to judicial oversight. The insistence that certain standards – prohibiting ill-treatment or extra-judicial executions for example – be maintained at all times shows not the naivety, rigidity or inadequacy of the framework but the determination by the international community that certain responses, whatever the challenges, are beyond the pale of international legitimacy.

It is suggested that a holistic look at the framework, in light of all applicable law, reveals a fairly comprehensive framework of rule and principles ripe for application in concrete situations. While there are no gaping holes in the legal framework there may inevitably be areas where the law has changed post 9/11 and undoubtedly areas of controversy where such legal change may unfold in the future.

12.2.2 Legal change post 9/11? A 'Grotian' moment, or pockets of legal development?

In the wake of 9/11, alongside the emphasis by politicians on the unparalleled threat and unprecedented challenges, were rapid suggestions of a transformative paradigm shift in the international legal order. Some have suggested that 9/11 was a 'Grotian' moment of international legal transformation, while others spotted 'turning points' and defining 'constitutional' moments.[61] As a dynamic instrument that evolves largely through practice, international law is always in a state of flux. The intensity of international responses to terrorism post 9/11 make this an area ripe for evolution. However, as has been noted: "[i]t is always easy, at times of great international turmoil, to spot a turning point that is not there."[62]

Custom develops through shifting general practice of states and *opinio juris*. Change is generally slow and requires a certain consistency of practice. Particular difficulties may attach to identifying customary international norms in a rapidly evolving area, particularly one as politically fraught as that of the 'war on terror' post 9/11. Care must undoubtedly be taken not to read precipitously into divergent practice and poor compliance an unraveling of legal

60 The interpretation of IHL alongside IHRL in genuine armed conflict situations ensures a legal framework that adjusts to the realities of particular situations, while ensuring that deviation from generally applicable rules is no more than is justified by those exigencies.

61 See Michael P. Scharf, "Seizing the "Grotian moment": Accelerated Formation of Customary International Law in time of Fundamental Change available at: http://works.bepress.com/michael_scharf/1

62 Ibid.

norms themselves. Divergence of views does not itself change the law, still less where those views, or the practice giving effect to them, is found only in one or two states, even hegemonic ones.

The war on terror practices and the reactions to them discussed in this thesis suggest that, despite the enormity of the attacks and their political repercussions, 9/11 may not have had the anticipated transformative or paradigm-shifting effect on the legal order. Rather, it may reveal isolated pockets wherein there is some claim to legal shift, others where there is surprisingly little movement, and a more substantial number of areas where established legal principles have been reasserted, clarified or developed through the interpretation and application of the law in the course of the war on terror.

The most noteworthy way in which the framework has *not* developed post 9/11 is in relation to the definition of terrorism itself. Post 9/11, the conclusion of a global definition and convention seemed inevitable. Yet, as explained in Chapter 2, no general terrorism convention has been agreed despite the priority afforded to combating terrorism on the international agenda. Over time, greater clarity around the term may have emerged through guidance from the United Nations provided parameters of a definition, but this contrasts with the plethora of national level definitions adopted, and in any event it does not purport to provide a legally binding definition of terrorism.[63] Variations in the elements of national and international terrorism definitions suggest that this is an area of considerable diversity, rather than consistency, of practice, giving strong reason to doubt the suggestion that a definition of terrorism, still less the crime of terrorism, has emerged under customary international law.

By contrast, perhaps the strongest claim to normative shift lies in relation to the use of force against non-state actors. As Chapter 5 explores, the overwhelming support for the use of force in self defence against al Qaeda in Afghanistan, apparently without attribution of its acts to the state, is often cited as evidence of legal shift towards the right to self defence being triggered by non-state actors. While this development in the law may have been supported by other practice, international resolutions, state practice and expressions of support in relation to Afghanistan provided the clearest evidence of, and a decisive contribution to, the recognition of a shift in customary international law. The support for the possibility that an armed attack can be carried out by a non-state actor, sufficient to trigger the right to self defence (if the other conditions for self defence such as necessity and proportionality are met), is however quite distinct from some of the assertions of the right

63 See Chapter 2. SCRes 1566 and U.N. High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', U.N. Doc. No. A/59/565 (2 December 2004), neither of which purport to provide a legally binding definition.

to use of force preemptively against terrorists, on a potentially worldwide basis, which has not garnered support.

In certain other areas where a paradigm shift been claimed, there would appear to be a similar lack of widespread practice in support. In respect of the underlying issue of the existence or not of a conflict against al Qaeda and associates globally, the claim to acceptance of a shifting paradigm of conflict must be questioned, in light of the resounding international rejection as set out in chapter 6. While the post 9/11 context may have clarified certain issues of IHL, and perhaps obscured others, there is little indication of a radical shift in international legal standards.

9/11 has prompted greater activity, political and normative, than perhaps any other single event, and the impact on the legal framework is undeniable. Most notably, the burgeoning of terrorism laws on the domestic level has transformed at least *national* legal frameworks. On the international level, however, what has emerged may be described as smaller pockets of legal development.

Normative development has taken many forms and developed in many directions. Most obviously, there are some examples of new or revised inter-state agreements, such as those on international cooperation,[64] terrorist financing or nuclear terrorism.[65] As noted in relation to the 'reactions' to the war on terror above, in many areas there have been reassertions of rules and principles of the legal framework, and with them, in some cases, the development or elaboration of those norms. This was illustrated repeatedly in the chapters concerning human rights and the role of the courts where, in the face of alarming claims such as purported 'justifications' for torture, the reaction has generally not been a wavering approach to standards but a strong reassertion of the absolute nature of the torture prohibition.[66] Practices of arbitrary or secret detention, explored in the case studies on Guantanamo Bay or rendition, may ultimately have led not to the acceptance of those practices but to an underlining of their unacceptability and the elaboration of safeguards.[67] The abundant judicial practice in the counter-terrorism context may have had an important role in this process, in some cases lending weight to normative strengthening by contributing to evolving international customary

64 See Chapter 4B.3.

65 See Chapter 2.1.

66 See Chapter 11. Examples may include eg jurisprudence on the extra-territorial scope of state responsibility for human rights violations (eg *Al Skeine & Ors v UK*, ECHR), or the nature of states positive obligations on detention (eg *Sabbeh &Ors v. Egypt*, ACHPR) or the cases before the European Court of Justice, among other courts and bodies, on the inter-relationship of the legal framework on sanctions or peace and security and human rights (eg *Kadi* and other cases).

67 This is seen eg. in the development of the jurisprudence on non-refoulement (to arbitrary detention or flagrant denial of justice for example) or the reassertion of safeguards against torture set out in Chapter 7 as well as thorough other soft law initiatives.

law,[68] or supporting the argument for arbitrary detention as a *jus cogens* wrong.[69]

While evolving jurisprudence may ultimately have strengthened protection in some areas, or eroded it in others, it has certainly contributed to a more elaborate framework of law through interpretation and application of treaty obligations in the counter-terrorism context in recent years.[70] In addition, new 'soft law' has proliferated in a range of areas from the financing of terrorism[71] to human rights standards[72], once again providing a more detailed – albeit non-binding – frameworks.

To understand changes in the legal framework one must also look beyond normative development as such, to ways in which the norms have been accepted and implemented and the system strengthened. Perhaps more significant than new conventions is the increased number of ratifications of existing sectoral anti-terrorism conventions, which contributes to providing a far more comprehensive normative framework for cooperation against international terrorism than existed before 9/11. The framework has likewise been strengthened through enhanced implementation, including improved modalities of cooperation as discussed in Chapter 4.

In turn, the enhanced ratification and implementation are supported by institutional and capacity building developments. Nationally, examples may include the establishment of focal points for international cooperation or domestic reform in some states to ensure a framework of accountability for intelligence agencies. Internationally, the notable shift of approach by the Security Council counter-terrorism committee and other regional and international political organisations towards embracing a human rights dimension as an inherent aspect of its security agenda, and the new or enhanced international and regional entities dedicated to strengthening the prevention of terrorism within the rule of law, have the potential to bolster the international

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68 See e.g. R. Baker, Customary International Law in the 21st Century: Old Challenges and New Debates, European Journal of International Law, Volume 21, Issue 1, Pp. 173-204 describing the acceptance of the jurprudence of the internaitonal criminal tribunals as "slowly begun to be elevated into norms of customary international law," and noting that "the debate over whether consistent state practice and opinio juris are the only building blocks of customary international law is over, because clearly, for better or for worse, they no longer are."

69 See Chapter 7A.5.3 on the repeated reference in the counter-terrorism context in recent years as to the prohibition of arbitrary detention constituting a jus cogens norm by e.g. the working group arbitrary detention, special rapporteurs and commentators.

70 Chapter 11 explores the role of the courts, though other examples are found in Chapters 7B, 8 and 10.

71 See eg International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – the FATF Recommendations, 2012.

72 Examples include the 'Principles on National Security and the Right to Information (Tshwane Principles)' (2012) or the 'Framework Principles' for securing accountability in the context of State counter-terrorism' by the Special Rapporteur on Terrorism and Human Rights, A/HRC/22/52 (2013).

infrastructure in this area.[73] Rather than a radical shift in the legal order, these may evidence a decisive move towards making obligations *vis a vis* countering terrorism a reality.

12.2.3 Areas of tension and possible future development?

While there may not be gaping holes or seismic shifts in the legal framework, it would be naive not to recognize that the war on terror practice has exposed tensions and challenges for the legal framework. While it goes beyond the scope of this study to speculate on where normative development will come from over time, the following are among the areas where the law may well evolve informed by the on-going global fight against terrorism.

One such area where future attention is inevitable is in relation to the legality of the use of drones, robotic or other weapons systems that have proliferated in recent years, as highlighted throughout the study, in particular in Chapter 6. Considerable international attention is being set on questions around the inherent lawfulness of particular modern weapons systems and, perhaps more productively, on how existing rules and principles should be applied in the evolving landscape.

As has been noted, the extent to which the legal framework can or should accommodate targeted killings outside of armed conflict must be seriously doubted, not least given the nature of the right to life and the *jus cogens* nature of the prohibition on extra-judicial executions. Proposals for new conventions between states allowing for such killings on their territory would not remedy the unlawfulness under human rights law or IHL,[74] just as suggestions for judicially endorsed lethal 'warrants' or other safeguards, for example, could have no plausible traction within a framework of international law.[75] Undoubtedly, the right to life has been under serious attack in recent years and it remains to be seen to what extent calls for fuller international attention to legal standards may lead to an unraveling of a fundamental prohibition or a reassertion of fundamental principles.

A related question which the war on terror has highlighted, and where evolving practice may influence standards in important respects, is in relation to whether and in what circumstances there is an obligation under IHL (or

73 E.g. Examples may include the dedicated Special Rapporteur on terrorism and human rights,the UN Implementation Task Force to give effect to the UN Global Counter-terrorism Strategy's commitment, and potentially the CTC Technical Assistance team or Task Force on Money Laundering. .

74 See "US Draft National Security Strategy 2013", at http://www.utexas.edu/lbj/sites/default/files/file/news/National%20Security%20Strategy%202013%20(Final%20Draft).pdf.

75 See e.g. President Obama, National Defense University speech, 23 May 2013 on the discussion of safeguards on drone killings outside areas of "hostilities"; it is unclear e.g. how such areas of hostilities would be defined.

under IHRL read in light of IHL in armed conflict) to capture rather than kill persons taking part in hostilities.[76] Another specific area which may be ripe for clarification, as suggested by the ICRC, is in relation to the minimal standards applicable in NIAC, which may be clarified through the ICRC elaboration of minimal standards, or through practice.[77]

On this issue, as on others, as the question of co-application and interplay of legal regimes (as between IHL and IHRL or peace and security and human rights and IHL) continues to be given effect, including by the increasingly role of human rights bodies in giving effect to these concurrent obligations, the complex issue of interplay deserves to be further clarified.[78]

Much of the controversy in the war on terror, as addressed further below, has stemmed from an overreaching approach to armed conflict and the applicability of IHL, or selectivity in its application. While the idea of a perpetual global war with al Qaeda and others may have few supporters,[79]definitional and classification challenges around the nature of the parties to a non-international armed conflict look set to continue, particularly as lines between organised criminality and conflict will continue to be blurred in practice in particular situations from Mali to Mexico and beyond.

Terrorism and the multi-actored, coordinated nature of aspects of counter-terrorism have brought into sharp focus areas of controversy concerning the law of state responsibility. Among the issues raised by international cooperation in unlawful war on terror practices is whether and how the legal framework embraces, or might embrace, the responsibility of states for 'complicity' in international wrongs through forms of cooperation that may fall short of the concrete support and knowledge required of 'aiding and assisting'.[80] Practice is unfolding in relation to responsibility for the receipt of intelligence obtained through serious human rights violations, for example, or the uncertain implications for the ability of states to try an individual whose rights have

76 Ch 7 B.3, War and Human Rights and Chapter 6B.2.2 Drone Killings, which both highlight developments in practice, evolving US positions and reactions, judicial developments, critique from within the UN and experts and the ICRC Guidance on DPH, all of which may come to influence legal development and support an obligation to capture rather than kill wherever feasible.

77 See Chapter 6B. See also 7B.3 on interplay between IHL and IHRL, noting that perceived gaps may be addressed through an adequate approach to applying IHRL mindful of the realities of conflict.

78 As noted above the question of whether there is an obligation under IHL (or under IHRL read in light of IHL in armed conflict) to capture rather than kill and if so in what circumstances has been discussed in Chapter 7B.3.

79 See Chapter 6B.1 on the position of other states. While the US' assertion of a conflict with al Qaeda and associates continues, see President Obama's recognition of the need to shift from a perpetual war paradigm in the National Defense University speech, 23 May 2013.

80 See Chapter 10.

been violated by other states.[81] Controversies also attend the high threshold for the test for attribution and the challenges it poses in particular contexts, whether in terms of state responsibility for terrorism, or for abusive acts of private security companies in the counter terrorism context, as discussed in Chapter 3. It remains to be seen whether criticism of the current framework, or its consideration in light of post 9/11 practice, may ultimately impel future legal development in this field.

While the human rights framework in the counterterrorism context is elaborate, the war on terror has also illuminated certain areas of that body of law that may deserve greater clarity as regards states obligations in the context of counter-terrorism. Examples may include the due process rights applicable to inter-state transfers, where human rights systems adopt differing approaches,[82] the extra-territorial reach of human rights obligations in relation to privacy which remain underexplored,[83] or the guarantees regarding data protection, where the law remains skeletal.[84]

In these area, as in others, the law is a dynamic tool which will continue to respond to rapidly unfolding practice. Differences of view as to how that development should unfold, and proposals for change, are an inevitable and healthy part of any legal system. In no credible system of law, however, can they provide a pretext for non-compliance with those aspects of legal framework which subjects dispute, still less for the blanket subjugation of international law to domestic interests.

12.3 THE 'WAR ON TERROR' AND INTERNATIONAL LEGALITY: SOME ESSENTIAL CHARACTERISTICS

While there may be a detailed legal framework governing terrorism and counter-terrorism, the practice of counter-terrorism in recent years reveals certain recurrent approaches to that framework that are worthy of reflection. Highlighted in turn below, these might be described as: i) selectivity, and a fragmented approach to the framework; ii) exceptionalism and its insidious creeping reach; c) a 'purposive' interpretation of the law and the undermining of its authority and binding force; and d) arbitrariness and lack of process. It is suggested that these approaches are manifestations of an overarching characteristic which is the erosion of the principle of legality itself. They are

81 Eg. The abuse of process claim that arise increasingly in practice: Chapter 4B.5. For examples of this 'shared responsibility' of states and issues arising in the context of rendition, see Chapter 10.

82 Chapter 7A.5.10(iii).

83 In the context of revelations of massive surveillance, e.g., the US asserts that privacy protections do not apply, while the extra-territorial scope of human rights obligations in this context is uncertain and has not been explored by human rights bodies.

84 See Chapter 7.A.5.7 and B.13.

the antithesis of the principles – among them clarity, fairness, due process and accountability – that underpin a 'rule of law' approach to addressing international terrorism.

12.3.1 Selectivity and Fragmentation

A recurrent feature of the relationship between the 'war on terror' and international law has been selectivity – in respect of which law applies, to whom and for whose protection. Selectivity is the antithesis of universality, and is itself a slight on the legality principle.

Selectivity has been most obviously manifest in the resistance to the role and relevance of international law as a constraint on *all* states. In its most caricatured form, such double standards were seen in the first US National Security Strategy after 9/11 wherein international law was mentioned only once, as a vehicle by which 'rogue states' were defined, yet was entirely absent from the lengthy exposition of the US policies – such as the doctrine of pre-emptive force – itself of, at best, dubious legality. While the language of rogue states has gone, allegations of double standards linger. State Department reports, condemning arbitrary detention, torture or impunity by particular states, juxtapose starkly alongside the travesties of the 'war on terror'.

Likewise, it is noteworthy that since September 11 states have not infrequently invoked international law as directly or indirectly providing a pretext for taking action against other states or individuals. Examples include references to non-compliance with Security Council resolutions on Iraq, the failure by Afghanistan to surrender bin Laden, or Pakistan's failure to prevent terrorists being active on its territory. The emphasis given to human rights violations by the Taleban or Saddam Hussein regimes provide less direct examples. Yet ironically these 'enforcement missions' have often themselves violated the international standards in whose service they purported to act.[85] The message appears to be that while international law is important for other states, it cannot constrain the exercise of the United States' unique power.

A selective approach to international law is apparent also in the scope of persons *protected* by the law. In its extreme form, this was manifest in the suggestion that some states, or some people, were so 'evil' or dangerous that they are rendered beyond the protection of law.[86] Another example cited in previous chapters is the stark contrast between the emerging recognition of

85 On the rejection of a right to use force to 'enforce' violations by other states, see Chapter 5. Chapter 9 notes the reference to the rights of victims in justifying the killing of Bin laden. The notion of the innocence of victims should not be relevant to the right to reparations and to accountability.

86 See e.g. statement by then legal adviser John Yoo that some people are beyond the legal framework, header to Chapter 8, or President Bush's 2002 'axis of evil' speech, Chapter 5.

the rights of 'innocent' victims of terrorism to compensation, and the vanishingly slim record of reparation to victims of counter-terrorism, even those emerging from simple mistaken identities.[87] The creation of categories of deserving and suspect victims is anomalous to the notion of universal human rights in general, and to basic customary principles of reparation in particular.

A more specific contrast emerges from the decision that the most senior officer charged with torture at Abu Ghraib could not be prosecuted on due process grounds (given the failure to read him his rights), while individuals secretly detained and torture for years are prosecuted despite this, before military commissions with limited due process and where they will be subject to the death penalty if convicted.[88] While rights should be denied to no-one, the selectivity in the reverence of defence rights is striking. The misplaced emphasis placed on the relevance of 'nationality' in respect of core rights, as in relation to drone killings or detention rights, is perhaps another example of a selectivity of protection that has no basis in the legal framework and further erodes the inalienability of basic rights and the universality of international legal protection.[89]

In short, a perception emerges of international law that protects 'us' but not 'them', and constrains 'them' but not 'us'. The impact on the universality and legitimacy of international law, and the credibility of offending states to invoke international law and to call others to account by its standards, is profound.

Another form of selectivity arises in the 'pick and choose' approach by which only particular areas of law, or particular rules therein, are acknowledged as applicable. A fragmented or atomised approach to the law has been a common feature of international legal discourse since 9/11 – and risks presenting a misleading portrait of the normative framework, suggesting gaps, anomalies and inconsistencies where they may in fact not exist.

Much US policy in this area relies on IHL, in line with the putative 'war' paradigm, and an expansive approach to self defence, with an emphatic blindness to the role of IHRL. In the context of justifying its positions on targeted killings, or its asserted right to detain people that may pose a threat, the policy reasons why the US would cite *jus ad bellum* or IHL and ignore IHRL

87 Chapter 7.B.14. Chapters 8 on Guantanamo and Chapter 10 on extraordinary rendition both contain examples of mistaken identities involving no culpability whatever on the part of the victim of unlawful detention or torture.

88 Chapter 8.B.4.4

89 See eg Justice Department White Paper, 2013, on targeting US citizens and surrounding debate. See also Why citizenship should not be the main focus of targeted killing'J Hafetz, al Jazeera, http://www.aljazeera.com/indepth/opinion/2013/03/201331073748511377.html. On controversy concerning UK orders stripping of citizenship before drone attacks and unlawful detention, see "British terror suspects quietly stripped of citizenship… then killed by drones" Independent,

are plain. There can, however, be no legal justification for a blanket rejection of the relevance of human rights law.

Another example might be the blindness of the Security Council to the full range of international obligations when it mandated measures pursuant to peace and security post 9/11, though as noted above the fragmented approach has been rejected since. In the implementation of these obligations, states have on occasion sought to deny the relevance of other obligations under human rights, refugee law or IHL.[90] Conversely, a similar critique may be leveled at the blind application of IHRL by the ECtHR, without due reference to the relevance of IHL in genuine armed conflict situations.[91]

In addition to the selective regard for certain areas of law, and neglect of others, is the lack of internal consistency; where for example IHL has been invoked to displace IHRL, IHL has itself in turn been applied selectively. An example highlighted relates to targeted killing of suspected al-Qaeda operatives, where IHL standards are invoked to justify targeting which would be unlawful outside armed conflict, but not accepted as applicable to protect similarly situated persons in the event that they are detained. The claim that detainees are dangerous criminals rather than POWs has been made to question the appropriateness of affording them the protection of IHL, while a claim that they are 'combatants' had been made to justify the non-application of criminal law and human rights guarantees.

Finally, a fragmented approach is evident also in the failure to have due regard to underlying legal principles, focusing instead on 'uncertainty' around what are presented as inadequate or outmoded 'technical' legal rules. The debate on the status or rights of prisoners was one example, where the discussion revolved unduly around particular provisions concerning classification of detainees, while largely ignoring fundamental principles such as equality, humanity and non-arbitrariness,[92] and the fact that basic rights apply to all persons irrespective of status.

12.3.2 Exceptionalism and its creeping reach

An exceptionalist approach to international law has taken many forms in the fight against international terrorism, purporting to justify exceptions to normally applicable legal regimes, norms or processes. A certain degree of ex-

90 On the difficult issues of interplay arising, see Chapter 7B.3.

91 Chapter 7 discussion – *see e.g.*, the *al Jedda* case in relation to ECtHR's approach to applicable law in Iraq.

92 See eg the emphasis on non-arbitrariness in the UN Secretary General's definition of the rule of law, which include *"equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."* Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies" (2004)).

ceptionalism is anticipated in the legal framework itself, in that the law adjusts to exceptional circumstances. Thus for example the framework of IHRL allows for derogation from certain human rights provisions, the limitation of enumerated rights on 'national security' or 'public order' grounds, and for adjustment through the co-applicability of IHRL and IHL in time of armed conflict. Curiously perhaps, the derogation exception in human rights law, which allows for broad but not limitless suspension of certain rights, has hardly been relied upon by states in the war on terror.[93] Instead, as noted above the practice of some states shows a broader reaching challenge to the applicability of IHRL entirely.

The designation of the 'war on terror,' later referred to as a global conflict with al-Qaeda or associated groups, represented an attempt to create an overarching exception to normally applicable rules and criteria.[94] In the context of a putative conflict waged against an unclear opponent, on a 'global battlefield' with no identifiable geographic or temporal limits, the exception is vast and indeterminate.[95] An uncertain range of persons suspected of an uncertain range of forms of associations with the uncertain phenomenon of terrorism are brought within the exception and subject to exceptional rules on targeting or detentions under IHL that are intended for a much narrower, definable and specific situation of armed conflict under international law.

The restrictive approach to the territorial scope of human rights provisions, and denial of the applicability of obligations when the state acts outside its own territory (despite human rights jurisprudence to the contrary), is another manifestation of an exceptional approach that seeks to exclude the applicability of aspects of the human rights framework.[96]

The Security Council's determination that 'terrorism' itself constitutes a threat to international peace and security, adopted in a broad brush rather than differentiated, context specific manner, may be seen as a further manifestation of an exceptionalist approach to the phenomenon of terrorism.[97]

An exceptionalist approach is seen recurrently in criminal law, where exceptional laws, penalties or procedures are brought to bear in 'terrorism' cases that mirror the development of a 'law of the enemy' approach to criminal law.[98] Chapter 4 illustrates how even core principles on which the criminal justice process depends, such as the presumption of innocence or the right to trial before an independent and impartial tribunal, have been jettisoned by numerous states around the world in the course of terrorism trials.

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93 Chapter 7B.4. The notable exception was the UK which derogated in respect of detentions within the UK under article 5.

94 On inter-relationship with IHRL, see Chapter 7B.3.

95 Chapter 6.B.1.1.

96 Chapters 7A.2.2 for the legal framework, and 7B.2 for issues arising post 9/11; see cases in Chapter 11.

97 Chapter 5 on such threats, and Chapter 7.B.1.

98 Eg Chapter 4 and Chapter 7B3.

Exceptions have a tendency to expand and to normalize, as the war on terror amply illustrates. While exceptions should be strictly construed, a persistent and insidious feature of the post-9/11 landscape has been the creeping reach of exceptional justifications. They have crept downwards, taking root in the way a range of issues are approached until the exception becomes embedded in the norm. They have also crept outwards embracing an ever more diverse and broader range of actors, facts and circumstances, until the situations embraced are not (or are no longer) exceptional, and may bear little relation to the original justification.

One manifestation of this phenomenon is seen in the ever expanding forms of 'association' with and 'support' for terrorism. Thus an indeterminate range of individuals and activities, including even activities acknowledged as *per se* innocent, can be swept within an exceptional international framework intended for, or justified by reference to, the 'worst of the worst'.[99] The extent to which malleable terrorism laws, aimed at upholding the rule of law, have become a weapon to suppress political dissent, social organisation, even attempts at humanitarian or educational support, often providing a new legitimacy to old autocracy, is borne out by the practice reflected in previous chapters. 'Mission creep' whereby rules or approaches from the terrorism context are employed for other purposes is illustrated in preceding chapters, including increased surveillance powers or security controls, justified by security threats then employed far beyond them, bypassing normally applicable frameworks of protection and process.[100]

Likewise, self defence is an exception to the prohibition on the use of force. It has not, however, been construed narrowly, as exceptions should be, but extremely expansively. While self defence in Afghanistan was considered justified in light of the exceptional prevailing circumstances of the 9/11 attacks and imminent threat of further attacks, self defence has since been stretched to purportedly justify force far beyond those sort of exceptional circumstances.

The extent to which terrorism poses an exceptional threat is increasingly subject to debate as the struggle against terrorism unfolds, and some assert that the menace of al-Qaeda or others diminishes.[101] 9/11 may well have been an exceptional moment in history for many reasons, but it may be doubted whether the acts of al-Qaeda, associated groups or acts of terrorism

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99 Chapter 4B2 on examples of criminalising even well intentioned 'material support' for those considered terrorists; the best known example from the jurisprudence of US courts is *Holder v. Humanitarian Law Project*, 561 U.S. (2010).

100 See e.g. F. N. Baldwin Jr. and D. R. Koslosky, 'Mission Creep in National Security Law', 14 (2012) W. Va. L. Rev. 669.

101 See e.g. Chapter 5 on the nature of the threat, its immediacy and source(s). Official US indications in early 2013 suggest that US soil has never been safer; see e.g. State of the Union address of 2013, President Obama acknowledged the need to pursue the "remnants" of al Qaeda, National Security Strategy 2013, and 23 may 2013 speech. Different considerations clearly apply in different states.

more broadly would meet the same criteria. Yet 9/11 casts a very long shadow that colours the approach to quite distinct, myriad acts and threats of international terrorism since then.[102] There is a risk of broad ranging, disparate acts and threats being treated as emanating from one source, and being brought within the exceptional category in respect of which exceptional treatment is sought.[103]

The justification of exceptional approaches to certain types of cases because of the label that attaches to them, rather than on a case by case basis as justified by the application of clear, foreseeable law to particular facts, risks undermining international legal responses to terrorism.

12.3.3 'Purposive' Legal Interpretation and Undermining the Authority of Law

War on terror practice has also raised questions as regards the interpretation, or the manipulation, of international law.[104] International law and practice provide interpretative principles which assist in the application of the law, particularly in novel contexts.[105] What has euphemistically been referred to as the 'purposive interpretation' of the law by states or their legal advisers, in line with the policy of the day, has been a feature of the post 9/11 landscape. The most notorious example was 'the torture memos' from the US Justice Department, which redefined torture and provided justifications for it that have been lambasted as spurious, untenable interpretations of the law.[106]

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102 See e.g. the discussion of the 'continuing' threats and attacks in chapter 5.

103 See discussion of this phenomenon, in the justification for resort to self defence against terrorists worldwide, in Chapter 5.

104 For analysis on the types of legal advice given in the war on terror, see the following: P. Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values*, supra note 51. *See* P. Margulies, 'Foreward: Risk, Deliberation, and Professional Responsibility', 1 (2005) J. Nat'l Sec. L. & Pol'y 357, 360; D. Cole, *The Torture Memos: Rationalizing the Unthinkable* (The New Press: New York City, 2009); J. Lavitt, 'The Crime of Conviction of John Choon Yoo: The Actual Criminality in the OLC During the Bush Administration', 62 (2010) Me. L. Rev. 155; M. P. Scharf, 'The Torture Lawyers', 20 (2010) Duke J. Comp. & In''l L. 389; J. Cooper Alexander, 'John Yoo's War Powers: The Law Review and the World', 100 (2012) Calif. L. Rev. 331; A. H. Garrison, 'The Role of the OLC in Providing Legal Advise to the Commander-in-Chief After September 11th: The Choices Made by the Bush Administration Office of Legal Counsel', J. of the Nat'l Assoc. of the Administrative L. Judiciary, Fall 2012.

105 Art 69, VCLT. Human courts have developed specific principles of relevance, including an evolutive approach to law as a living instrument, the principle of effectiveness, a purposive and contextual interpretation, and finally a holistic approach in line with broader international law. See Chapter 7A.6.

106 Chapter 7B; *see generally* P. Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (Palgrave MacMillan: New York City, 2009).

Another example in another but related field was the controversial, 'evolving' advice of the UK Attorney General on the lawfulness of the Iraq invasion.[107]

International practice recognizes the legitimate role of the 'purposive' interpretation of law, to ascertain the underlying purposes of the law and to give effect to it, which inevitably involves political and value judgment and embodies considerable flexibility.[108] On many of the issues explored, there will inevitably be a range of plausible interpretations as to the law, the purposes it serves and how to ensure its effectiveness. Within the legal framework, there is natural inherent flexibility, and this will inevitably be exploited to some degree by states and policy makers. War on terror practice raises the question as to where the line is drawn, however, between interpretations of law, and its enslavement to politics. Stretching 'interpretation' and legal opinion beyond plausible limits can only undermine the role of legal advisers and potentially the credibility of the law itself.

Other examples emerge in the war on terror as to the marginalization of that legal advice that was not consistent with policy objectives.[109] Where the law could not be made compliant, one troubling approach was to suggest, as was done at the outset of the war on terror, that international law would be respected 'so far as consistent' with the domestic agenda.[110] The implicit refusal to adhere to the law when it is not perceived to be in the national interest is inconsistent with basic international legal principles[111] and inevitably undermines the binding authority of the law.

12.3.4 Arbitrariness

A persistent characteristic that has emerged from the treatment of international law in the 'war on terror' is arbitrariness and the lack of due process. Pro-

107 *See* Chapter 5.

108 For one example of various interpretative approaches in the human rights context see Murillo v Costa Rica, Chapter 7. *See* e.g. P. Margulies, 'Foreward: Risk, Deliberation, and Professional Responsibility', 1 (2005) J. Nat'l Sec. L. & Pol'y 357. On the promotion of a 'purposive' interpretation in the context of Iraq, see M. Byers, A decade of Forceful Measures against Iraq, EJIL 13 2002 21-41.

109 See eg evidence to the Iraq Inquiry in the UK, Chapter 5.

110 See eg Memo from Alberto Gonzales to President Bush, 'Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban', 25 January 2002, or Former US President Bush, Memorandum, 'Humane Treatment of al Qaeda and Taliban Detainees', 7 February 2002. It refers to being "a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.' Note that the language of "supporting" international law, but implicitly not being constrained by it, is also reflected in the 2013 Draft National Security Strategy.

111 A state cannot justify non-compliance with international law by reference to its domestic law is one of the most basic principles of the international order.

tecting against arbitrariness is at the core of the rule of law.[112] Yet quite different manifestations of the promotion of unfettered executive discretion in matters of security emerge from across the spectrum of responses to 9/11. Meanwhile, as exceptional categories have drifted and expanded, as noted above, so have protections and safeguards shrunk.

The suggestion that matters such as the status of detainees and lawfulness of detention were exclusively 'military' matters not susceptible to judicial determination (rejected by the US Supreme Court), or the refusal to meet the obligation under IHL to have a competent tribunal determine detainees' status, provided early illustrations. The exclusion, or marginalisation, of the role of judicial oversight has however taken many forms, from the denial of access to a court for habeas corpus, to summary extradition procedures, to replacement of regular impartial and independent courts with *ad hoc* tribunals, to restrictions on the fair trial guarantees that make the judicial process meaningful or the removal of international law as a source of law for the courts in terrorism related cases.[113]

A rather different manifestation of the unstructured exercise of broad-reaching powers, without safeguards or oversight, is seen in the essential unilateralism that has characterized the use of military force in response to terrorism since 9/11. The interventions in Afghanistan and Iraq, and most graphically the National Security Strategy advanced by the US,[114] may reflect the refusal of certain militarily powerful states to be beholden to a collective security system that they do not control. The European Security strategy by contrast, while corresponding quite closely to its American counterpart in the assessment of risks and threats, emphasises multilateralist responses within a framework of collective security.[115]

While there has been a shift towards the 'individualisation' of international obligations through Security Council sanctions imposed directly on individuals, rather than the traditional approach of acting through states, there has not been a corresponding shift to ensure the right of individuals to challenge the Council's decisions. The lack of any fair process prompted the establishment of the Ombudsperson on delisting, and calls for further reform of the Council to ensure the rights of individuals and greater accountability of the Council,

112 See Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies" (2004), UN Doc. S/2004/616.

113 See e.g. Chapter 11.

114 See Chapter 5.B.4; this was most striking in the 2002 National Security Strategy and a shift of tone and approach was evident in subsequent strategies. In practice and policies, however, a broad reaching assertion of the right to use force unilaterally when the US determines it is necessary remains.

115 'A Secure Europe in a Better World – the European Security Strategy' approved by the European Council 12 December 2003 and drafted under EU High Representative Javier Solana, and 'Internal Security Strategy for the European Union "Towards a European Security Model," approved 23 February 2010.

but the deficit remains.[116] On the national level too, measures including sanctions, expulsions and other 'preventative' orders of varying types have infringed a wide range of rights, without providing basic information or a meaningful opportunity for challenge to those affected.[117] A critical dimension of the role of the courts discussed in Chapter 11 has indeed been to reclaim and reassert that very role, and its democratic credentials, and to impose process and oversight in this environment of widespread arbitrariness.[118]

12.3.5 Secrecy, the Refusal to Look Back and the lack of Accountability[119]

Access to information enables public scrutiny of government action, safeguards democratic participation and guards against future abuse.[120] Yet in many ways the war on terror has been, and remains, an exercise in clandestinity. This is epitomized by the extent of secrecy surrounding the rendition practice, designed and implemented to ensure that no information came to light, and followed by a concerted and systematic cover up.[121] However it comes in many other guises. These include the protracted refusal for many years to reveal information as to who was detained at Guantanamo and why.[122] While that has ceded, wide-reaching gagging orders on numerous detainees continue, precluding any information about the detainees, however innocuous, from reaching the public eye.[123] The censoring of the military commission process for references to detainee abuse,[124] prosecutions and disproportionate penalties imposed on journalists and whistleblowers,[125] or the invocation of state secrecy to completely block *ab initio* access to justice for victims of torture or secret arbitrary detention exemplify a defensive and absolutist approach to

116 See Chapter 7B.8 on the development of the Ombudsperson to counter the procedural arbitrariness and the national, regional and international cases in Chapter 11.

117 *See* e.g. Chapter 7.B.7, though curtailing due process runs across many of the issues raised in Chapter 7.

118 In Chapter 11, see e.g. Lord Bingham's classic expression of the democratic role of the courts in *A&Ors*.

119 President Obama stated that he is interested in looking forward, not backwards, discussed in e.g. Chapter 7.B.14.

120 See e.g. National Security Principles and the Right to Information, (Thwane Principles, 2012).

121 Council of Europe Committee on Legal Affairs and Human Rights, 'Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report', 7 June 2007, Chapter 10.

122 This protracted refusal spanned many years but has now been lifted; see Chapter 8.

123 See the case of *Abu Zubaydah* (Abu Zubaydah v Poland, ECtHR application 26 March 2013) highlighted in Chapters 10 and 8..

124 Chapter 8B.4.5

125 On the prosecution of Bradley Manning 'whistleblower' on war crimes in Iraq, nominated for the Nobel Prize but prosecuted by the U.S., see http://www.bradleymanning.org. See also Chapter 7 on freedom of expression.

secrecy, at odds with the careful balancing enshrined in the legal framework.[126]

An overreaching approach to national security and state secrecy, evident across the practice of several states, obscures the legitimate role for protection of national security information, creates distrust, delegitimizes counter-terrorist efforts and impedes the rights to truth, justice and accountability.

Closely linked to the fortress approach to information and secrecy outlined above is the lack of reparation, and of accountability, that continues to characterise the war on terror. Reparation is a basic principle of international law.[127] It serves multiple restorative purposes – for the wronged, for society to learn from the past and to ensure non-repetition, and for the rule of law that requires reassertion in the face of egregious wrongs.[128]

The imperative of accountability, and its significance on multiple levels, is also firmly reflected in the international law and practice set out in this study.[129] Accountability is recognized as one of the cornerstone principles of the 'rule of law'.[130] The priority the international community has afforded to it has led to the elaborate system of international criminal justice, with its national and international elements, set out in Chapter 4.

"Justice," as invoked in the 'war on terror' however, assumes peculiar form. It was hailed for example when Osama bin Laden was shot to death,[131] and mounted on the sign for 'Camp Justice' in Guantanamo which houses the controversial military commissions. Yet justice is notably absent for the crimes committed in the name of counter-terrorism and for their many victims.The resistance to accountability in relation to crimes committed in the name of the war on terror, and the unwillingness thus far to look back, learn, account and repair, is a striking characteristic of the war on terror to date. It poses a challenge to the credibility of the framework of international law, and to the prospects of moving to a rule of law approach to countering terrorism in the future.

126 Chapter 7B.14, 10 and 11 on state secrets, or the *A&Ors v UK* case for one of many examples of judicial reasoning on the balance between protecting genuine national security information while protecting human rights in Chapter 7.B.7 and 11.

127 Chapters 3 and 7A.4.2.

128 See Chapter 7 on reparation, and the illustration of rendition in Chapter 10. The UN rule of law initiative website gives priority to justice and accountability and reparation as dimensions of the rule of law, see http://www.unrol.org/article.aspx?article_id=3

129 Chapter 4, 6, 7, 8, and 10; Secretary General 2004 Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies" (2004), UN Doc. S/2004/616) and UN Rule of Law website, ibid.

130 Ibid.

131 See Chapter "The Killing of Osama bin Laden: Justice Done?"

12.4 Challenges and Implications: The War on Terror and International Legality

The overview of the framework of international law provided in these chapters suggests that the applicable law contains no gaping holes. It is not inherently outmoded or ill-equipped to deal with the challenges of international terrorism. It is not excessively complex, nor inaccessible, still less irrational. It is not blind to, but responds to accommodate, in various ways, security challenges of the type epitomised by 9/11. The law has not undergone revolutionary change, but it has gradually evolved since 9/11 and will continue to do so. While there are areas for legitimate disagreement as to its interpretation, areas where the law may be unclear and legal development desirable and/or underway, what 9/11 exposed – and the 'war on terror' confirmed – was not so much the inadequacy of law but the fragility of respect for it, and the pressing challenge of enforcement.

The approaches to the law, through the selectivity, exceptionalism, legal distortion, arbitrariness and lack of accountability outlined above, are the antithesis of the core rule of law principles upon which the system is based. Systematic violations of core norms shake the foundations of the legal order. As we grow accustomed over time to widespread violations of legal norms, and exceptional approaches, the risk of desensitisation, normalization and acceptance of the inevitability of such an approach grows. In a 'war on terror' in which one debates the legitimacy of extreme violations such as waterboarding, targeted killing or indefinite detention without charge or trial, 'softer' responses in the form of inhuman treatment, denial of basic fair trial rights, the quashing of political dissent or the right to privacy, for example, appear almost trivial. The distortion of law and respect for it so far as politically convenient ultimately jeopardize the universality, integrity and the authority of the legal order.

The extent of the corrosive effect and the long-term impact of the 'war on terror' on legality, remains to be seen. Much depends on how the international community continues to address the fundamental challenges that terrorism and counter-terrorism currently pose.

A key challenge to be faced in the road ahead is plainly to ensure that the scourge of terrorism be addressed, and that this is done effectively. The prevention, investigation and prosecution of serious acts of violence are themselves obligations under international law. While there may be growing divergence of view as to the true nature of the global terrorist threat and its priority for the international community as compared to other challenges,[132] images of

132 Official reports give vastly different views on this. Some official reports suggest al Qaeda and associated groups are greatly depleted, or that American soil has never been safer (Draft 2013 National Security Strategy). Understanding the nature of the threat is essential to the

terror attacks around the globe from Bali to Baghdad, or Madrid to Mogadishu, pay chilling testament to the need to meet the challenge of terrorism prevention. This sits alongside the need to critically assess, on an on-going basis, the real nature of existing threats and the effectiveness of strategies to address them.

The focus on prevention, including by addressing the causes and contributing factors to terrorism, is consistent with the implementation of the UN global strategy. The effectiveness of particular strategies of prevention, while essentially a political matter, is also linked to lawfulness.[133] Measures that in fact propagate further terrorism, or that impede crucial counter-terrorism initiatives, cannot be justified as legitimate restrictions on rights in the name of terrorism prevention. The counter-productivity of signature features of the war on terror, notably Guantanamo, Extraordinary Rendition or drone strikes, has been noted.[134] One of the war on terror paradoxes is that international cooperation and criminal justice action against international terrorism has been hampered by abusive practices themselves taken in the name of 'counter-terrorism.' Practice set out in this book indicates the pragmatic as well as principled importance of countering terrorism in accordance with the rule of law.

The challenge ultimately is to ensure that this effective counter-terrorism strategy unfolds in a way that restores, rather than further undermines, the rule of law. Promoting respect for international law is essential to ensuring that the 'war on terror' does not score a devastating own goal by eroding permanently the rule of law and 'deliver a victory to terrorists that no act of theirs could achieve'.[135] Ultimately, the characteristics referred to above must be addressed, and the principle of legality – the clarity and coherence of law, its universality and the principle of due process inherent therein – must be reasserted.

Confidence must be restored in the capacity, relevance and credibility of international law, as providing an essential legal framework which, while imperfect, is equipped to address the normative consequences of 9/11 and its aftermath. International law is perhaps more present in political discourse since the 'war on terror' than before, but lingering perception of the 'bizarre'[136] or inept nature of international law should be countered. In areas where the law is unclear, the challenge of clarifying the normative framework, while remaining true to its essential norms and principles, should be met. The

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application of the legal framework and the necessity, appropriateness and proportionality of responses.

133 See Chapter 7A on the necessity and proportionality requirement; measures that are not effective to achieve their legitimate aim they pursue cannot constitute necessary and proportionate restrictions on rights. Some rights can never be restricted.

134 See 'Reactions' at Ch.12.1 above.

135 Former Secretary General Annan's quote cited at the outset of the chapter.

136 See statement by Baroness Hale cited at the outset of the chapter.

proliferation of responses to terrorism raises the challenge of ensuring that the on-going development and interpretation of the law is coherent rather than fragmented. Proposals for normative change, which in any vibrant system of law will inevitably follow developing practice, should therefore be encouraged so far as they pursue and are constrained by the principles of the rule of law. Differences of view on the law and proposals for legal change must, however, be distinguished from the erroneous view that there is currently no effective system of law. The distinction between the law as it is, and the law as some would wish it to be, must be reasserted.

Second, essential to reasserting the principle of legality is underlining the universality of law, demonstrating that core rules of international law apply to all states, for the ultimate protection of all persons. The continued recovery of the central role of international human rights law, and clarification of its universal application, *whenever* (including in times of crisis or conflict), *wherever* (whether at home or abroad) and in relation to *whomever* the state exercises its authority or control over will contribute to this process. The perceived universality of the international system depends on the law applying to, and constraining, the more powerful as well as the less. The harm done through selectivity and perceived double standards is readily evident in frequent statements by states, underming the authority of the U.S. (or its supporters) to opine on or criticize violations by other states in light of 'war on terror' crimes.

The law is safeguarded by its application according to procedural principles and effective oversight. Addressing the challenges facing the undermining or marginalising of role of courts and legal mechanisms, national and international, in the area of national security is clear. Ensuring the procedural fairness of sanctions or other measures taken against individuals, whatever their provenance, is essential. As regards collective security mechanisms, there is plainly a new imperative around the old debate on reform of the Security Council, and the need for systems that command international respect and more effectively enforce the rule of law, while ensuring essential restraint on the otherwise unfettered exercise of power of any one state. The perceived arbitrariness of international law should be countered by strengthening the infrastructure of mechanisms to give effect to it. This includes ensuring the standing, authority and resources of mechanisms charged with ensuring compliance with human rights in counter-terrorism.

A critical question is what impact the experience of the war on terror will have on shifting policies and practices, in terms of what states do directly and on their cooperation relationships with others. Repudiation of unlawful practices of the past is important and there are positive examples in the practice

explored in this book.[137] The war on terror has graphically illustrated the dark side of international cooperation, and there are indications of reform and of a more cautious or questioning approach by states to ensure that they do not become complicit in such wrongs in the future, though the extent of this remains open to question. The willingness of states to conditioning cooperation in criminal, military or intelligence matters on compliance with basic international law norms, and to demonstrate the priority afforded to such compliance, may prove critically important.

States' reactions have been explored throughout the thesis. Robust responses have rejected some fo the worst excesses, as highlighted in relation to Guantanamo, and resisted lasting erosion of legal standards, though in relation to targeted killings the willingness to defend the legal framework is less readily apparent and the implications as yet unclear. The emerging emphasis that has been given to the role and responsibilities of third states in the face of serious violations of international law, and the positive obligations to act individually or collectively, are of potentially critical importance to a rule of law approach. As seen from the legal framework highlighted in various chapters, such responsibility is reflected in established and developing law and practice on state responsibility, human rights, humanitarian law and international criminal law. It remains to be seen whether it can impel states to take more seriously their positive obligations of cooperation to end or to prevent the sort of egregious wrongs that epitomize the low points of the war on terror.

A critical challenge is to ensure accountability in accordance with law. The concept of the rule of law is 'deeply linked to the principle of justice, involving an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs.'[138] The denial of justice to victims of egregious violations of terrorism or in apparent response thereto should be replaced with an approach that gives effect to their legal rights. The impunity currently afforded to the multiplicity of individuals responsible for egregious crimes should be replaced with full and fair accountability within the established framework of international law. The willingness and ability of the international community to consistently hold to account states, and individuals, who have violated fundamental international norms, whether through grave acts of 'terrorism' or in the name of counter terrorism, is crucial to the rule of law approach.

The commitment to learn lessons and to grapple with the need to repair, to restore and to account, is far from certain. The disregard of the international

137 These include Obama's repudiation of torture upon taking office, or new UK Consolidated Guidance on intelligence relationships making clear that intelligence agencies should not cooperate with torture abroad. See Chapters 7B5 and 10. See also 'reactions' to the war on terror at 12.1 above.

138 'What is the Rule of Law'? UN Rule of Law website, http://www.unrol.org/article.aspx?article_id=3.

framework during the 'war on terror' may be allowed to stand – with few implications for wrong-doing nations and without individual accountability – and to further erode the essential legitimacy of the law, and of those that purport to enforce it. Or, it may yet be that the excesses of the 'war on terror', and the alacrity with which legal standards were jettisoned in the name of security, will serve as an alarming reminder of the dangers of a 'fast and loose' approach to international law. It will be the extent of the international community's commitment to clarify and strengthen international law, not only by reiterating standards but by ensuring that they are respected, that will define where the pendulum stops, and the ultimate impact of the 'war on terror' on the international rule of law.

Samenvatting

De 'Oorlog tegen Terrorisme' en het internationaalrechtelijk raamwerk

Inleiding

Sinds de tragische gebeurtenissen van 11 september 2001 ('9/11') is de agenda van de internationale gemeenschap gevormd, of misschien zelfs gedomineerd, door de strijd tegen het internationale terrorisme. Terrorisme en maatregelen ter bestrijding daarvan zijn geen nieuwe fenomenen, en bestonden lang voor 2001. Deze fenomenen hebben altijd de nodige uitdagingen met zich gebracht. Toch is in de praktijk van terrorismebestrijding sinds 9/11 de nadruk consequent gelegd op het buitengewone karakter van de dreiging, op de unieke kenmerken van de uitdagingen,[1] en op de ontoereikendheid van het bestaande internationale recht. In dat licht richt deze studie zich op het identificeren en evalueren van de relevante internationale rechtsregels die van toepassing zijn op terrorisme en terrorismebestrijding in het post-9/11 tijdperk.

In de massale en wereldwijde anti-terrorisme campagne vanaf 9/11 – ook wel bekend onder de naam 'oorlog tegen terrorisme'[2] – is een praktijk ontstaan met vele dimensies en op vele niveaus, zowel lokaal, nationaal als internationaal. Terwijl de 'wereldwijde oorlog tegen het terrorisme' unilateraal geleid werd door de Verenigde Staten, heeft deze universele manifestaties en repercussies gehad. Dit proefschrift onderzoekt deze praktijk en evalueert de juridische vraagstukken die zich voordoen bij de toepassing van het juridische raamwerk op de praktijk. Het identificeert gebieden waar de praktijk verder is gegaan dan de flexibele standaarden uit dat raamwerk. Meer in zijn algemeenheid wordt in dit proefschrift zorg uitgesproken over de implicaties op langere termijn van deze praktijk op het bestaande raamwerk, en op respect voor internationaal recht in meer algemene zin.

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1 Zie bijvoorbeeld the State of the Union Address van de Amerikaanse president Bush op 29 januari 2002.

2 Toespraak van President George W. Bush op een gezamenlijke sessie van het Congres en zich richtend tot het Amerikaanse volk, 20 september 2001, te lezen op: http://archive.org/details/gwb2001-09-20.flac16. Het feit dat dit geen conflict in de juridische zin van het woord betreft wordt behandeld in hoofdstuk 6 van het proefschrift.

Doel van het proefschrift

Het voornaamste onderzoeksdoel van dit proefschrift is het identificeren van het bestaande internationaalrechtelijke raamwerk dat van toepassing is op terrorisme en maatregelen ter bestrijding van terrorisme. De rechtmatigheid van de praktijk van na 9/11 zal worden beoordeeld in het licht van dit multidimensionale kader. De vraag is in hoeverre het bestaande raamwerk voldoende handvaten biedt om internationaal terrorisme en de antwoorden daarop te reguleren en of het de internationale gemeenschap in de gelegenheid stelt om de uitdagingen die internationaal terrorisme stelt het hoofd te bieden. Het proefschrift analyseert punten waarop het recht onduidelijk is en gebieden waar het recht in ontwikkeling is of lijkt te zijn als reactie op veranderende werkelijkheden.

Een tweede vraag die in dit proefschrift wordt behandeld is in hoeverre de normen en mechanismen van het internationale rechtssysteem gerespecteerd zijn gebleven of juist geschonden in de praktijk van de bestrijding van terrorisme in het tijdperk na 9/11. Het antwoord op deze vraag wordt gevonden door een studie van verschillende voorbeelden op meerdere niveaus, waaronder internationale en nationale voorbeelden en de praktijk van zowel de wetgever, de uitvoerende macht, alsmede de rechterlijke macht. Hierbij wordt met name gekeken naar de statenpraktijk die betrekking heeft op terrorismebestrijding, maar ook de praktijk waar het gaat om remedies voor fouten begaan tijdens terrorismebestrijding. In de analyse van concrete voorbeelden zal worden gezocht naar meer algemene karakteristieken die gedistilleerd kunnen worden uit de praktijk in zijn geheel.

Een derde groep vragen die voortvloeit uit de analyse van het bestaande raamwerk en de contemporaine praktijk betreft de implicaties van de 'oorlog tegen terrorisme' op langere termijn. Het proefschrift heeft niet de ambitie om op gedetailleerd niveau de staat en ontwikkeling van het internationaal gewoonterecht op basis van geïdentificeerde statenpraktijk en *opinio juris* weer te geven. Maar in het licht van de geanalyseerde voorbeelden geeft het wel een evaluatie van hoe het bestaande raamwerk geëvolueerd is door en in de praktijk. In dit kader worden ook de meer algemene implicaties voor het respect voor het internationaal recht en de staat van de internationale rechtsorde besproken.

Juridisch raamwerk

Deze studie geeft weer hoe één bepaald fenomeen, internationaal terrorisme, te maken heeft en gereguleerd wordt door een veelvoud aan rechtsgebieden, en een overdaad aan overlappende rechtsbronnen. Elk van de hoofdstukken 2 t/m 7 onderscheidt verscheidene primaire en secundaire normen, rechtsbeginselen en mechanismen vanuit verschillende rechtsgebieden welke tezamen het toepasselijke juridische raamwerk vormen in de strijd tegen internationaal

terrorisme. De hoofdstukken 8 t/m 10 laten vervolgens via *case studies* zien hoe de verschillende rechtsgebieden zich onderling verhouden en tegelijkertijd van toepassing kunnen zijn in bepaalde situaties.

Het aldus in kaart gebrachte juridische raamwerk bestaat vanzelfsprekend uit meerdere en overlappende verdragen, waaronder regionale en multinationale terrorismeverdragen, uitleveringsverdragen, diplomatieke verdragen en verdragen op het terrein van de mensenrechten en het internationaal humanitair recht. Deze verdragen zijn bindend voor de staten die partij bij het verdrag zijn maar kunnen soms verdergaande betekenis hebben voor de ontwikkeling van algemene normen. Vaak zullen de verplichtingen die in dit proefschrift besproken worden ook de status van internationaal gewoonterecht hebben, en in sommige gevallen zelfs behoren tot de selecte groep van regels met *erga omnes* werking of *jus cogens* status. Deze laatste kenmerken hebben gevolgen voor de normatieve waarde en de juridische status die aan deze regels wordt toegekend, de resistentie van deze regels tegen verandering en de gevolgen van schending. Alhoewel de reikwijdte en de juridische status van de verplichtingen dus verschilt, is het merendeel van de regels die dit proefschrift identificeert als behorend tot het relevante juridisch raamwerk bindend voor alle staten.

Het raamwerk wordt nader vorm gegeven door andere rechtsbronnen. Met name rechterlijke beslissingen van nationale, regionale en internationale hoven die bepaalde terrorisme bestrijdingsmaatregelen beoordelen, spelen een belangrijke rol in de analyse. Deze uitspraken kunnen gezien worden als statenpraktijk. Daarnaast sporen zij ook aan tot statenpraktijk in die zin dat zij overheden aanmoedigen tot bepaald gedrag, bijvoorbeeld het implementeren van of reageren op een bepaalde uitspraak. Bovendien kunnen deze uitspraken het recht verder ontwikkelen. Algemene rechtsbeginselen zijn ook een relevante rechtsbron gebleken om het juridisch raamwerk aan te vullen, in het bijzonder op punten van onduidelijkheid. Daarnaast hebben Veiligheidsraadresoluties een speciale betekenis gekregen in de wereld na 9/11, alsmede de hieruit voortvloeiende praktijk onder toezicht van het Terrorismebestijdingscomité (Counter Terrorism Comittee). De exponentiele groeit van 'soft law' kan ook niet onvermeld blijven. Deze normen geven verdere inhoud aan internationale regels en bieden een aanwijzing hoe die regels dienen te worden geïnterpreteerd en toegepast in concrete situaties waarin terrorisme wordt bestreden. Zij verduidelijken het juridisch raamwerk, ontwikkelen dit verder of geven aan welke punten rijp zijn voor verdere juridische ontwikkeling. Veel van deze 'soft law' bronnen zijn aangehaald in rechterlijke beslissingen hetgeen hun status verder heeft verstevigd.

Het proefschrift zet het gedetailleerde en zich nog ontwikkelende recht betreffende internationaal terrorisme uiteen, onder verwijzing naar de vele relevante rechtsgebieden van het internationaal recht en de verscheidene, overlappende en elkaar onderling versterkende rechtsbronnen, die in de kern gebaseerd zijn op fundamentele rechtsbeginselen. Het is een flexibel raamwerk,

dat zich op verschillende manieren kan aanpassen aan noodsituaties, en ruimte laat voor veiligheidseisen bij de rechtshandhaving en andere uitdagingen die terrorisme stelt. Alhoewel het raamwerk niet voorziet in speciaal beleid, hoeft het niet *per se* als inadequaat te worden aangemerkt. Beweringen dat er leemtes en onduidelijkheden in het raamwerk bestaan of dat dit ontoereikend is, kunnen ook duiden op een gebrek aan bereidheid om het raamwerk te respecteren en in die zin een reflectie zijn van de keus om bepaalde beleidsprioriteiten boven het recht te stellen.

In andere gevallen kunnen deze beweringen het gevolg zijn van de nalatigheid om het raamwerk in al zijn detail en gelaagdheid qua normen, beginselen en processen volledig in beschouwing te nemen. Het proefschrift toont aan hoezeer alle aspecten van het raamwerk onderling verbonden zijn en als onderdeel van een geheel geïnterpreteerd dienen te worden, waarbij elk rechtsgebied en iedere specifieke norm van internationaal recht begrepen dient te worden in het licht van de kernbeginselen waar zij uit voortvloeien en dat in onderlinge samenhang met elkaar.

De complexe en dynamische verhouding tussen de rechtsgebieden en tussen de verschillende rechtsbronnen zoals hierboven uiteengezet, heeft praktische consequenties en kan aanleiding zijn voor spanningen, zoals onderzocht in dit proefschrift. Dit betreft bijvoorbeeld de interactie tussen mensenrechten en internationaal humanitair recht, of de verhouding tussen Veiligheidsraadresoluties en mensenrechten. Zoals dit proefschrift aantoont, werd de 'oorlog tegen terrorisme' gekenmerkt door een selectieve toepassing van bepaalde rechtsgebieden of normen van het raamwerk, bijvoorbeeld een sterke nadruk op het recht dat van toepassing is in tijden van gewapend conflict, ten nadele van andere toepasselijke normen, en in het bijzonder fundamentele mensenrechten alsmede de onderliggende beginselen van het internationaal humanitair recht zelf. Het proefschrift geeft de verscheidene manieren weer waarop een dergelijke gefragmenteerde en selectieve benadering van het raamwerk geleid heeft tot beweringen betreffende het bestaan van juridische leemtes of beruchte claims dat sommige mensen niet door het recht beschermd dienen te worden, omdat zij in een lacune zouden vallen die in feite niet bestaat als het raamwerk als een geïntegreerd geheel wordt opgevat.[3]

Het overzicht van het raamwerk van internationaal recht in deze hoofdstukken suggereert dat het toepasselijke recht geen gapende lacunes bevat. Het geldende internationale recht is niet inherent gedateerd of onvoldoende geëquipeerd om de uitdagingen van het internationaal terrorisme aan te gaan. Het is ook niet uitzonderlijk complex of moeilijk toegankelijk, en zeker niet irrationeel. Het is niet blind voor de veiligheidseisen en uitdagingen zoals die gesteld worden door een aanval zoals 9/11. Na deze aanval is het recht niet drastisch veranderd, maar het heeft zich geleidelijk aan verder ontwikkeld en zal dit

3 Zie bijvoorbeeld hoofdstuk 8 over Guantanamo Bay.

blijven doen. Alhoewel er punten zijn waarop legitiem verschil van inzicht kan bestaan betreffende de juiste interpretatie, waar het recht onduidelijk is of verdere juridische ontwikkeling gewenst of onderweg, is het ook zo dat 9/11 heeft duidelijk gemaakt – en dit is bevestigd door de 'oorlog tegen terrorisme' – dat het recht niet zozeer inadequaat is, maar dat respect voor dit recht fragiel is, en de naleving ervan een uitdaging.

De praktijk in de 'oorlog tegen terrorisme'

De praktijk van na 9/11 zoals onderzocht in dit proefschrift doet zich voor op verschillende niveaus (internationaal, regionaal en nationaal), waarbij een grote pluraliteit van actoren betrokken is (wetgever, rechterlijke en uitvoerende macht, veiligheidsdiensten, private actoren en andere) en in een veelvoud van vormen (wetten, beleid en praktijk, gedrag, aanwijzingen en controle van staten, medeplichtigheid of steun, daden en nalaten). Alhoewel op sommige punten de invloed, aard en reikwijdte van de praktijk van de VS een grotere nadruk en aandacht voor die staat rechtvaardigt, zijn terrorisme, terrorismebestrijding en de uitdagingen die zich daarbij voordoen universele fenomenen. Deze studie is derhalve ook universeel gericht. Het gaat uit van universele normen en praktijken, maar ook regionale en sub-regionale standaarden, en voorbeelden van nationale terrorismebestrijding in diverse staten verspreid over de wereld, van Afghanistan tot Algerije, van Bahrein tot Bali en van Colombia tot Tsjetsjenië. In feite kijkt het naar alle diverse praktijken die worden uitgevoerd in de naam van terrorismebestrijding maar waarbij persistente vragen gesteld kunnen worden betreffende het respect voor het raamwerk.

Een veelvoud aan praktijken die het juridisch raamwerk onder druk zetten wordt onderzocht. Hierbij kan gedacht worden aan de grootschalige en langdurige militaire interventies in Afghanistan en Irak, die de deur openzetten naar een wereldwijde oorlog tegen Al-Qaeda en geassocieerde terroristische netwerken zonder geografische begrenzing. De praktijk die voortvloeide uit het beruchte beroep op een breed begrip van het 'oorlog'-paradigma wordt onderzocht. Dit beroep had ten doel om uitzonderingsmaatregelen te rechtvaardigen, zoals het buiten spel zetten van de normale standaarden voor de bescherming van gedetineerden of verdachten, het oprichten van speciale rechtbanken en het instellen van speciale rechtsregimes, alsmede het gericht doden van individuen hetgeen buiten het oorlog-paradigma als buitengerechtelijke executie moet worden aangemerkt. Dit beroep heeft ook een misleidend effect gehad op de gepercipieerde relevantie en inhoud van het internationaal humanitair recht, waarbij de relevantie van mensenrechtenbescherming zoals deze voor ieder individu dient te bestaan gemarginaliseerd werd. De oorlogsretoriek heeft terrorismebestrijding gekarakteriseerd als een conflict tegen een vijand die vernietigd dient te worden, ten koste van alles, en niet als een situatie waarin via het recht tegen bepaalde individuen en groeperingen diende te

worden opgetreden. Eén van de specifieke onderwerpen die onderzocht wordt is de rechtmatigheid van het beleid om individuen gericht te doden, een praktijk die in recente jaren is opgebloeid en waarbij vragen kunnen worden gesteld naar de onderlinge verhouding tussen gevangenneming en doden in het licht van het toepasselijk juridisch regime.[4]

Naast het gebruik van termen en concepten als 'oorlog' tegen een niet duidelijk geïdentificeerde vijand, en zelfverdediging die niet langer exclusief defensief van aard is, verdient ook de ambiguïteit van het gebruik van het terrorisme-label en gerelateerde activiteiten aandacht. Een veelvoud aan praktijken is over de hele wereld ontstaan, en oude soms dubieuze praktijken zijn gecontinueerd met een hernieuwde legitimiteit, in de naam van terrorismepreventie. Deze praktijken voldeden vaak niet aan internationale beschermingsstandaarden. Praktijken die zich hebben voorgedaan in de naam van terrorismepreventie omvatten het verbieden van organisaties, het uitbannen van groepen, het inperken van de vrijheid van meningsuiting, het verbieden van demonstraties en publicaties, het onthouden van het recht om de doden te begraven, het opzijzetten van aansprakelijkheidsprocessen met een beroep op immuniteit, en inbreuken op het recht op privacy. Deze praktijken worden onderzocht in het licht van de balans die inherent is aan het juridisch raamwerk welke mensenrechten beschermt maar daarbij ook ruimte laat voor legitieme nationale veiligheidsoverwegingen.

De hardnekkige aanwezigheid van marteling als een kenmerk van de oorlog tegen terrorisme, alsmede pogingen om dit te rechtvaardigen en af te wegen tegen nationale veiligheidsbelangen of de poging om relevante bepalingen uit te hollen geven aan hoe absolute rechten en waarden in twijfel zijn getrokken, en hoe basale standaarden zijn aangetast onder het mom van de noodzaak om veiligheidsinformatie te verzamelen die noodzakelijk is voor de oorlog tegen terrorisme.

Het *rendition*-beleid van de CIA is één van de schaduwkanten van internationale samenwerking en geeft goed weer hoe een veelvoud aan actoren verantwoordelijkheid draagt voor de oorlog tegen terrorisme. Dit beleid van gedwongen verdwijning van personen werd geleid door de CIA, maar was nauwgezet afgestemd met netwerken van individuen, private actoren en statelijke partners over de hele wereld, waarbij individuen systematisch aan de bescherming van het recht werden onttrokken hetgeen vervolgens even systematisch werd toegedekt. De oorlog tegen het terrorisme wordt gekenmerkt door een systematische en herhaaldelijk wederkerend gebruik van marteling, medeplichtigheid aan marteling, wegkijken wanneer marteling plaatsvindt. Hierbij waren niet louter een paar geïsoleerde pariastaten betrokken. Deze feiten geven aanleiding tot gecompliceerde vragen aangaande staatsaansprakelijkheid.

4 Zie hoofdstuk 7B.3, hoofdstuk 6B.2.2, en hoofdstuk 9.

Het in de tijd verschuivende strafrechtparadigma – waarbij meer nadruk werd gelegd op een preventieve rol voor het strafrecht – heeft geleid tot nieuwe strafwetten die betrekking hadden op een zich uitbreidend scala aan handelingen, waaronder het steunen, faciliteren van of bijdragen aan daden van terrorisme. Naast deze wetten, zijn ook de onderzoeksbevoegdheden en strafrechtsmachtsgronden uitgebreid, en zijn de strafrechtprocedures aangepast en andere initiatieven ontplooid om de internationale samenwerking te versterken en te stroomlijnen.[5] Terwijl deze ontwikkelingen in sommige opzichten het normatieve en institutionele raamwerk hebben verstevigd om via het strafrecht tegen terrorisme op te treden, hebben bepaalde maatregelen het algehele rechtssysteem eerder ondermijnd omdat zij zich niet goed verhielden met algemene beginselen van het strafrecht waaronder het beginsel van individuele aansprakelijkheid, legaliteit en het recht op een eerlijk proces.

De internationale praktijk wordt ook onderzocht via de praktijk van internationale organisaties, waarbij met name de nadruk wordt gelegd op de praktijk van de VN Veiligheidsraad en diens uitoefening van wetgevende en quasi-rechterlijke rollen in het post- 9/11 tijdperk.[6] De toegenomen inzet van gerichte sancties tegen individuen en groepen heeft een enorme impact gehad op deze individuen en hun omgeving, en wellicht ook op de reputatie van de Veiligheidsraad zelf. Het draconische gebrek aan eerlijke en transparante procedures die de benadering van de Veiligheidsraad typeren wordt weerspiegeld in nationale maatregelen, zoals sancties, uitzettingen en verschillende andere maatregelen, die een inbreuk hebben gemaakt op een wijd scala aan rechten zonder basale informatie te verstrekken of een betekenisvolle mogelijkheid om deze maatregelen aan te vechten.[7]

De studie naar de praktijk bekijkt niet alleen maatregelen die genomen zijn in reactie op terrorisme, maar beschouwt ook andere praktijken die een reactie vormen op de aard of excessen van de oorlog tegen terrorisme. Hierbij is met name aandacht voor de derde vraag die hierboven is gesteld, namelijk de implicaties op langere termijn van de oorlog tegen terrorisme, en de vraag of deze zal uitmonden in blijvende erosie van bestaande standaarden en respect voor het recht meer in zijn algemeenheid.

Dit proefschrift traceert de evoluties in hoe staten zich opstellen ten aanzien van de ergste excessen van de oorlog tegen terrorisme. Het suggereert dat er een beweging kan worden waargenomen terug naar een situatie waarin een erkenning bestaat van het feit dat terrorismebestrijding dient plaats te vinden met respect voor bestaande rechtsregels en waarbij het standpunt is dat het bestaande rechtsregime dient te worden verstevigd in plaats van ondermijnd of genegeerd. Deze beweging is het meest duidelijk op papier, waarbij thans meer nadruk wordt gelegd op enerzijds de complementaire aard

5 Zie hoofdstuk 4B.2.3.
6 Zie bijvoorbeeld hoofdstuk 7B.3
7 Zie bijvoorbeeld hoofdstuk 7B.7, 7B.8 en 7B.10 voor voorbeelden, en 12.3.

van de verplichting om terrorisme te bestrijden en mensen te beschermen en anderzijds respect voor het recht, democratie en met name mensenrechten. Dit kwam duidelijk naar voren in de 2006 *UN Global Strategy*, die – zoals vele andere declaraties en resoluties – mensenrechten en veiligheid beschreef als doelen die niet strijdig met elkaar, maar complementair en elkaar versterkend zijn.[8] De aanvankelijke veronachtzaming van mensenrechten door de Veiligheidsraad ten faveure van veiligheidsoverwegingen heeft plaats gemaakt voor een erkenning dat respect voor het recht, voor mensenrechten en internationaal humanitair recht integrale onderdelen zijn van effectieve terrorismebestrijdingsstrategieën.[9] Deze beweging wordt ook weerspiegeld in institutionele ontwikkelingen op nationaal en internationaal niveau, waarbij zorg bestaat voor de noodzaak om effectieve terrorismebestrijdingsmaatregelen consistent te houden met internationaal recht.[10]

Een belangrijke dimensie van de beweging terug naar een grotere mate van rechtsstatelijkheid is de opkomende erkenning dat veel terrorismebestrijdingsmaatregelen in het post 9/11 tijdperk een contra-productief effect hebben gehad. Onrechtmatige praktijken gevoerd in de naam van terrorismepreventie hebben vaak een katalyserend effect gehad op nieuwe daden van terrorisme. Zelfs de president de VS heeft dit erkend. Hij beschreef bijvoorbeeld Guantanamo Bay als een toprekruteringsmechanisme voor nieuwe terroristen.[11] Meer recent zijn de *drone* aanvallen aangemerkt als zodanig.[12] De moeilijkheden om verdachten gevangen te nemen en bijkomende bewijsproblemen, kwesties van ontvankelijkheid en andere procedurele problemen in strafzaken, zoals beschreven in hoofdstuk 4, worden in toenemende mate aangemerkt als wijzen waarop het negeren van het recht heeft geleid tot minder succesvolle terrorismebestrijding via het strafrecht.[13] De hernieuwde aandacht van de internationale gemeenschap voor omstandigheden die vruchtbaar zijn voor terrorisme, zoals uiteengezet in de *Global Strategy* en weergegeven in

8 *VN Doc.* A/60/825, insert DATE. De *Global Strategy* is weerspiegeld in benaderingen van regionale lichamen, zoals bijvoorbeeld ACHPR, Resolution on the Protection of Human Rights in the Fight against Terrorism, aangenomen op de 37e sessie, 2005, en OVSE Consolidated Strategy 2012. Zie ook hoofdstuk 7B.1.

9 Zie VN Veiligheidsraadresolutie 1373 (2001) (is that correct illustration for the point you make?)en hoofdstuk 7B.

10 Zie bijvoorbeeld hoofdstuk 7B.1.

11 E.g. B. Obama, 'News Conference by the President', South Court Auditorium, Eisenhower Executive Office Building, 22 December 2012, beschikbaar op: http://www.whitehouse.gov/the-press-office/2010/12/22/news-conference-president laatst bezocht op 18 April 2013 and Chapter 7B.1.

12 E.g. P. Alston, 'Press Statement', UNAMA Press Conference, Kabul, Afghanistan, 15 May 2008, beschikbaar op: http://unama.unmissions. Zie ook hoofdstuk 8 met betrekking tot Guantanamo.

13 Zie hoofdstuk 4B.4.

internationale en nationale verklaringen,[14] suggereren ook dat er een meer holistische benadering komt die erkent dat er een relatie bestaat tussen mensenrechten en het recht op ontwikkeling enerzijds en terrorismepreventie anderzijds.

De reacties van staten op grove mensenrechtenschendingen en schendingen van het internationaal humanitair recht laten ook zien dat de internationale gemeenschap zich steeds prominenter uitspreekt en duidelijk standpunten inneemt ten aanzien van bepaalde kwesties. Het meest sprekende voorbeeld is wellicht Guantanamo Bay, zoals besproken in hoofdstuk 8, waar de veroordeling bijzonder krachtig is geworden, komend van staten, internationale lichamen, en vele anderen, waarbij nog kan worden opgemerkt dat niet al deze actoren allemaal even bekend staan als uitgesproken voorvechters van de mensenrechten.[15] De veroordeling van het *rendition*-programma, zoals besproken in hoofdstuk 10, neemt ook steeds sterkere vormen aan. De feiten die daarbij aan het licht worden gebracht zijn zeer ernstig en dragen bij aan het in kaart brengen van de aansprakelijkheid van verschillende andere staten dan de VS. Het is waarneembaar dat steeds minder staten dit programma of deze tactieken willen verdedigen.[16] In scherp contrast hiermee, moet geconstateerd worden dat het systematische gericht doden niet op even krachtige wijze aan de kaak wordt gesteld. Maar ook hier blijven wel reacties opkomen, en er is zeker weinig steun of acceptatie, impliciet of expliciet, voor de *drone* aanvallen buiten situaties van gewapend conflict.[17]

Een aantal staten hebben hun bezorgdheid of protest tegen deze praktijken kracht bijgezet in de vorm van een weigering om mee te werken aan deze praktijken omdat dit strijd met hun eigen verplichtingen onder het internationale recht zou opleveren.[18] Het is niet zeker of de veroordeling van deze praktijken, zo deze al bestaat, ook zal leiden tot acties waarbij zij die direct verantwoordelijk zijn aansprakelijk worden gehouden of waarbij genoegdoening wordt verleend aan de slachtoffers van onrechtmatige handelingen die in het kader van de 'oorlog tegen terrorisme' zijn begaan.

Er is ook opkomende erkenning van de beperkingen en gevaren van een te eenzijdige militair gericht antwoord op internationaal terrorisme.[19] De overdadige en kritiekloze steun voor de interventie in Afghanistan[20] staat

14 Zie de genoemde *Global Strategy* en bijv. "Why terrorism? Addressing the Conditions Conducive to the Spread of Terrorism" (Straatsburg, 2007) en de toespraak van President Obama, 23 mei 2013, waar de nadruk wordt gelegd op het belang van een alomvattende aanpak waarbij ook percepties van onrecht en armoede worden aangepakt.

15 Zie hoofdstuk 8C.

16 Zie hoofdstuk 10.

17 Zie hoofdstuk 6B.2.2.

18 Zie hoofdstuk 7A.5.10 voor het juridisch raamwerk en B.14 voor praktijk van na 9/11; zie ook hoofdstuk 4B over strafrechtelijke samenwerking.

19 Hoofdstuk 5. Zie ook Veiligheidsraadresolutie 1963 (2010), 4e paragraaf van de preambule.

20 Zie hoofdstuk 5B.1.

in sterk contrast met de luide en krachtige internationale oppositie tegen de oorlog in Irak, en het gebrek aan steun voor de stelling van de VS dat een recht op zelfverdediging tegen terroristen waar ook ter wereld bestaat.[21] Daarentegen hebben de ontwikkelingen en het gebruik van strafrecht, en het onderzoeken van het preventieve potentieel van dit rechtsgebied, geleid tot een beter ontwikkeld raamwerk en een gedeelde wereldwijde praktijk.[22] De groeiende erkenning van de rol en het belang van het strafrecht bevat een reële belofte voor een ommezwaai naar meer rechtsstatelijkheid in de strijd tegen terrorisme.

Een essentieel onderdeel van de reactie op de 'oorlog tegen terrorisme' komt vanuit de rechterlijke hoek die daden van andere delen van de staat heeft berecht.[23] Alhoewel de stem van de rechter niet altijd even luid was, en deze bij tijd en wijle veel ruimte heeft gelaten aan de uitvoerende macht, is er toch ook een ruime praktijk ontstaan waarin rechtbanken en hoven wel degelijk een duidelijke rol op zich hebben genomen om het optreden van de overheid terug te brengen binnen de grenzen van het recht, en om een mate van toezicht en aansprakelijkheid te waarborgen. De impact hiervan is veelomvattend geweest. Het heeft geleid tot verandering in wetgeving en beleid, en het heeft bestaande standaarden herbevestigd en aangesterkt. Hierdoor zijn de beginselen van aansprakelijkheid en toezicht bekrachtigd.[24] Deze reacties op de 'oorlog tegen terrorisme' door verschillende normatieve actoren verzachten de blijvende negatieve impact van de praktijk. Dit leidt tot de conclusie dat, alhoewel het juridisch landschap na 9/11 een desolaat aanblik gaf, niet zonder meer gesteld kan worden dat de 'oorlog tegen terrorisme' geleid heeft tot een catastrofale situatie vanuit rechtsstatelijk perspectief zoals door sommigen wel is voorspeld.[25]

Overzicht van de hoofdstukken en conclusies

Het proefschrift bestaat uit drie delen. Het eerste deel geeft een schets van preliminaire juridische vraagstukken betreffende internationaal terrorisme en internationale aansprakelijkheid voor terrorisme. Het tweede, meer inhoudelijke deel, onderzoekt de rechtmatigheid van bepaalde reacties op het internationale terrorisme. Hierbij wordt gekeken naar antwoorden via het strafrecht en het recht op geweldgebruik tussen staten, maar ook het recht dat bepaalt hoe bestrijdingsmaatregelen moeten worden uitgevoerd, waaronder hoofdstukken

21 Zie hoofdstuk 5.
22 Zie hoofdstuk 4B.1.2.
23 Zie hoofdstuk 11.
24 *Ibid.*
25 See A. Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law,* EJIL 2001.

over mensenrechten en internationaal humanitair recht zoals dat toepasselijk is tijdens gewapend conflict.

De politieke betekenis van het terrorisme-label sinds 9/11 staat buiten kijf en wordt door de gehele studie heen onderzocht. In het eerste deel van hoofdstuk 2 wordt echter aangevangen met een betoog aangaande de juridische betekenis van terrorisme als een zelfstandig concept in het internationale recht. Het behandelt het welbekende gebrek aan een universele definitie, en beschrijft internationale en regionale ontwikkelingen (voor en na 9/11) die bijdragen aan een meer generieke definitie van terrorisme, en de proliferatie van verdragen die op specifieke vormen van terrorisme betrekking hebben. Alhoewel het bestaan van een algemeen aanvaarde definitie van terrorisme onder verdragenrecht of internationaal gewoonterecht op dit moment twijfelachtig is, introduceert dit hoofdstuk de veelvoud aan internationale rechtsnormen die een verbod op terrorisme bevatten en de daarmee verbonden verplichtingen.

Hoofdstuk 3 behandelt aansprakelijkheid onder internationaal recht. Het gaat allereerst in op de aansprakelijkheid van staten voor daden van internationaal terrorisme, en de gronden op basis waarvan daden van private actoren, zoals individuen, netwerken en organisaties, zoals Al-Qaeda en geassocieerde groepen, aan een staat toegerekend kunnen worden (zoals aan Afghanistan na 9/11). In dit hoofdstuk wordt de suggestie gedaan dat onder de huidige standaarden, toerekening vaak moeilijk is als er geen duidelijk aanwijzingen bestaan dat een staat controle heeft over concrete handelingen. Hierbij wordt een onderscheid gemaakt tussen toerekening in de context van specifieke terroristische aanvallen en toerekening in de context van aansprakelijkheid voor andere onrechtmatige daden. Voor elk van deze scenario's worden de consequenties van aansprakelijkheid zoals deze voortvloeien uit het internationale recht uiteen gezet. Het hoofdstuk gaat ook in op de mate waarin individuen en organisaties – de zogenaamde niet-statelijke entiteiten, zoals Al-Qaeda, of individuele leden en gelieerde organisaties[26] – aansprakelijk kunnen worden gesteld onder het internationale recht en in hoeverre het recht op dit punt in ontwikkeling is. Het laatste deel gaat in op kwesties van staatsaansprakelijkheid die kunnen opkomen in het kader van onrechtmatige terrorismebestrijdingsmaatregelen. Hierbij wordt met name ingegaan op vraagstukken betreffende gedeelde aansprakelijkheid van staten in situaties waar staten handelen via of in samenwerking met andere staten. Daarnaast worden de controverses rond staatsaansprakelijkheid voor private aannemers besproken en de beweringen betreffende leemtes in het juridische raamwerk in deze context worden in twijfel getrokken. Het hoofdstuk behandelt ook het recht, of in uitzonderlijke omstandigheden de verantwoordelijkheid, van andere staten om op te treden tegen onrechtmatigheden die voortvloeien uit daden van terrorisme of juist uit terrorismebestrijdingsmaatregelen.

26 Zie hoofdstuk 6.

In deel twee, analyseert hoofdstuk 4 het internationale terrorisme en reacties daartegen via het strafrecht. Alhoewel internationaal terrorisme als zodanig niet als misdrijf onder verdragenrecht of internationaal gewoonterecht moet worden aangemerkt, beschrijft deel A verscheidene andere misdrijven die gepleegd kunnen worden door daden van internationaal terrorisme. Het zet de relevante rechtsbeginselen van strafrecht uiteen die bepalen wie aansprakelijk kan worden gehouden en het onderzoekt welke hoven of tribunalen rechtsmacht kunnen uitoefenen en in welke omstandigheden. Bovendien worden in dit deel het recht en de mechanismen besproken die van belang zijn voor implementatie en handhaving van internationaal strafrecht, met name verantwoordelijkheden in het kader van de internationale samenwerking.

Hoofdstuk 4, deel B analyseert de toepassing van het strafrechtmodel in de praktijk sinds september 2001. Hierbij is aandacht voor het gebrek aan optreden via het strafrecht in de nadagen van 9/11, en de geleidelijke transformatie van wetten en praktijken op dit punt in de loop van de tijd. In dit deel worden normatieve ontwikkelingen getraceerd, die een trend laten zien naar een meer preventieve rol voor het strafrecht en exceptionele benaderingen van het strafrecht en strafprocedure ten aanzien van terrorisme in recente jaren. Voorbeelden hiervan zijn de expansie van aan terrorisme gerelateerde misdrijven en aansprakelijkheidsvormen, aangepaste beginselen en procedures in het strafrechtelijk onderzoek en de vervolging van terrorisme en innovaties in internationale samenwerking. Deze voorbeelden worden gerelateerd aan juridische verplichtingen op het gebied van de mensenrechten en er wordt bezien wat de implicaties van deze voorbeelden zijn voor het strafproces zelf. Tot slot, alhoewel de nadruk van het hoofdstuk ligt op internationaal terrorisme, kijkt dit hoofdstuk ook naar de relevantie van het internationaal strafrecht paradigma en onderzoekt het in hoeverre internationale misdrijven gepleegd worden in de naam van terrorismebestrijding. In deze context valt op dat er weinig praktijk is waarbij individuen aansprakelijk worden gehouden onder het internationaal strafrecht voor misdrijven die gepleegd zijn in de context van de oorlog tegen het terrorisme.

Hoofdstuk 5 behandelt de buitengewone omstandigheden waarin het gebruik van geweld gerechtvaardigd is als antwoord op internationaal terrorisme, in het kader van zelfverdedigingsacties of volgend op een autorisatie van de Veiligheidsraad onder hoofdstuk VII van het VN Handvest. Alhoewel andere rechtvaardigingsgronden ook kort genoemd worden, gaat de aandacht vooral uit naar die gronden waar een beroep op gedaan is in diverse contexten sinds 9/11, en in het bijzonder het beroep op een uitgebreid recht op zelfverdediging tegen terrorisme. In dit licht gaat het hoofdstuk in op de reikwijdte en begrenzingen van het recht op zelfverdediging en de rol van de Veiligheidsraad in deze context bij het autoriseren van geweldgebruik in het belang van de internationale vrede en veiligheid. Hoofdstuk 5, deel B analyseert dit juridische raamwerk in het licht van daadwerkelijk optreden met geweld in het post 9/11 tijdperk. De rechtmatigheid van geweldgebruik bij de interventies

van Afghanistan en Irak wordt beoordeeld alsmede de openstaande claim dat er een recht bestaat om wereldwijd geweld te gebruiken in de context van acties waarbij beweerdelijke leden van al-Qaeda en geassocieerde groepen gericht worden gedood. Hierbij wordt de stelling ingenomen dat een dergelijke expansieve benadering van het recht op zelfverdediging zich niet verhoudt met het bestaande juridische raamwerk.

Hoofdstuk 6 gaat in op de relevantie, de reikwijdte en aard van het internationaal humanitair recht zoals van toepassing in tijden gewapend conflict en onderzoekt wanneer en in hoeverre dit van toepassing is op de strijd tegen het internationale terrorisme. Het beoordeelt de juridische status van het gewapende conflict en analyseert de sleutelnormen die van toepassing zijn, met name de normen die bepalen welke doelen legitiem zijn, welke methoden en middelen zijn toegestaan, welke humanitaire bescherming geldt en wat de verantwoordelijkheid is van staten die partij zijn bij de Verdragen van Genève om ervoor te zorgen dat de standaarden van het internationaal humanitair recht worden nageleefd.

In het licht van dit overkoepelende juridisch raamwerk, onderzoekt deel B van hoofdstuk 6 de kwestie die het juridisch debat heeft overheerst, en in feite geblokkeerd, sinds het begin van de zogenaamde 'oorlog tegen terrorisme', en wel de vraag of er een wereldwijde oorlog met Al-Qaeda en geassocieerde groeperingen is of kan bestaan. Secundair hieraan, gaat dit deel in op de vraag hoe de conflicten die bestaan hebben sinds 9/11 moeten worden gekwalificeerd. Het behandelt ook bepaalde kwesties zoals expansieve doelenselecties, en andere vraagstukken betreffende methoden en middelen van oorlogvoering en humanitaire bescherming in het licht van bestaand internationaal humanitair recht, waaronder de behandeling van vijandelijke strijders, detentie tijdens gewapend conflict en *drone*-aanvallen.

Hoofdstuk 7 onderzoekt de relevantie van mensenrechten op de oorlog tegen terrorisme. Het bespreekt waar, wanneer en ten aanzien van wie het mensenrechtenraamwerk van toepassing is. Hierbij wordt de nadruk gelegd op de inherente flexibiliteit van mensenrechten en de manieren waarop ruimte kan worden geschapen voor veiligheidsbelangen en andere uitdagingen die het terrorisme stelt. Vervolgens komen specifieke rechten aan de orde die van belang zijn in de context van terrorisme en terrorismebestrijding. Hoofdstuk 7, deel B behandelt een aantal voorbeelden van specifieke vragen die opkomen bij de toepassing van dit juridische raamwerk in het post 9/11 tijdperk. Drie veelomvattende kwesties worden besproken die direct betrekking hebben op de relevantie en de toepasselijkheid van het raamwerk en de onderlinge verhouding met andere regimes. Het betreft hier de verhouding tussen veiligheid en mensenrechten, de extraterritoriale werking van mensenrechten en de toepasselijkheid van mensenrechten op de oorlog tegen Al-Qaeda (en, waar gepast, de verhouding met het internationaal humanitair recht). Dit hoofdstuk gaat ook in op specifieke praktijken van na 9/11 die de mensenrechten direct schenden of het raamwerk onder druk zetten. Voorbeelden betreffen verstrek-

kende anti-terrorisme wetgeving en de implicaties hiervan voor het legaliteitsbeginsel, profileringspraktijken in het licht van het gelijkheidsbeginsel, de implicatie van het op sanctielijsten plaatsen en verwijderen van terrorismeverdachten, de erosie van het recht op privacy, de veelvormige schendingen van het verbod op marteling en onmenselijke behandeling. Meer algemene vragen betreffen de marginalisering van mensenrechten en mechanismen in de onmiddellijke nadagen van 9/11, en de vraag of er thans een meer prominente en centrale rol voor mensenrechten is weggelegd in de voortdurende oorlog tegen het terrorisme.

In deel 3, worden een aantal *case studies* behandeld die illustreren hoe diverse rechtsgebieden en regimes tegelijk van toepassing zijn en deels samenvallen, en hoe deze co-existentie in de praktijk uitwerkt inzake bepaalde controversiële feitelijke scenario's. De *case studies* geven ook de mate weer waarin het juridische raamwerk niet is nageleefd, alsmede de punten waarop onenigheid of controverses bestaan over het raamwerk zelf. Hoofdstuk 8 betreft de detentie in Guantanamo Bay, Cuba, die symbool is komen te staan voor het arbitraire karakter van de oorlog tegen terrorisme. Deze *case study* biedt de mogelijkheid om dieper in te gaan op de juridische kwesties die behandeld zijn in hoofdstukken 6 en 7. Het bekijkt ook de onderlinge verhouding tussen deze kwesties. Het gaat in op de rechtmatige gronden die bestaan voor de detentie van de gevangenen en de procedurele basisrechten die zij zouden moeten genieten volgens het mensenrechtenrecht en het internationaal humanitair recht, alsmede ook kwesties die voortvloeien uit hun berechting door militaire commissies. Het hoofdstuk sluit af met de vraag wat de implicaties zijn van de Guantanamo Bay anomalie: voor de VS en voor andere staten, en voor vragen van rechtsstatelijkheid meer in het algemeen.

Hoofdstuk 9 presenteert de tweede *case study* betreffende de standrechtelijke executie van Osama bin Laden, en de gepastheid vanuit juridisch perspectief van de prompte bewering nadien dat het recht had gezegevierd. In dit hoofdstuk wordt de rechtmatigheid van de actie beschouwd, op basis van de beschikbare feiten en daarbij in ogenschouw nemend de relevante rechtsgebieden, waaronder het *jus ad bellum*, *jus in bello* en de aard van het recht op leven zoals dit bestaat in het mensenrechtenregime. Internationaalrechtelijke kwesties die voortvloeien uit het dumpen van het lijk in de Arabische zee worden ook besproken,

Hoofdstuk 10 gaat dieper in op de praktijk van buitengewone *rendition*, geleid door de CIA maar mogelijk gemaakt door een complex netwerk met andere staten en private actoren. Meer dan enig andere praktijk komen hierbij kwesties van gedeelde aansprakelijkheid aan de orde. Het hoofdstuk beziet welke staten aansprakelijk zijn voor welke vormen van participatie in het programma, en welke onduidelijkheden en spanningen hierbij bestaan. Het gaat in op pogingen om de praktijk aan de kaak te stellen, en ook wat de implicaties van het *rendition*-programma zijn en van de straffeloosheid die dit programma heeft omgeven tot nu toe.

Hoofdstuk 11 kijkt naar de rol van hoven, waarbij de aandacht met name uitgaat naar mensenrechtenhoven die het leeuwendeel van rechtszaken op internationaal niveau hebben behandeld. Het hoofdstuk geeft weer welke begrenzingen aan de hoven zijn gesteld en op verschillende manieren sinds 9/11. Desondanks zijn er belangrijke uitspraken gedaan die een rechterlijk antwoord vormen op de oorlog tegen terrorisme, Het hoofdstuk analyseert de rol en impact van deze mensenrechtenzaken in een gebied waar transparantie, aansprakelijkheid en genoegdoening voor slachtoffers van de 'oorlog tegen terrorisme' nauwelijks aanwezig zijn.

Het laatste hoofdstuk zet de conclusies van het onderzoek uiteen betreffende het juridische raamwerk. Het geeft de overkoepelende karakteristieke kenmerken weer van de praktijken in de oorlog tegen terrorisme, en biedt een evaluatie van de implicaties hiervan op langere termijn. Karakteristieke kenmerken omvatten onder meer een zeer selectieve en fragmentarische benadering van rechtsregimes, exceptionalisme, en doelgerichte interpretaties die het recht ondergeschikt maken aan beleid en die de autoriteit van het recht ondermijnen. De kenmerken omvatten tevens arbitraire en geheime benaderingen en een gebrek aan behoorlijke procedures, en uiteindelijk de weigering of het verzet om terug te kijken en te garanderen dat beginselen van aansprakelijkheid en genoegdoening die in de kern van internationaal recht liggen gerespecteerd worden. De genoemde selectiviteit, het exceptionalisme, juridische distorsies, arbitraire benaderingen en gebrek aan aansprakelijkheid zoals beschreven in het proefschrift zijn de antithesis van fundamentele rechtsbeginselen waarop het rechtssysteem is gebaseerd.

Op basis van de uitgebreide analyses van het recht en de praktijk wordt desalniettemin gesteld dat er weinig basis bestaat voor de conclusie dat er gapende leemtes in het juridische raamwerk bestaan. Bovendien hebben geen grote transformaties plaats gevonden, zoals aan het begin van de 'oorlog tegen terrorisme' door sommigen aangekondigd. Wel bestaan er bepaalde gebieden van onzekerheid of spanning, en onderdelen waar het recht zich heeft ontwikkeld.

Door het bestaande juridische raamwerk en de praktijk sinds 9/11 nauwkeurig te onderzoeken, biedt het proefschrift tot slot ook de mogelijkheid om vraagtekens te zetten bij de implicaties op langere termijn van de oorlog tegen het terrorisme, en de gevolgen ervan voor het internationale recht. Systematische schendingen van fundamentele normen hebben de internationale rechtsorde op zijn fundamenten doen schudden. Nu we gewend zijn geraakt aan deze wijdverbreide schendingen, en buitengewone benaderingen, bestaat er een risico van ongevoeligheid, normalisering en acceptatie van de onvermijdelijkheid van een dergelijke benadering. In een 'oorlog tegen terrorisme' waarin de legitimiteit van extreme schendingen, zoals waterboarding, bepaalde doelgerichte uitschakelingen of detentie voor onbepaalde duur zonder aanklacht, nog bediscussieerd dient te worden, worden 'zachtere' antwoorden zoals onmenselijke behandeling, het ontkennen van een basaal recht op een eerlijke

procedure, het de grond indrukken van politieke afwijkende opinies of een inbreuk op het recht op privacy, welhaast triviaal. De distorsie van het recht en het respect daarvoor als dat politiek gezien uitkomt vormen een groot gevaar voor de universaliteit, integriteit en autoriteit van de internationale rechtsorde.

Aan de andere kant kan het zo zijn dat de excessen van de 'oorlog tegen terrorisme' en het gemak waarmee juridische standaarden weren opgeofferd in de naam van veiligheid uiteindelijk zullen dienen als alarmerende herinneringen van de gevaren van het ontwijken of het ondermijnen van internationaal recht. Er bestaat wel steun voor de visie dat lessen getrokken zijn en aanpassingen gemaakt in de praktijk zoals hierboven beschreven. Op andere gebieden is het nog onzeker of voldoende bereidheid bestaat om het juridisch raamwerk in de toekomst te implementeren. Voorbeelden hiervan zijn met name de huidige onvolmaakte staat van aansprakelijkheidsprocessen en het onthouden van genoegdoening aan slachtoffers van terrorismebestrijding. Deze kunnen beschouwd worden als uitdagingen die de internationale gemeenschap zal moeten aangaan om de papieren beloften gestalte te geven dat de 'oorlog tegen terrorisme' die zo omgeven was van illegale praktijken ten einde is en dat deze heeft plaatsgemaakt voor een benadering gestoeld op effectiviteit en respect voor het recht.

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Curriculum vitae

Helen Duffy is a Scottish international lawyer who runs a human rights practice ('Human Rights in Practice') in The Hague. She provides representation in human rights litigation and legal advice, working in the Inter-American, African and European human rights systems, and before treaty bodies, sub-regional and national courts. For ten years she was the Legal Director of INTERIGHTS in London. Prior positions include as Legal Officer at the *International Criminal Tribunal for the former Yugoslavia*; Counsel to *Human Rights Watch* in New York, Legal Director of the *Centro para Acciün Legal en Derechos Humanos (CALDH)* in Guatemala, Legal Adviser to the UK *'Arms for Iraq' Inquiry* and Legal Officer in the *UK government legal service* in London. Helen is a visiting lecturer in international human rights law at the University of Leiden, external adjunct professor teaching international law and transnational justice at the University of Webster, and an Honorary Professor of International Law at the University of Glasgow. She is defending her PHD at the University of Leiden, and is a graduate of University College London (LLM), the Universities of Edinburgh (Dip.LP) and Glasgow (LLB Hons). Her other professional activities have included being appointed as an expert on terrorism and human rights to the UN Office on Drugs and Crime and to the OSCE, and a steering Committee member of the 'Leiden International Expert Group on Terrorism and International Law and Policy'. She is currently a consultant to the Hague Institute for Global Justice on the role of strategic human rights litigation and serves on the advisory boards of several NGOs.

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