The 'war on terror' and International Law

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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

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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.*