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Expert Workshop on Human Rights and International Co-operation in Counter-Terrorism

15-17 November 2006

Triesenberg, Liechtenstein

FINAL REPORT

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Background

1. The Office of the High Commissioner and the OSCE Office for Democratic Institutions and Human Rights (ODIHR), with the support of the Government of Liechtenstein, jointly organised a Workshop on Human Rights and International Cooperation in Counter-Terrorism on 15-17 November 2006. The meeting was hosted by the Government of Liechtenstein; the Minister for Foreign Affairs, Mrs. Rita Kieber-Beck opened the workshop, the Prosecutor-General and the Ambassador of Liechtenstein to the United Nations in New York participated, together with the Ambassador of Liechtenstein to the OSCE. The Director of the ODIHR Ambassador Christian Strohal and Ms. Mona Rishmawi, Head of Rule of Law and Democracy Unit of OHCHR also made opening remarks.

2. Some fifty people from 17 OSCE participating States attended the workshop. Discussions took place under Chatham House rules and provided an opportunity for security experts and legal advisors from ministries of interior, justice, defence and foreign affairs in various OSCE participating States, as well as human rights and international law experts from international organisations, civil society and academia, to engage in an open and constructive dialogue.

3. This workshop was the first joint initiative by the OHCHR and the OSCE-ODIHR to address practical and legal aspects of human rights issues which arise in international cooperation in countering terrorism. The objectives of the workshop were to identify and discuss international human rights obligations and commitments of OSCE participating States relevant to the field of international co-operation in combating terrorism and to assist States to ensure that measures taken to counter terrorism comply with those obligations. As such, the workshop built on developments within the UN human rights system, in particular on the seminar organised by OHCHR in June 2005 on human rights, counter terrorism and states of emergency, as well as a number of OSCE-ODIHR initiatives including the Workshop on the Protection of Human Rights while Countering Terrorism, organized by OSCE-ODIHR in co-operation with the Danish Ministry of Foreign Affairs and the Canadian Department of Foreign Affairs and International Trade, which took place in Copenhagen in March 2004 and the Supplementary Human Dimension Meeting on Human Rights in the Fight against Terrorism organised in Vienna in July 2005.

4. The expert workshop included four substantive sessions. Day one focused on the transfer of individuals suspected of terrorist activity, including a morning session on international co-operation and the principle of *non-refoulement* in the context of transferring individuals suspected or involved in terrorist activities, and an afternoon session on the issue of procedural guarantees and due process in the transfer of persons in the fight against terrorism. Day two focused on the transfer of information, with a morning session on asset freezing and confiscation, including the human rights implications of national and international listing mechanisms, and an afternoon session on exchange of evidence and

information–sharing in international cooperation in the fight against terrorism. The final session on day three was dedicated to conclusions, synthesis of discussions and the way forward. The main points of discussion from each of the four substantive sessions are set out below.

I. Transfer of individuals

a. International Co-operation and the Principle of Non-Refoulement

5. Session one focused on international co-operation and the principle of *non-refoulement* in the context of transferring individuals suspected of involvement in terrorist activities. In particular, the meeting addressed the scope and applicability of the *non-refoulement* principle in international law; the standard of scrutiny / burden of proof in assessing the risk of torture and ill-treatment; the relevance of the principle *aut dedere, aut judicare*; and the issue of diplomatic assurances.

6. The principle of *non-refoulement* is recognized explicitly in international instruments including the 1951 UN Convention Relating to the Status of Refugees (Art. 33), the 1984 Convention against Torture (Art. 3) and the 2006 International Convention for the Protection of all Persons from Enforced Disappearance (Art. 16). It is also implicitly recognised in other instruments such as the European Convention on Human Rights (Art. 3) and the International Covenant on Civil and political Rights (Articles 6, 7). Participants noted the importance of the nature of the principle as a rule of customary international law, particularly in cases where a State is not party to the 1951 Refugee Convention.

7. Emphasizing the absolute prohibition on torture, several participants argued that the prohibition on *refoulement* is also absolute and not subject to any derogation, qualification or limitation. It was stressed that this position was well-established in the case law of the European Court of Human Rights (ECtHR) and the UN Human Rights Committee and has featured prominently in reports and statements by the UN High Commissioner for Human Rights, the UN Special Rapporteur on Torture, and several international human rights NGOs. It was further noted that *non-refoulement* constitutes a procedural rule which complements the absolute prohibition of torture.

8. The discussions briefly addressed the question of whether and to what extent the *non-refoulement* principle was equally applicable in the face of terrorism or other national security threats. Reference was particularly made to the dissenting opinions in the ECtHR case *Chahal v U.K.*, the *Suresh* case of the Supreme Court of Canada, and the third party intervention of the United Kingdom, Lithuania, Slovakia and Portugal in the case of *Ramzy v. the Netherlands*, which is currently pending before the European Court of Human Rights. In the latter case the intervening States proposed that all relevant circumstances should be taken into

account in *refoulement* cases and that national security considerations cannot be dismissed as irrelevant in this context.

9. Participants pointed out, however, that the jurisprudence of regional and international bodies has so far 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*. It was argued that in addition to the majority opinion in *Chahal*, this line of reasoning has been followed in other cases of the European Court of Human Rights and other bodies such as the Committee against Torture (CAT). In the recent case of *Agiza v. Sweden* the CAT specifically held that "the Convention's protections are absolute, even in the context of national security concerns".[1] It was argued that no exceptional circumstances, however grave or compelling, could justify the introduction of a "balancing test" when fundamental norms such as the prohibition on *refoulement* in case of torture or ill-treatment were at stake.

10. More generally, participants stressed that it was not helpful to refer to a "balancing exercise" when it comes to reconciling the interests of national security with the protection of human rights. Security and human rights are complementary and mutually reinforcing State obligations. Some participants recalled the importance of recognizing the right of a sovereign State to decide who can or cannot remain on its territory, as well as the obligation of States to take necessary steps to protect their citizens.

11. The meeting also addressed the question of whether or not the *non-refoulement* principle constituted a *jus cogens* norm of international law, which would have important consequences. For example, if the principle is a *jus cogens* norm, then any treaty provision or resolution adopted by the UN Security Council which is inconsistent with the absolute prohibition on *refoulement* would be invalid under international law. In this context it was suggested that the *jus cogens* character of the *non-refoulement* principle followed from the fact that the *refoulement* prohibition is inherent in the absolute prohibition on torture.

12. It was also suggested that the question of whether or not the *non-refoulement* principle constituted a *jus cogens* norm did not have much relevance in practice, as it was codified by several international instruments and arguably constitutes a rule of international customary law. On the other hand, it was suggested that the *jus cogens* nature of the principle of *non-refoulement* did matter in practice because of its effect in relation to other principles of international law.[2]

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[1] UN Committee against Torture, *Agiza v. Sweden*, CAT/C/34/D/233/2003, 24 May 2005, para 13.8.

[2] See e.g. *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* (T-315/01, 21 September 2005.

13. Participants also discussed the scope and applicability of the *non-refoulement* principle, in particular in relation to the following human rights violations:

    - Right to life (including death penalty cases);
    - Torture and other cruel, inhuman or degrading treatment or punishment;
    - Enforced disappearance;
    - Right to liberty and security;
    - Other violations causing "irreparable harm."[3]

14. Citing national case law, one participant noted that the Courts in one participating State have accepted the applicability of *non-refoulement* in relation to the European Convention on Human Rights Articles 2 (right to life), Article 3 (prohibition on torture/ill-treatment) and 6 (right to a fair trial where the breach amounted to a flagrant denial of justice). The question of whether the Article 6 ECHR protection extended to the practice of plea bargaining was raised as it was suggested that this may compromise the right to a fair trial. It was not clear, however, whether the *non-refoulement* principle was also applicable to Art 8 ECHR (right to private and family life) although this was not ruled out. Reference was made to case law both accepting and denying the applicability of the *non-refoulement* principle to the right to family life.

15. The responsibility of States for violating the prohibition on refoulement was also addressed. Reference was made to Article 16 of the International Law Commission's Draft Articles on State Responsibility which establishes state responsibility for "aiding or assisting" the commission of an internationally wrongful act by another state, where "knowledge of the circumstances" existed and the act in question would have been wrongful had it been committed directly by the third party state. In addition, an argument was made that State officials may also be accountable under international criminal law for facilitating or complicity in torture and ill-treatment in refoulement cases.

16. Participants engaged in a discussion on the different standards of scrutiny applied by States in assessing the risk of torture and ill-treatment in refoulement cases, such as:

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[3] " […] the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters", Human Rights Committee General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 12.

- "substantial grounds for believing that he would be in danger of being subjected to torture" (Art. 3 of the Convention against Torture). According to the Committee against Torture this requires "grounds that go beyond mere theory or suspicion."[4]
- "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."[5]
- "where there are substantial grounds for believing that there is a real risk of irreparable harm"[6].
- "more likely than not."[7]

17. The question of whether and to what extent the burden of proof was on the individual or the government when it comes to establishing the risk of torture and ill-treatment in refoulement cases was discussed. Citing the *Ramzy* case, one participant noted that the defendant (the Netherlands) was neither challenging the absolute prohibition on torture nor asking the Court to overturn the *Chahal* decision, but rather was asking the Court to confirm its approach in relation to the burden of proof to establish the risk of torture/ill-treatment. This involved the proposition that the onus of proof could not solely lie on the government and that the individual also had a certain obligation to present evidence that goes beyond referring to generalised country reports and other information confirming the risk of torture and ill-treatment. Several participants, however, cautioned against shifting the burden of proof to the individual. In particular it was stressed that, from a practical perspective, it was very difficult for an individual to provide evidence about the risk of torture and ill-treatment in a given country, while a State had the administrative means and support to produce relevant evidence and information. The question of burden of proof is an important one in ensuring that rights are real and effective.

18. Building on these discussions, it was suggested that the principle *aut dedere aut iudicare* ("extradite or prosecute") had to be considered equally important as the principle of *non-refoulement*, although there are important practical challenges related to the implementation of both principles. The question was posed as to how governments should deal with suspects that can not be extradited because of a State's human rights obligations. The difficulties inherent in prosecuting suspects where evidence and witnesses may be in another country and the suggestion that the country in question may not be willing to cooperate following a failed

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[4] UN Doc. A/53/44, annex IX, para. 6. Also: *SV* v. *Canada* (No. 49/1996), UN Doc. A/56/44, p. 102, para. 9.4; *MEP* v. *Switzerland* (No. 122/1998), UN Doc. A/56/44, p. 124, para. 6.4.
[5] ECtHR, *Chahal* v. *United Kingdom*, 15 November 1996, Reports 1996-V, para. 74.
[6] UN Human Rights Committee, "General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant", UN Doc. CCPR/C/21/Rev.1/Add.13, para. 12.
[7] UN Doc. CCPR/C/SR.2380, para. 10; "Second Periodic Report, United States", UN Doc. CAT/C/48/Add.3, para. 38; "List of issues to be considered during the examination of the second periodic report of the United States of America [to the Committee Against Torture], Response of the United States of America, pp. 26-50; UN Doc. CAT/C/SR.703, para. 34, 38.

extradition request were pointed out. From a law enforcement and policy perspective, it was suggested that the State should allow individuals suspected of terrorism to remain in the country for the purposes of intelligence gathering and monitoring. At the same time it was acknowledged that the monitoring of terrorism suspects required substantial financial and human resources and thus represented a considerable practical challenge.

19. Discussions in session one also focused on the practice of so-called 'diplomatic assurances' in refoulement cases where there was a risk of torture and ill-treatment. It was noted that one participating State had recently concluded 'memoranda of understanding' with Libya, Lebanon and Jordan and was currently engaged in negotiations towards similar agreements with other countries. The participating State in question was now taking steps to ensure that these documents were as explicit as possible and contained monitoring arrangements.

20. Participants agreed that the practice of diplomatic assurances or memoranda of understanding may be acceptable in "regular" extradition cases involving a risk that the individual may be subject to the death penalty in that the death penalty is governed by law and therefore guarantees may be given within the rule of law framework. There was also some support for the suggestion that diplomatic assurances could be sought in cases where a person is sent to states with guarantees that the person expelled would not be returned or re-extradited to a country where he/she would face ill-treatment.

21. A large number of participants, however, emphasised that diplomatic assurances were neither lawful nor practical in cases engaging Article 3 of the UN Convention against Torture and of the ECHR (i.e. where there is a risk of torture, cruel, inhuman or degrading treatment). Reference was made to the report of the Group of Specialists of the Council of Europe, which rejected the drafting of minimum standards in relation to the use of diplomatic assurances.

22. Furthermore, participants noted that diplomatic assurances in Article 3 cases were problematic in principle as they undermined the international human rights system as a whole, and the prohibition on torture in particular. Participants argued that such assurances were concluded between States who were already parties to binding international and regional treaties which prohibit torture and cruel, inhuman or degrading treatment or punishment, and refoulement to such practices, and that the need for and value of diplomatic assurances in such cases is therefore questionable. It was also pointed out that ad-hoc arrangements, such as diplomatic assurances, concluded outside the system threatened to weaken its foundations.

23. One participant referred to the practice of diplomatic assurances as an "island of legality in a sea of illegality", noting that diplomatic assurances were problematic as they were subject to diplomatic negotiations and practically unenforceable, without a credible means for monitoring. In this

context reference was made to the *Agiza* case.[8] In addition, the point was made that independent NGO monitoring of the implementation of diplomatic assurances and monitoring arrangements was virtually impossible.

24. Finally, it was noted that the practice of diplomatic assurances was problematic as there was evidence to suggest that people subjected to such assurances were at greater risk of torture in the form of reprisals against complaints. It was also pointed out that terrorist suspects were often likely targets of torture on their return by virtue of their status as terrorist suspects.

25. Overall, the discussions in Session one illustrated the complexity of the legal and practical issues associated with the *non-refoulement* principle in the context of transferring individuals suspected of or involved in terrorist activities. It was pointed out that in fact there were few examples of *non-refoulement* arguments in extradition cases and that the question of *non-refoulement* featured more prominently in immigration cases. More generally it was agreed that it was not helpful to talk about a "balance" between human rights and security but rather about complications arising from the implementation of human rights and counter-terrorism related obligations. The session also made clear that it is preferable to prosecute individuals suspected of terrorism rather than to transfer them and that expulsion should be considered as a last resort. It was noted that international cooperation and an adherence to standard rules of evidence could help to avoid refoulement through expulsion, for example, through the lawful use of telephone intercepts in court proceedings leading to successful prosecutions. In conclusion it was suggested that the principle of *non-refoulement* is an important means for ensuring the prevention of torture and other cruel, inhuman or degrading treatment or punishment.

b. Procedural obligations

26. Session 2 of the workshop considered the main issues concerning the procedural requirements for the transfer of persons in the fight against terrorism in international criminal law, human rights law, humanitarian and refugee law.

27. It was noted that the universal counter-terrorism conventions are fully compatible with international human rights law, and that none contains provisions which would necessarily lead to limitations on human rights in the process of implementation. On the contrary, the counter-terrorism conventions contain various common features that either expressly or impliedly require compliance with international human rights law. However, human rights concerns may arise in the context of the implementation of these conventions. Two means were identified for

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[8] UN Committee against Torture, *Agiza*, *cit*..

ensuring that the implementation of the conventions does not lead to interference with human rights, including:

- More effective coordination in relation to the technical assistance provided to States for the implementation of the universal conventions; and
- A more active role on the part of the UN Counter-Terrorism Committee in its interaction with States on the implementation of UN Security Council resolutions 1373 (2001) and 1624 (2005).

It was noted that the latter was also the position advocated by the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism.[9] Participants also commented on the role of the Counter-Terrorism Committee and, in particular, on the need for improved working methods in this regard.

28. Participants agreed that those responsible for committing terrorist acts must not be permitted to manipulate refugee mechanisms in order to find safe haven or achieve impunity. It was noted that international refugee law is capable of dealing with this challenge. For example, where a person has already been granted refugee status, that status may be cancelled where there is new evidence which, had it been available at the time that the refugee application was considered, would have led to a refusal of status. Moreover, the obligations under the Refugee Convention 1951 do not apply to the country of refuge where the exclusion clauses under Article 1F of the Convention are applicable. In particular, Article 1F(b) of the Convention relates to the commission by the applicant of serious non-political crimes, which may include acts of terrorism, prior to the person's admission to the country of refuge. There are also exceptions to the principle of *non-refoulement* as it applies in refugee law under Article 33(2) of the Refugee Convention. A State is not obliged to grant refugee status where the conduct of the applicant either constitutes a danger to the security of the host State, or constitutes a danger to the community of the host State. Particular care should be taken to ensure the scrupulous application of Articles 1F and 33(2) of the Convention.

29. The discussions focused on a number of challenges involved in the interface between counter-terrorism, international human rights law, international humanitarian law, and international refugee law. With regard to international humanitarian law, one participant suggested that a combatant cannot claim refugee status because international humanitarian law applies as the *lex specialis*.

30. Several participants expressed serious concerns with the description of counter- terrorism activity as a "war", in particular given the never-ending

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[9] See, for example, report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism to the Commission on Human Rights (UN Doc E/CN.4/2006/98, spec. para. 63).

nature of such a war and the transposition of the rules of international humanitarian law related to "unlawful combatants". Other concerns were raised in relation to appeals against a denial of refugee status, particularly in circumstances where the person is returned to the State of origin or nationality.

31. Session two also addressed the transfer of persons by "rendition" and so-called "extraordinary rendition". Discussion first focused on the positive obligations of States to refrain from engaging in the practice of renditions outside the rule of law, as well as to suppress such practices by other States. Whether or not initiated by lawful arrest or detention, rendition which takes place outside the rule of law and without due process may involve multiple human rights violations affecting the right to liberty, the prohibition on torture and other cruel, inhuman and degrading treatment and punishment, the right to a fair trial, the right to private and family life and the right to an effective remedy.

32. It was pointed out that States have an obligation to comply with their international human rights obligations (whether arising under treaties or customary international law) and to take joint and separate action to achieve the universal respect for, and observance of, human rights for all. It is contrary to an effective counter-terrorism strategy to permit violations to occur since they can lead to the exclusion of evidence which might otherwise lead to the criminal conviction of the perpetrators of terrorist acts. They may also lead to the disaffection of persons and the creation of an environment conducive to recruitment and action by international terrorist groups. It was further noted that the practice of rendition outside the rule of law runs counter to the International Convention for the Protection of All Persons from Enforced Disappearance recently adopted by the Third Committee of the UN General Assembly.[10]

33. Building on these points, participants discussed the scope and content of States' obligations to suppress illegal or extraordinary rendition and identified a number of issues requiring further consideration:

    - Oversight/control of the conduct of intelligence services;
    - The legal framework regulating air traffic; and
    - The potential impact of State immunity.

34. Reference was made to the background paper to this session, which recalls that a transit State has a positive obligation to ensure that its territory is not used to transfer persons to places where they are likely to be subjected to torture or other serious violations of human rights, including taking all practical steps to determine whether foreign movements through its territory are undertaking such practices. Participants raised a number of concerns, emphasizing the practical difficulties States continue to face in this regard, in particular concerning what procedures States should impose

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[10] Sixty-first General Assembly, Third Committee. 45th Meeting of 16 November 2006. press release available at http://www.un.org/News/Press/docs/2006/gashc3872.doc.htm.

as a minimum obligation to satisfy these positive obligations and ensure that they are not complicit in the practice of rendition. A number of practical considerations were highlighted:

- Any transfer of persons from one territory to another must be undertaken pursuant to a prescription by law and within the framework of international law;
- Judicial oversight and review must be available prior to transfer; and
- Interdictions and/or investigations must be undertaken in response to credible allegations of rendition involving a real risk of torture.

Following the approach of the Human Rights Committee in *Alzery v Sweden* [11], an assessment of all the circumstances should be made, including for example the prior practice on the part of the transiting State; the origin and destination of the transiting aircraft or vehicle; the preparedness or otherwise of the transiting State to share information and/or provide assurances; and, in the case of aircraft, the status of the aircraft under Article 4 of the Chicago Convention (as noted by the Venice Commission in a recent report [12]).

II. Transfer of information

a. Asset Freezing and Confiscation

35. Session 3 of the workshop focused on the human rights implications of national and international listing mechanisms for terrorist organisations and individuals suspected of terrorist activity, including United Nations' listings leading to asset freezing and EU listing mechanisms.

36. The session addressed the question of how States can fulfil their human rights obligations within the constraints put on them by these international mechanisms and processes. It also addressed some of the human rights considerations that should go into setting up any system of listing and/or asset freezing in the context of counter-terrorism.

37. The session provided an opportunity to discuss the background to the current system of targeted sanctions against selected persons or non-State entities, which developed in the 1990s at UN level in response to concerns

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[11] Human Rights Committee, *Alzery v Sweden,* CCPR/C/88/D/1416/2005, 10 November 2006.

[12] European Commission for Democracy through Law (Venice Commission), *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, COE Doc CLD-AD(2006)009, 66th Plenary Session, Venice, 17-18 March 2006.

about comprehensive sanctions. There are two general types of individual sanctions in the UN system, including general anti-terrorism measures under Security Council resolution 1373, and al-Qaeda/Taliban sanctions under Security Council resolution 1267. It was noted that while the system of targeted sanctions is an improvement over the system of comprehensive sanctions, there are concerns that these procedures also violate human rights, in particular procedural guarantees.

38. The question of the effectiveness of individual sanctions, as well as their impact on human rights and countering terrorism, was also addressed. It was noted that asset freezing is a useful way of tracking and disrupting terrorist activity, but that such procedures must meet certain human rights standards. In this regard, participants emphasized the need for an open debate on financial sanctions and their impact on human rights, as well as other aspects of counter-terrorism. The question was raised as to the scope of activities of the Security Council, which now makes decisions that have a direct impact on individuals, and the possibilities for reviewing Security Council decisions.

39. It was noted that some improvements have been made to the current sanctions procedures. For example, there are now criteria for listing and the requirements for statements of case are being refined. Serious human rights concerns with the current targeted sanctions practice remain regarding the respect for due process rights, in particular the rights to fair trial and to an effective remedy, such as:

- Standards of proof and evidence in listing procedures: these sanctions clearly have a punitive character, yet there is neither a uniform standard of proof, nor a clear process for listing individuals;
- Inadequate notification: member States are responsible for informing their nationals that they have been listed, but often this does not happen; Individuals should be aware of the reasons why they have been listed, as well as the procedures available for challenging listing decisions. This is a problem both for individuals and for implementing States, as often the reasons behind the decisions are unclear;
- The lack of an end date to listings, unless they are challenged: the timespan of individual sanctions is enormously important. The consequence of a lack of end date is that a temporary freeze of assets may, in fact, become permanent amounting effectively to a confiscation of the assets. At the same time, the longer the person is on a list, the more punitive the effect will be;
- Inaccessibility: Individuals do not have standing to challenge the sanctions regime, only States have standing which assumes that the State will act on behalf of the individual. In practice, often this does not happen, and individuals are effectively excluded entirely from a process which may have a direct punitive impact on them. In addition, some participating States described difficulties of transparency even for States to challenge sanctions;

- Remedies: there is a lack of consideration to remedies available to individuals whose human rights have been violated in the sanctions process, including possible compensation mechanisms.

40. Several participants emphasized the powerful nature of stigma associated with terrorism: once someone is listed and labelled, this can have very serious consequences for the individual, as well as his or her family and community. Consequences affecting the prohibition on torture or other cruel, inhuman or degrading treatment, the right to liberty, the presumption of innocence and the prohibition on enforced disappearance were mentioned in this regard.

41. The need for improvement in the UN sanctions regime was recognized in the World Summit Outcome Document, which calls 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.." [13] These procedures also have prompted human rights challenges before courts in Europe. [14] The most recent of these cases involved challenges to the implementation of 1267 sanctions in the EU. In one case, the Court of First Instance stated that it had no authority to review the legality of UN Security Council resolutions, but agreed to examine whether Council resolutions conformed with *jus cogens* norms. Other cases are pending before the Court of Justice and the Court of First Instance, which points to the need to improve the system to meet rule of law/human rights standards.

42. On the specific procedural issues, it was noted that a clear distinction should be made between the various phases of the procedure, in particular listing and de-listing. While much focus has been on de-listing, there is a need to ensure a good listing process which is transparent, based on clear criteria, and with an appropriate, explicit, and uniformly applied standard of evidence. It was noted that with better listing procedures, the importance of de-listing procedures becomes less important. The question of who decides on listing and what kind of decision-making process is in place are key concerns which must be addressed.

43. The question of the nature of individual listing was raised as an issue with consequences for evidentiary standards, as well as procedural implications. It was noted that if an individual listing is not a criminal sanction, and its aim is to prevent terrorist activities, then that listing must be able to change as the activities of the individual change. The focus should be on the effective remedy, although there is a lack of consensus as to what the

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[13] UN General Assembly, A/RES/60/1. 2005 World Summit Outcome, 24 October 2005, para. 109.

[14] See, for example, Kadi v. Council and Commission, Case T-315/01, 21 September 2005; Yusuf and Al Barakaat International Foundation v. Council and Commission, Case T-306/01, 21 September 2005; Faraj Hassan, Case T-49/04, 12 July 2006; and Chafiq Ayadi, Case T-253/02, 12 July 2006.

nature of that remedy should be. In addition, the system of humanitarian exemptions must be improved.

44. The use of intelligence information was identified as a crucial question. The lack of effective information-sharing is an impediment at all levels – including for the listing procedure, de-listing and possible remedies.

45. Various possible ways to improve the system were discussed, including through the appointment of an ombudsman; the appointment of a focal point within the UN secretariat; the appointment by the Security Council of a Committee with power to recommend delisting and compensation; and the more effective use of national mechanisms for review of listing decisions. However, it was also noted that relying on national remedies may lead to inequalities and lack of uniform standards. Other possible avenues to explore could be recourse to courts – including, for example, through a request for an ICJ Advisory Opinion.

46. In any event, participants emphasized that the effectiveness of any review mechanism would depend on its independence, impartiality, its ability to provide for an effective remedy; and most importantly, accessibility – both for individuals and concerned States.

b. Exchange of Evidence and Information-Sharing

47. The purpose of session four was to address issues related to the exchange of evidence and information-sharing in the context of international cooperation in the fight against terrorism, and to identify human rights concerns in the context of providing a fair trial in criminal and non-criminal proceedings.

48. Participants recalled that States are required to protect those within their jurisdiction in a manner consistent with human rights law, and that security and human rights interests are mutually reinforcing. The session considered a number of human rights concerns which may arise during the course of different phases of judicial cooperation, such as:

- the impact of the origins of intelligence information on its admissibility as evidence;
- differences in the definition of the elements of crime between jurisdictions, as well as 'dual criminality' concerns;
- procedures for gathering evidence, in particular where interrogation of witnesses or suspects is coercive and may constitute torture or cruel, inhuman and degrading treatment;
- unlawful interferences with privacy with respect to interception, search and seizure, surveillance;
- the right to an effective remedy for violation of human rights in the context of evidence gathering and information-sharing;
- the transfer and/or admissibility of evidence gathered by unlawful means;

- rules relating to the use of confession evidence, particularly where the confession was obtained under duress;
- the principle of legality in relation to the definition of terrorist offences;
- protection of witnesses;
- questions related to the burden of proof in criminal proceedings.

49. It was noted that serious human rights questions arise in the process of judicial cooperation in counter-terrorism measures, notably issues related to the implications of the prohibition of torture, cruel, inhuman or degrading treatment; due process guarantees; the protection of privacy; and the right to an effective remedy. With regard to evidence-sharing, it was noted that difficulties can arise due to differences in legal procedural requirements and it was suggested that greater efforts should be made on the part of requested States to understand the rules of evidence in the trial State in order to take these into account when gathering evidence to ensure that it can be used.

50. Participants further pointed out that the question of whether an activity is criminal in two States ("double criminality") did not feature prominently in traditional terrorism cases, as activities considered to constitute terrorism are usually criminalized in all jurisdictions. On the other hand, it was suggested that problems could arise in relation to the new subsidiary offences created in relation to terrorism, such as incitement to or glorification of terrorism. It was noted that while the title of the offences might be the same in two jurisdictions, the constitutive elements of a criminal act may vary between the two States and therefore may act as a barrier in judicial cooperation. Thus, it was suggested that the requested State should be informed about the constituent elements of an offence.

51. One of the key challenges identified was the question of how to obtain an effective combination of intelligence and police information on the one hand, and judicial information that can be used as evidence for successful prosecutions on the other. An important aspect of this challenge that needed to be examined urgently was the question of how to turn intelligence information into admissible evidence. It was noted in this context that there was a tendency in the area of counter-terrorism to obtain information without due consideration of whether this information could be used as evidence in criminal proceedings. Intelligence agencies did not necessarily view terrorism only as a crime but more generally as a threat and therefore consider prosecution and conviction as but one of the tools to address the threat.

52. Another important concern which arises in the context of the use of intelligence information as evidence is that of the source of information. Intelligence bodies are not willing to jeopardise the whole intelligence machinery which is based on secrecy. Further, they are usually more willing to keep the person under their surveillance and monitoring, as much of the information that they gather might not result in criminal proceeding and conviction.

53. It was proposed that a report on the rules of evidence could be undertaken, which could outline what the rules of evidence and procedure in different legal systems are, in order to ensure that information is shared in most effective manner. Further, in relation to the issue of use of information or evidence obtained illegally in criminal proceedings, it should be examined whether the practice should be based on the 'doctrine of the fruit of poisoned tree".

54. The need for training and awareness-raising amongst practitioners with regard to mutual legal assistance also was emphasised. In particular, the need to make defence lawyers aware of the possibilities of using mutual legal assistance to identify exculpatory evidence. It was observed that usually state authorities (including police, prosecution) undertake and are involved in mutual legal assistance. In contrast, in some states the judges and defence lawyers, who are involved in criminal cases, are not even aware that there exists a possibility and a framework for seeking information through mutual legal assistance. Also, in some states defence lawyers do not have the right to make mutual legal assistance requests.

55. It was noted that a Draft Framework Decision on Procedural Rights for Suspects and Defendants in Criminal Proceedings is being discussed in the Council of the European Union. The justification for this proposed Framework Decision is that an improvement in standards of procedural rights in EU Member States would facilitate international cooperation in criminal matters, in particular with regard to the European arrest warrant surrender procedures, as it would improve mutual trust in the legal systems of EU Member States.

56. Reference was made in this context to the 9th Eurojust conference in September 2006 in Oslo, where General Prosecutors of the Member States of the European Union and other invited States (e.g. Norway) participated. The conference addressed various aspects of the challenge of terrorism in Europe which is of particular interest for prosecution services. Two important conclusions adopted by member States at the conference were highlighted:

> "*the fight against terrorism should not be seen as a 'war'. Terrorism must be regarded as a crime, albeit a particularly serious one, and should be combated as such. Preventive measures, investigation, prosecution and trial must be founded on the rule of law, be under judicial control and based on the international recognized human rights principles as enshrined in the United Nations Human Rights Conventions and the European Convention on Human Rights.*" (para 3)
>
> "*Under no circumstances is the use of torture or of cruel, inhuman or degrading treatment or punishment or violation of other non-derogable rights under the international Human Rights instruments permissible. Threats of torture or use of evidence stemming from torture must never be accepted.*" (para 4)

57. Participants highlighted that the Council of Europe Convention on Prevention of Terrorism of 2005[15] and EU Council Framework Decision on Combating Terrorism of 2002[16] attempt to harmonize terrorist offences. Also, the Framework Decision of the Council of European Union on the European Arrest Warrant (EAW) 2002 sets aside the requirement of double criminality in the execution of EAWs for the offences listed therein, including terrorism, and thereby facilitates judicial and legal cooperation between European Union Member States in criminal matters.

III. Conclusions and recommendations

58. The expert workshop provided an important opportunity for strengthening cooperation between international organisations, regional organizations and participating States in the field of international cooperation in human rights and counter-terrorism, as well as for deepening the analyses of practical and legal challenges related to human rights and international cooperation in countering terrorism. The meeting concluded with a synthesis of the discussions and consideration of possible measures for taking these issues forward.

59. In relation to the issue of transfer of individuals, participants noted the need to encourage States to prosecute rather than transfer individuals suspected of terrorist activity where there is a risk of human rights abuses should the person be returned. The role of the United Nations treaty bodies in helping to clarify the nature and scope of States parties' obligations in relation to the transfer of individuals also was highlighted. In this regard, expert participants suggested the development by the Committee against Torture of a General Comment on the issue of "complicity".

60. Participants also noted the need for greater scrutiny of the individual sanctions regime, in particular with regard to due process considerations in the context of asset freezing. With regard to individual sanctions and asset freezing in the context of counter-terrorism, expert participants suggested the need for an information leaflet on procedures related to asset freezing to assist States in the implementation of UN Security Council sanctions.

61. Participants welcomed the workshop and its format as an excellent opportunity to examine and discuss human rights-related issues and challenges in the field of international cooperation in counter-terrorism on a technical expert level. They also noted the need for further debate on the effectiveness of counter-terrorism measures and ensuring their compliance with human rights with a view to promoting the effective role of human rights in enhancing human security.

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[15] CETS 196, 16 May 2005.
[16] Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), in Official Journal of the European Communities (OJEC), 22 June 2002, No L 164, p. 3.

62. Specific topics of interest were identified as requiring deeper examination and analysis from a human rights perspective, and as possible topics for future expert meetings on international cooperation and human rights in countering terrorism, notably the issue of intelligence information, the transfer of intelligence information between States and its use as evidence within and between States.

63. Other issues requiring further study include evidence and information-sharing, in particular the rules of evidence in different jurisdictions and on how intelligence information can be shared between authorities in different jurisdictions with a view to its use as evidence and in a manner consistent with human rights. More generally it was suggested that follow-up workshops could focus on topics like the right to life in the context of counter-terrorism, the right to liberty and security of the person in the context of counter-terrorism and partnerships with civil society in fighting terrorism.

ANNEX

- Background papers, technical workshop on Human Rights and International Cooperation in Counter-Terrorism, Liechtenstein, 15-17 November 2006.

Please note: Opinions expressed in the background papers are those of the authors and not necessarily those of the OSCE-ODIHR or the OHCHR.

Non-Refoulement

by William A. Schabas*

Background Paper for the technical workshop on Human Rights and International Cooperation in Counter-Terrorism, Liechtenstein, 15-17 November 2006
OSCE Office for Democratic Institutions and Human Rights and UN Office of the High Commissioner for Human Rights

THE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS, states that '[n]o one may be removed, expelled or extradited to a State where there is a serous risk that he or she would be subjected to the death penalty, torture or other inhuman or degradinjg treatment or punishment'.[1] The norm declared in article 19(2) of the European Charter is often described as the principle of non-*refoulement.* Although the European Constitution of which it is a part has not yet been adopted, the Charter is important as an authoritative contemporary statement of basic human rights norms. Article 19(2) of the *Charter* is an effort at codification of the case law of the European Court of Human Rights.[2]

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Note: Opinions expressed in this paper are not necessarily those of the OSCE-ODIHR or the OHCHR.

1 *Charter of Fundamental Rights*, [2000] OJ C364, art. 19(2). A similar formulation appears in paragraph 13 of the preamble of the Council of Europe Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 13 June 2002, 2002/584/JHA. On the Charter, see: François Julien-Laferrière, 'Article II-79 – Protection en cas d'éloignement, d'expulsion et d'extradition', in Laurence Burgorgue-Larsen, Anne Levade & Fabrice Picod, *Traité établissant une Constitution pour l'Europe, Commentaire article par article*, Vol. II, Brussels: Bruylant, 2005, pp. 269-279.; Henri Lebayle, 'Article 19', in *EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union*, June 2006.

2 'Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, 11 October 2000, Explanations, p. 21.

The word 'refoulement' does not appear in the authoritative Oxford English Dictionary, but it has become common in English usage, at least at a specialised level, because of its appearance in article 33 of the 1951 Convention on the Status of Refugees and, subsequently, in article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The language appears to have originated in the 1933 Convention relating to the International Status of Refugees, which introduced an explicit prohibition on *refoulement* into the existing body of refugee law: 'Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorized to reside their regularly, unless the said measures are dictated by reasons of national security or public order.'[3] 'Refoulement' and 'refouler' arguably mean the same thing as the English terms 'expulsion' or 'return'. The drafters of the 1951 Refugee Convention apparently felt it necessary to add the French term to the English text so as to ensure that the duty of non-return was understood to have 'no wider meaning' than that of the French expression, 'which was agreed not to apply in the event that national security or public order was genuinely threatened by a mass influx'.[4]

Be that as it may, the concept of 'refoulement' now refers, in public international law, to the return of an individual to a territory where there is a risk of ill treatment. In the context of refugee protection, non-*refoulement* concerns the expulsion of a refugee or asylum seeker to a State where life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. The terms echo the criteria for determination of refugee status that are set out in article 1 of the Refugee Convention. According to article 33 of the Refugee Convention:

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[3] (1935) 159 LNTS 3663, art. 3. The Convention is discussed in James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press, 2005, pp. 86-89.

[4] James C. Hathaway, *The Rights of Refugees Under International Law*, Cambridge: Cambridge University Press, 2005, at p. 357.

> Prohibition of expulsion or return ("*refoulement*")
>
> (1)No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> (2)The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[5]

The *Declaration on Territorial Asylum* adopted in a unanimous resolution of the United Nations General Assembly, in 1967, is to similar effect.[6] Within the international law governing the protection of refugees and asylum seekers, there are several other formulations of the principle, such as the 1966 *Asian-African Refugee Principles*,[7] the *Organisation of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa*[8] and the *Cartagena Declaration*.[9]

The Refugee Convention only applies to those whose refugee status has been recognized. Moreover, it explicitly excludes persons about whom there are 'serious reasons for considering' that they have committed international crimes or 'acts contrary to the purposes and principles of the United Nations'.[10] These 'exclusion clauses' certainly cover

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5 *Convention Relating to the Status of Refugees*, (1954) 189 UNTS 137.

6 GA Res. 2132 (XXII), art. 3.

7 'Report of the Eighth Session of the African-Asian Legal Consultative Committee held in Bangkok from 8 to 17 August 1965', p. 335, art. III(3).

8 (1969) 1001 UNTS 3, art. II(3).

9 'Colloquium on the International protection of Refugees in Central America, Mexico and Panama, Conclusions', 1984, Section III, para. 5.

10 *Convention Relating to the Status of Refugees*, (1954) 189 UNTS 137, art. I(F)(c).

many terrorist suspects.[11] In addition, article 33(2) itself declares that the principle of non-*refoulement* may not be claimed by a refugee about whom 'there are reasonable grounds for regarding as a danger to the security of the country in which he is'. It is argued, however, that these exceptions do not apply in cases where the individual will be exposed to torture. Because of the absolute prohibition of torture under international law,[12] the exceptions that appear to authorise *refoulement* do not apply in such a case. For most countries, a debate about whether there is an implied limitation on *refoulement* contained within the Refugee Convention will be largely academic, however, because in any event the State will be subject to other treaty obligations, notably article 3 of the *Convention Against Torture*, where non-*refoulement* is set out explicitly, and the anti-torture provisions of the general human rights treaties, where it is implied. Although this is known as 'complementary protection', the human rights regime governing non-*refoulement* has largely taken over that of the Refugee Convention, which is gradually becoming virtually superfluous.[13]

Non-*refoulement* as a general norm of international human rights law

The principle of non-*refoulement* has been enlarged by modern international human rights law, applying to broader categories of individuals, and not only refugees or asylum-seekers.[14] It may also apply to a larger range of threats to the individual in question and,

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[11] 'Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel inhuman or degrading treatment or punishment', UN Doc. A/57/173, para. 28.

[12] See, e.g., Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 July 1990, para. 12(3)::'no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or another public emergency, may be invoked as a justification of torture'.

[13] See, *e.g.*, Brian Gorlick, 'The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees', (1999) 11 *International Journal of Refugee Law* 479; David Weissbrodt & Amy Bergquist, 'Extraordinary Rendition: A Human Rights Analysis', (2006) 19 *Harvard Human Rights Journal* 123; Hélène Lambert, 'Protection Against *Refoulement* From Europe: Human Rights Law Comes to the Rescue', (1999) 48 *International and Comparative Law Quarterly* 515.

[14] As was acknowledged by the European Court of Human Rights in *Chahal* v. *United Kingdom*, 15 November 1996, Reports 1996-V, para. 80.

arguably, brook fewer exceptions. The *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly in 1948, states:

> (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
>
> (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.[15]

There is nothing explicit here about expulsion, but this might reasonably be implied from the general terms of the provision. Invoking this provision in the *Universal Declaration of Human Rights*, in 2005 the United Nations Commission on Human Rights called upon States to respect the 'principle of non-refoulement'.[16] But in the past the right may have seemed somewhat precarious, given the failure to reaffirm it in the two international covenants that were derived from the *Universal Declaration of Human Rights*.

The first explicit manifestation of the non-*refoulement* principle in international human rights treaty law appears in article 22(8) of the *American Convention on Human Rights*, which was adopted in 1969 and entered into force in 1978. It declares:

> In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race nationality, religion, social status, or political opinions.[17]

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[15] *Universal Declaration of Human Rights*, GA Res. 217 A (III) UN Doc. A/810, art. 14.

[16] 'Human rights and mass exoduses', UN Doc. E/CN.4/RES/2005/48, para. 7. Also: 'Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel inhuman or degrading treatment or punishment', UN Doc. A/57/173, para. 27.

[17] *American Convention on Human Rights*, (1979) 1144 UNTS 123, OASTS 36.

The provision contemplates 'aliens' in general. It does not concern itself with nationals who, in any event, may not be expelled, in accordance with article 22(5) of the Convention. The text of article 22 suggests that these rights are not subject to limitation of any kind.[18] Nevertheless, in accordance with article 28, it is possible for a State to derogate from these obligations.

Non-*refoulement* is expressly set out in article 3 of the 1984 *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*:

> 1. No State Party shall expel, return ("refouler") 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.
>
> 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.[19]

A similar but slightly different formulation to that of article 3 of the Torture Convention appears in article 17 of the more recent Convention for the Protection of All Persons from Enforced Disappearance.

> 1. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are

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[18] See, especially, article 22(3), which provides for limitations to 'foregoing' rights, implying that it does not apply to paragraphs (5) and (8).

[19] *Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/39/51, annex.

> substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
>
> 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 or of serious violations of international humanitarian law.[20]

Article 17 of the Enforced Disappearance Convention adds the term 'surrender' to paragraph 1, and reference to 'serious violations of international humanitarian law' to paragraph 2. This text is not yet in force, and remains in draft form. It was endorsed by the Human Rights Council at its first session, in June 2006, and is expected to be adopted by the General Assembly later in the same year. Its broad acceptance suggests it represents an authoritative statement of general international law at the present time.

Within the Inter-American regional system, article 13 of the 1987 Convention to Prevent and Punish Torture provides that '[e]xtradition 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 States.'[21]

However, the most expansive development of the principle of non-*refoulement* is not reflected in the treaties. Rather, it is the result of interpretation by judicial and quasi-judicial bodies that have concluded the norm is implied within the general prohibition of torture and other cruel, inhuman and degrading treatment or punishment, and possibly other fundamental rules of international human rights law. Although satisfying from the standpoint of human rights advocacy, the fact that norms are at their broadest when they are only implied from vague and general texts, and rather more narrow when they are formulated in precise treaty

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[20] *International Convention for the Protection of All Persons from Enforced Disappearance*, UN Doc. A/HRC/RES/2006/1.

[21] *Inter--American Convention to Prevent and Punish Torture*, OASTS 67, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83.

provisions, seems contrary to general principles of interpretation. There is also academic authority for the view that non-*refoulement* is a norm of customary international law, a corollary of the absolute prohibition of torture.[22]

The European Court of Human Rights was the first to develop the concept of an implied prohibition of *refoulement.* The leading case is *Soering*, an essentially unanimous decision of a Grand Chamber of the Court holding that extradition of an accused person to the United States would violate the European Convention on Human Rights, because he would be exposed to 'inhuman or degrading treatment or punishment', which is prohibited by article 3.[23] The case concerned capital punishment, not torture, but the Court cleverly concluded that article 3 was engaged because so-called 'death row phenomenon' was the inevitable accompaniment of the death penalty, in Virginia at least. According to the Court, 'expulsion by a Contracting State may give rise to an issue under Article 3 [of the *European Convention on Human Rights (ECHR)*, which states: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'], and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.' Moreover, '[e]xtradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be

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[22] Elihu Lauterpacht & Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in Erika Feller, Volker Türk & Frances Nicholson, *Refugee Protection in International Law*, Cambridge: Cambridge University Press, 2003, pp. 87-177, at pp. 163-164. There is some authority for the view that the prohibition of torture is a peremptory norm (*jus cogens*): *Prosecutor* v. *Furundžija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, paras. 139, 153; *Prosecutor* v. *Delalić* et al. (Case No. IT-96-21-A), Judgment, 20 February 2001, para. 172, fn. 225. The arguments that non-*refoulement* is a *jus cogens* norm are not particularly convincing: Rene Bruin and Kees Wouters, 'Terrorism and the Non-Derogability of Non-*Refoulement*', (2003) 15 *International Journal of Refugee Law* 5, at pp. 24-26; Jean Allain, 'The *Jus cogens* Nature of Non-*refoulement*', (2002) 13 *International Journal of Refugee Law* 533.

[23] On the *Soering* case, see William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed., Cambridge: Cambridge University Press, 2003.

contrary to the spirit and intendment' of the provision.[24] Since *Soering*, the Court has restated the principle on several occasions.[25]

As has already been mentioned, although the International Covenant on Civil and Political Rights (like the European Convention) was modelled on the Universal Declaration of Human Rights, it contains no reflection of article 14 and the 'right to asylum'. However, the United Nations Human Rights Committee, which is responsible for implementation of the *International Covenant on Civil and Political Rights*, has held that the prohibition of torture and cruel, inhuman or degrading treatment or punishment, set out in article 7, requires that States must not expose individuals to 'the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'.[26] This statement appears in a General Comment, indicating that it reflects a consensus of members of the Committee. Obviously, this non-*refoulement* principle invoked by the Human Rights Committee must be taken as an implied exception to article 13 of the *Covenant*, which authorises the expulsion of an 'alien lawfully in the territory of a State party'.[27]

The United States, which ratified the Covenant in 1992, has challenged the Committee's interpretation. In submissions to the Human Rights Committee, in July 2006, it argued that nothing in the text of article 7 of the Covenant suggested a non-*refoulement* argument. It noted that the Committee had found a larger non-*refoulement* obligation in the Covenant than the one set out explicitly in the *Convention Against Torture.* It explained:

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[24] *Soering* v. *United Kingdom*, 7 July 1989, Series A, No. 161, 11 EHRR 439, para. 88.

[25] *Cruz Varaz* v. *Sweden*, 20 March 1991, *Series* A, No. 201, para. 69; *Vilvarajah* et al. v. *United Kingdom*, 30 October 1991, Series A, No. 215, paras. 73-74, 79-81; *Chahal* v. *United Kingdom*, 15 November 1996, Reports 1996-V, para. 75; *Ahmed* v. *Austria*, 17 December 1996, *Reports* 1996-VI, paras. 39-40; *TI* v. *United Kingdom* (App. No. 43844/98), Admissibility, 7 March 2000.

[26] 'General Comment No. 20 (44), Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7)', UN Doc. HRI/GEN/1/Rev. 1, para. 9.

[27] *International Covenant on Civil and Political Rights*, (1976) 999 UNTS 171, art. 13.

> In becoming a State Party to the Convention Against Torture, the United States carefully reviewed the language in Article 3 of that instrument and adopted formal understandings to clarify the obligations that the United States accepted under Article 3. The totality of U.S. treaty obligations with respect to non-refoulement for torture are contained in the obligations the United States assumed under the Convention Against Torture. The Committee's language in its General Comment 20 not only poses a new obligation not contained in the plain language of Article 7 of the Covenant, but it also poses an obligation beyond the non-refoulement protection contained in Article 3 of the Convention Against Torture. Specifically, it would change the standard regarding the degree of risk the individual must face and extends the protection to persons who face cruel, inhuman or degrading treatment or punishment. In contrast, under the Convention Against Torture, the protection against refoulement applies only to torture and not to cruel, inhuman or degrading treatment or punishment that do not amount to torture.[28]

A comment to the same effect was made by the head of the United States delegation during presentation of its periodic report in July 2006.[29]

In the public hearings, one of the Human Rights Committee members, Walter Kälin, explained to the United States delegation that the Committee's position on non-*refoulement* had been well-known when the Covenant was ratified. He said that the United States could not now contest the principle. Moreover, he noted that there was abundant caselaw in support, and that no State had ever contested the point.[30] In its Concluding Observations, dated 15 September 2006, the Human Rights Committee 'notes with concern' the

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[28] 'Written replies to the Human Rights Committee', July 2006, pp.. 17-18.

[29] UN Doc. CCPR/C/SR.2380, para. 10.

[30] CCPR/C/SR.2379, para. 37.

interpretation of article 7 espoused by the United States, by which there is no non-*refoulement* obligation.[31]

Is non-*refoulement* an absolute or a qualified right?

Human rights are rarely expressed in an absolute fashion. Many of the treaty provisions contain detailed 'limitation clauses' that allow those who interpret and apply them to restrain their scope. The various restrictions on freedom of expression, including protection of the reputation by means of libel legislation, and the prohibition on hate propaganda or certain forms of pornography, are well understood. International tribunals will limit or restrict fundamental rights even when this is not explicitly authorized by the terms of a particular treaty. For example, definitions of crimes that require an accused to prove certain elements in the defence of a charge clearly violate the presumption of innocence, but they have been upheld despite the seemingly absolute formulation of this norm. In other words, there are implied as well as explicit limitations on fundamental rights.

The principle of non-*refoulement* in the context of refugee law is quite clearly such a qualified right. Article 33(2) of the 1951 Refugee Convention limits the ambit of the rule against *refoulement* where 'there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'. Article 14(2) of the Universal Declaration of Human Rights says the right 'may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'.

Article 3 of the *Convention Against Torture* is silent with respect to exceptions or limitations. The original draft of article 3 referred to expulsion and *refoulement*, and made no mention of extradition. The reference to extradition was added to allow States to make

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[31] 'Concluding Observations, United States', UN Doc. CCPR/C/USA/CO/3 (15 September 2006), para. 16.

reservations with respect to existing extradition treaties that might be in conflict.[32] When the United States was considering ratification, the initial version of reservations sent by President Reagan to the Senate acknowledged this: '[t]he U.S. does not consider itself bound by Article 3 insofar as it conflicts with the obligations of the United States toward States not a party to the Convention under bilateral extradition treaties with such states'.[33] But the United States did not make the reservation. That the drafters contemplated reservations to article 3 suggests they acknowledged it was a right subject to limitation, but the Committee Against Torture has held that article 3 does not permit any exceptions.[34]

Recent authority takes the position that the prohibition on *refoulement* is unqualified. The European Court of Human Rights, in *Chahal*, has ruled that this is an absolute prohibition, and is not subject to exceptions, even in cases where State security is at stake.[35] Within the United Nations system, there is also much authority for the view.[36] It is said that

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[32] UN Doc. E/CN.4/1367, para. 18, cited in J.H. Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dordrecht: Martinus Nijhoff, 1988, at pp. 126-127.

[33] S. Treaty Doc. No. 100-20, at iii, 9-14 (1988) (The proposed text included: 'This reservation would eliminate the possibility of conflicting treaty obligations. This is not to say, however, that the United States would ever surrender a fugitive to a State where he would actually be in danger of being subjected to torture. Pursuant to his discretion under domestic law, and existing treaty bases for denying extradition, the Secretary of State would be able to satisfy himself on this issue before surrender.')

[34] *Tapia Paez v. Sweden* (No. 39/1996), UN Doc. CAT/C/18/D/39/1996, para. 14.5.

[35] *Chahal* v. *United Kingdom*, 15 November 1996, Reports 1996-V, para. 80.

[36] 'Annual Report, 2004', UN Doc. A/59/40 (Vol. I), para. 71 (Lithuania); 'Annual Report, 2005', UN Doc. A/60/40 (Vol. I), para. 95 (Thailand); 'Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, in accordance with Assembly resolution 57/200 of 18 December 2002', UN Doc. A/58/120, para. 15; 'Joint statement on the occasion of the United Nations International Day in Support of Victims of Torture [of the United Nations Committee against Torture, the Special Rapporteur of the Commission on Human Rights on the question of torture, the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture and the United Nations Deputy High Commissioner for Human Rights and Officer in charge of the Office of the United Nations High Commissioner for Human Rights]', UN Doc. A/58/44, para. 20; 'Concluding Observations of the Human Rights Committee, Canada', UN Doc. CCPR/C/CAN/CO/5, para. 15; 'Concluding Observations of the Committee Against Torture', UN Doc. CAT/C/CR/34/CAN, para. 4; Louise Arbour, 'In Our Name and On Our Behalf', (2006) 55 *International and Comparative Law Quarterly* 511, at p. 516.

the absolute nature of the prohibition is derived from 'the absolute and non-derogable nature of the prohibition of torture'.[37]

In *Chahal*, the United Kingdom had argued that the prohibition of *refoulement* was not absolute. It based this on the recognition of implied limitations in the Court's case law.[38] It also relied on the general principle of public international law by which a right of an alien to asylum is subject to qualifications, such as those set out in article 32 and 33 of the Refugee Convention. According to the United Kingdom, in anti-terrorism cases a balancing exercise was appropriate, by which the degree of risk of ill-treatment should be assessed on a case-by-case bases. Therefore, 'where there existed a substantial doubt with regard to the risk of ill-treatment, the threat to national security could weigh heavily in the balance to be struck between protecting the rights of the individual and the general interests of the community'.[39] These arguments persuaded seven of the nineteen judges, who submitted a dissenting opinion:

> [A] Contracting State which is contemplating the removal of someone from its jurisdiction to that of another State may legitimately strike a fair balance between, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain and, on the other, the extent of the potential risk of ill-treatment of that person in the State of destination. Where, on the evidence, there exists a substantial doubt as to the likelihood that ill-treatment in the latter State would indeed eventuate, the threat to national security may weigh heavily in the balance. Correspondingly, the greater the risk of ill-treatment, the less weight should be accorded to the security threat.[40]

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[37] 'Report of the Special Rapporteur on the question of torture, Manfred Nowak', UN Doc. E/CN.4/2006/6, para. 31.

[38] See, *e.g.*, *Soering* v. *United Kingdom*, 7 July 1989, Series A, No. 161, 11 EHRR 439, at paras. 88 and 89.

[39] *Chahal* v. *United Kingdom*, 15 November 1996, Reports 1996-V, para. 76.

[40] *Ibid.*, Joint Partly Dissenting Opinion of Gölcüklü, Matascher, Sir John Freeland, Baka, Mifsud Bonnici, Gotchev and Levits, para. 1.

As the dissenters explained, 'The essential difficulty lies in quantifying the risk'.[41]

A reluctance to formulate non-*refoulement* as an absolute principle can also be observed in a 2002 judgment of the Supreme Court of Canada, which is widely acknowledged to be one of the world's most progressive constitutional courts. The Court said it could not 'exclude the possibility that in exceptional circumstances, deportation to face torture might be justified'. The petitioner had sought an order striking down legislation that authorised the minister to allow expulsion even in torture cases, but the Court denied this. 'We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive', said the Court. 'The ambit of an exceptional discretion to deport to torture, if any, must await future cases.'[42] In its 'Conclusions and Recommendations' following presentation of Canada's periodic report, the United Nations Committee Against Torture lamented '[t]he failure of the Supreme Court of Canada, in *Suresh v. Minister of Citizenship and Immigration*, to recognize at the level of domestic law the absolute nature of the protection of article 3 of the Convention, which is not subject to any exception whatsoever'.[43]

Resistance to an absolute prohibition on *refoulement* has also manifested itself within the Council of Europe. Several governments are currently attempting to overturn the absolute nature of the prohibition on *refoulement* set out by the European Court of Human Rights in *Chahal*. The United Kingdom, Italy, Lithuania, Poland and Slovakia have obtained leave to intervene in *Ramzy v. Netherlands*, which concerns threatened torture in Algeria. The invervenors are arguing that the principle of non-*refoulement* should be balanced against the security interests of the State. There are also reports that in 2003, Prime Minister Blair proposed that the United Kingdom denounce the European Convention on Human Rights and

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[41] *Ibid.*, para. 8.

[42] *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3, 208 DLR (4th) 1, 37 Admin LR (3d) 159, 90 CRR (2d) 1; *Ahani* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 72, 208 DLR (4th) 57, 90 CRR (2d) 47, para. 78.

[43] UN Doc. CAT/C/CR/34/CAN, para. 4. The House of Lords recently criticised the Committee Against Torture for its comments on the Canadian report: *Jones* v. *Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* et al., [2006] UKHL 26, *per* Lord Bingham, at para. 23, *per* Lord Hoffmann, at para. 57. See: Stéphane Bourgon, 'The Impact of Terrorism on the Principle of "Non-*refoulement*" of Refugees: the *Suresh* Case Before the Supreme Court of Canada', (2003) 1 *Journal of International Criminal Justice* 169.

then ratify it, but with a reservation that would shelter Britain from the *Chahal* precedent. The idea was eventually abandoned.[44]

Degree of threatened violation

There have been many attempts to formulate the degree to which a violation of the prohibition of torture or other cruel, inhuman or degrading treatment or punishment is threatened in cases of *refoulement*. The relevant treaty provision, article 3(1) of the Convention Against Torture, refers to 'substantial grounds for believing that he would be in danger of being subjected to torture'.

In its General Comment on article 3, the Committee Against Torture has said that 'the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.'[45] Special rapporteur Theo van Boven referred to a standard of 'serious risk of torture or other forms of ill-treatment'.[46] The Committee Against Torture has explained how article 3 is to be applied:

> In reaching its conclusion, the Committee must take into account all relevant considerations, including the existence in the relevant State of a consistent pattern of gross, flagrant or mass violations of human rights. However, the aim is to establish whether the individual concerned would be at personal risk of torture in the country to which he or she would be returned. In accordance with the Committee's jurisprudence, the existence of a consistent pattern of gross, flagrant or mass violation of human rights in a country does not of itself constitute sufficient grounds for determining whether the person in question would be at risk of being

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[44] Joshua Rosenberg, 'Should Britaini Twist Human Rights Law to Meet its Own Ends?', *Daily Telegraph*, 30 January 2003, p. 21; Alan Travis, 'Asylum in Britain – You Can'tt Quit Treaties, Blair Warned', *Guardian*, 6 February 2003, p. 11.

[45] UN Doc. A/53/44, annex IX, para. 6. Also: *SV* v. *Canada* (No. 49/1996), UN Doc. A/56/44, p. 102, para. 9.4; *MEP* v. *Switzerland* (No. 122/1998), UN Doc. A/56/44, p. 124, para. 6.4.

[46] 'Torture and other cruel, inhuman or degrading treatment or punishment Report of the Special Rapporteur, Theo van Boven, Addendum, Summary of information, including individual cases, transmitted to Governments and replies received', UN Doc. E/CN.4/2004/56/Add.1, para. 1827.

> subjected to torture upon return to that country. Nor does the absence of such a situation mean that a person cannot be considered at risk of being subjected to torture.[47]

In *Khan*, the Committee considered that Pakistan's failure to ratify the Convention Against Torture was relevant to the issue of 'substantial grounds'.[48] In the same case, Canada had submitted that the term 'substantial grounds' meant that the risk of the individual being tortured if returned is a 'foreseeable and necessary consequence',[49] but the Committee made no comment on its position.

The test applied by the Human Rights Committee under the International Covenant on Civil and Political Rights, which is of course not derived from a normative text, is somewhat stricter. Initially, the Human Rights Committee said simply that States 'must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment'. Subsequently, it added the term 'real risk' to its formulation of the principle.[50] The Human Rights Committee's General Comment 31 refers to a 'real risk of irreparable harm'.[51] The words 'and substantial' had appeared in square brackets in the draft, but were removed when the final version was adopted.[52] The Committee has not explained why it sets an apparently higher threshold than the Committee Against Torture, but one justification may be the fact that under the Covenant it has held the non-*refoulement* principle to apply to a considerably larger range of human rights violations, and not to torture alone.

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[47] *SG* v. *Netherlands* (No. 135/1999), UN Doc. A/59/44, p. 11, para. 6.2. Also: *MRP* v. *Switzerland* (No. 122/1998), UN Doc. A/56/44, p. 124, para. 6.3.

[48] *Khan* v. *Canada* (No. 15/1994), UN Doc. CAT/C/13/D/15/1994, (1995) 15 *Human Rights Law Journal* 426, para. 12.5.

[49] *Ibid.*, para. 8.1.

[50] *Ng* v. *Canada* (No. 469/1991), UN Doc. CCPR/C/49/D/469/1991, UN Doc. A/49/40, Vol. II, p. 189, 15 *Human Rights Law Journal* 149, para. 14.1.

[51] 'General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13, para. 12.

[52] UN Doc. CCPR/C/74/CRP.4/Rev.2, para. 11.

Within the United States, the policy is to refuse *refoulement* when it is 'more likely than not' that torture might result.[53] The test is derived from a 1948 ruling of the United States Supreme Court that concerned cases of political persecution, and not torture, as has been noted by a member of the Human Rights Committee.[54] The United States formulated an 'understanding' to this effect at the time of its ratification of the Convention Against Torture: '(2) That the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in article 3 of the Convention, to mean `if it is more likely than not that he would be tortured.' Although several States objected to reservations made by the United States at the time, none raised a challenge to this particular understanding.

In its Concluding Observations, issued in September 2006, the Human Rights Committee expressed concern about the 'more likely than not standard'.

> According to the Human Rights Committee, in practice the United States appears to have adopted a policy to remove, or to assist in removing, either from the United States or other States' territories, suspected terrorists to third countries for the purpose of detention and interrogation, without the appropriate safeguards to protect them from treatment prohibited by the Covenant. The Committee is also concerned by numerous, well-publicized and documented allegations that persons sent to third countries in this way were indeed detained and interrogated under conditions grossly violating the prohibition contained in article 7, allegations that the State party did not contest. It is deeply concerned with the invocation of State-secrets privilege in cases where the victims of these practices have brought claim before the State party's courts (e.g. the cases

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53 UN Doc. CCPR/C/SR.2380, para. 10; 'Second Periodic Report, United States', UN Doc. CAT/C/48/Add.3, para. 38; 'List of issues to be considered during the examination of the second periodic report of the United States of America [to the Committee Against Torture], Response of the United States of America, pp. 26-50; UN Doc. CAT/C/SR.703, para. 34, 38.

54 UN Doc. CCPR/C/SR.2379, para. 37.

> of *Maher Arar v. Ashcroft* (2006) and *Khaled Al-Masri v. Tenet* (2006)). (article 7).[55]

In *Chahal*, the European Court of Human Rights described the obligation as follows: 'where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country'.[56] The judgment notes that '[t]he Government contested this principle before the Commission but accepted it in their pleadings before the Court'.[57] In other decisions, the European Court has said that there must be more than a 'mere possibility' of risk.[58]

According to Lauterpacht and Bethlehem, under customary international law the principle of non-*refoulement* can be described as 'circumstances in which substantial grounds can be shown for believing that the individual would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment'.[59] The formulation is a hybrid of the tests applied by the Committee Against Torture, the Human Rights Committee and the European Court of Human Rights.

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[55] 'Concluding Observations, United States', UN Doc. CCPR/C/USA/CO/3 (15 September 2006), para. 16.

[56] *Chahal* v. *United Kingdom*, 15 November 1996, Reports 1996-V, para. 74. In *Soering* v. *United Kingdom*, 7 July 1989, Series A, No. 161, 11 EHRR 439, at para. 88, it had used a slightly different formulation: 'real risk of exposure to'

[57] *Ibid.* According to the High Commissioner for Human Rights, the United Kingdom accepts the 'real risk' standard: Louise Arbour, 'In Our Name and On Our Behalf', (2006) 55 *International and Comparative Law Quarterly* 511, at p.517, fn. 15.

[58] *Vilvarajah* et al. v. *United Kingdom*, 30 October 1991, Series A, No. 215, para. 111.

[59] Elihu Lauterpacht & Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in Erika Feller, Volker Türk & Frances Nicholson, *Refugee Protection in International Law*, Cambridge: Cambridge University Press, 2003, pp. 87-177, at p. 162.

Scope of application of the prohibition of *refoulement*

In its General Comment 31, adopted in 2004, the United Nations Human Rights Committee says that the principle of non-*refoulement* is applicable to all rights where there is 'a real risk of irreparable harm'.[60] The Committee derives the principle from article 2(1) of the International Covenant on Civil and Political Rights, by which a State 'undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The Committee indicates articles 6 (right to life) and 7 (prohibition of torture and cruel, inhuman and degrading treatment or punishment) as examples of provisions to which the principle on non-*refoulement* applies.

In its findings in a contentious case a decade earlier, the Committee declared:

> Article 2 of the Covenant requires States parties to guarantee the rights of persons within their jurisdiction. If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's rights that may later occur in the other jurisdiction. In that sense, a State party clearly is not required to guarantee the rights of persons within another jurisdiction. However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it

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[60] 'General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13, para. 12.

> handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.[61]

Literally, the Committee's conclusions in this case seem to suggest that the principle of non-*refoulement* applies to all rights enshrined in the International Covenant on Civil and Political Rights. To date, however, it has recognised the principle only in cases concerning capital punishment,[62] torture or other cruel, inhuman or degrading treatment or punishment[63] and corporal punishment.[64] It has also praised States for respecting the rule against non-*refoulement* in cases involving torture and cruel, inhuman or degrading treatment or punishment (article 7),[65] the right to life (article 6),[66] especially capital punishment, and arbitrary detention (article 9).[67]

It remains uncertain how far the Committee would extend the prohibition on *refoulement* to provisions in the Covenant other than articles 6 and 7. Application of non-*refoulement* to cases of torture makes sense, if only so that the general provisions of the International Covenant on Civil and Political Rights remain coherent with the specialised treaty within the same system, the Convention Against Torture. To the extent that the

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[61] *Ng* v. *Canada* (No. 469/1991), UN Doc. CCPR/C/49/D/469/1991, UN Doc. A/49/40, Vol. II, p. 189, 15 *Human Rights Law Journal* 149, para. 6.2.

[62] *Judge* v. *Canada* (No. 829/1998), UN Doc. CCPR/C/78/D/829/1998.

[63] *Ng* v. *Canada* (No. 469/1991), UN Doc. CCPR/C/49/D/469/1991, UN Doc. A/49/40, Vol. II, p. 189, 15 *Human Rights Law Journal* 149. Also: *Byahuranga* v. *Denmark* (No. 1222/2003, UN Doc. CCPR/C/82/D/1222/2003, para. 11.2; *Ahani* v. *Canada* (No. 1051/2002), UN Doc. CCPR/C/80/D/1051/2002, para. 8.1; Singh v. Canada (Case No. 1051/2002), UN Doc. CCPR/C/86/D/1315/2004, para. 6.3.

[64] *GT*. v. *Australia* (No. 706/1996), CCPR/C/61/D/706/1996, para. 8.6; *ARJ* v. *Australia* (No. 692/1996), CCPR/C/60/D/692/1996, para. 6.14.

[65] 'Annual Report, 2005', UN Doc. A/60/40 (Vol. I), para. 81 (Finland), para. 87 (Iceland).

[66] 'Annual Report, 2005', UN Doc. A/60/40 (Vol. I), para. 81 (Finland),

[67] 'Annual Report, 2005', UN Doc. A/60/40 (Vol. I), para. 87 (Iceland).

principle extends to other rights on the basis of article 2 of the Covenant, which is a general principle applicable to all rights within the Covenant without apparent distinction, the approach of the Committee is enigmatic. In light of General Comment 31, the Human Rights Committee might well forbid *refoulement* in the case of expulsion to an *apartheid*-like regime, or where a systematic practice of slavery exists, but it might hesitate in finding a violation where an individual might be exposed to trial for a minor crime which would not be subject to appeal, despite the entrenchment of this right in article 14 of the Covenant. Some of this depends upon its interpretation of the prohibition of 'cruel, inhuman or degrading treatment'. For example, in an Australian case, it held that 'in circumstances where the State party has recognized a protection obligation towards the author, the Committee considers that deportation of the author to a country where it is unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party's violation of the author's rights would amount to a violation of article 7 of the Covenant'.[68]

In a recent Australian case, the State contested the application of article 9, which prohibits arbitrary detention, to the non-*refoulement* norm, an argument that had been advanced by the petitioner.[69] In another case, Australia argued that 'the obligation of non-refoulement does not extend to all Covenant rights, but is limited to the most fundamental rights relating to the physical and mental integrity of a person'.[70] In neither case did the Committee address these issues on the merits. The 'irrevocable harm' standard that is proposed in General Comment 31 might argue against application of the principle of non-*refoulement* to arbitrary detention, something that can always be 'corrected" by release and compensation.

There is nothing in article 2 or elsewhere in the Covenant to indicate an 'irrevocable harm' standard. To a certain extent all harm is irrevocable. Once attempts are made to establish degrees, the only harm that is truly irrevocable is death. Torture, after all, can be

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[68] *C v. Australia* (Case No. 900/1999), UN Doc. CCPR/C/76/C/900/1999, para. 8.5

[69] *C v. Australia* (Case No. 900/1999), UN Doc. CCPR/C/76/C/900/1999, para. 4.3.

[70] *Baban* et al. v. *Australia* (Case No. 1014/2001), UN Doc. CCPR/C/78/C/1014/2001, para. 4.12.

stopped, and there can be compensation for the harm done, as with all other rights except the right to life. Harm that is 'irrevocable' may also be caused by violation of economic and social rights, such as the right to medical care, or to a clean environment, but this is probably far from what the Human Rights Committee has in mind. Ultimately, its reasoning seems to be capable of almost indefinite extension. But the broader the scope, the more likely States will complain that this breaches their sovereign right to expel aliens which is itself affirmed in the Covenant. Obviously, a line needs to be drawn somewhere, but the Human Rights Committee does not yet seem to have found a convincing methodology for this determination.

The Committee Against Torture has consistently held that article 3 applies to torture but not to the cognate concept of cruel, inhuman or degrading treatment or punishment.[71] The Committee's interpretation is faithful to the intent of the drafters of the Convention, who deliberately distinguished torture and other cruel, inhuman or degrading treatment or punishment because 'torture' could be defined with specificity whereas 'cruel, inhuman or degrading treatment or punishment' was less easily specified.[72] But neither a literal reading of a human rights treaty provision nor one rooted in the intent of the drafters is compatible with the prevailing approach which requires a dynamic or 'evolutive' interpretative exercise.[73] The import of article 16 of the Convention Against Torture, which addresses cruel, inhuman or degrading treatment or punishment, is broadly similar to that of article 2 of the International Covenant on Civil and Political Rights, and there seems to be no good reason why the position taken by the Human Rights Committee in General Comment 31 should not be followed by the Committee Against Torture. In this context, it is useful to recall article 16(2) of the Convention Against Torture, which states:. 'The provisions of this

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[71] 'General Comment No. 01: Implementation of article 3 of the Convention in the context of article 22', 21 November 1997, para. 1*; BS* v. *Canada* (Case No. 166/2000), UN Doc. A/57/44, p. 158, para. 7.4; *TM* v. *Sweden* (No. 228/2003), UN Doc. A/59/44, p. 294, para. 6.2.

[72] J.H. Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dordrecht: Martinus Nijhoff, 1988, at pp. 70, 74, 122-23. Also: J. Voyame, 'La Convention des Nations Unies contre la torture', in A. Cassese, ed., *the International Fight Against Torture*, Baden-Baden: Nomos, 1991, p. 49.

[73] *Judge* v. *Canada* (No. 829/1998), UN Doc. CCPR/C/78/D/829/1998, para. 10.3.

Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.' Thus, *refoulement* with respect to cruel, inhuman and degrading treatment or punishment ought also to be proscribed by article 3 of the Convention Against Torture. This is all the more logical given the tendency of international human rights courts and tribunals to blur the distinction between torture and cruel, inhuman and degrading treatment or punishment.[74]

The European Court of Human Rights, which was the first body to elaborate a theory of non-*refoulement*, in the *Soering* case, has confined its application to cases of inhuman or degrading treatment or punishment. In *Soering* it expressly rejected the argument that non-*refoulement* applies to cases of capital punishment,[75] although it would be unlikely to take the same position today.[76] Yet in the same judgment it said it would not exclude the possibility that the non-*refoulement* principle could apply 'where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country'.[77] The Charter of Fundamental Rights of the European Union expressly extends the non-refoulement obligation to capital punishment.[78] The Inter-American Convention Against Torture includes 'danger to life' and the possibility of trial by a special or ad hoc court in the requesting States to the list of grounds.[79]

The transfer of a suspect may have other serious repercussions in terms of the protection of human rights, although given the current state of the law these may fall short of the threshold for application of the non-*refoulement* principle. Many cases document the threat to family life that results from the expulsion of individuals. Cases may arise where a

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74 *Öcalan* v. *Turkey* (App. No. 46221/99), 12 May 2005, para. 163

75 *Soering* v. *United Kingdom*, 7 July 1989, Series A, No. 161, 11 EHRR 439, para. 103.

76 *Öcalan* v. *Turkey* (App. No. 46221/99), Judgment, 12 March 2003, paras. 195-198. *Öcalan* v. *Turkey* (App. No. 46221/99), Judgment, 12 May 2005, paras. 163-165

77 *Soering* v. *United Kingdom*, 7 July 1989, Series A, No. 161, 11 EHRR 439, para. 113.

78 *Charter of Fundamental Rights*, [2000] OJ C364, art. 19(2).

79 *Inter--American Convention to Prevent and Punish Torture*, OASTS 67, art. 13.

family is effectively divided, either because family members cannot rejoin the person who has been expelled, or because dependant children are forced to leave the country in which they have a right to remain because of the departure of the person upon whom they are dependent. In *Chahal*, the petitioner had argued that expulsion to India would also violate his rights to family life under article 8 of the European Convention on Human Rights, but the Court considered that because it had found a violation of article 3 there was no need to address this issue.[80] Judge De Meyer disagreed that the issue was hypothetical, and said there was also a violation of article 8.[81] In a case where a person who had been deported was forced to live for eight years in the 'homeland' of Bophuthatswana, and then on a 'non man's land' border strip for another seven years, the African Commission on Human and People's Rights held that 'not only did this expose him to personal suffering, it deprived him of his family, and it deprived his family of his support. Such inhuman and degrading treatment offends the dignity of a human being and thus violates Article 5' of the African Charter of Human and People's Rights.[82]

The process of expulsion itself may also involve serious violations of human rights. In his Recommendation concerning Expulsion Orders, the Commissioner for Human Rights of the Council of Europe has said the wearing of masks by those involved should be banned outright, as well as the use of any means which may cause asphyxia or suffocation (adhesive tape, gags, helmets, cushions etc) and use of incapacitating or irritant gas, restraints which may induce postural asphyxia and tranquillisers or injections without prior medical examination or a doctor's prescription. According to the Commissioner, '[f]or safety reasons, the use during aircraft take-off and landing of handcuffs on persons resistant to expulsion should be prohibited'.[83]

The issue of territorial scope seems at first blush to be relatively straightforward, given that *refoulement* apparently by definition involves expulsion from the territory of the

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[80] *Chahal* v. *United Kingdom*, 15 November 1996, Reports 1996-V, para. 139.

[81] *Chahal* v. *United Kingdom*, 15 November 1996, Reports 1996-V, Partly Concurring, Parly Dissenting Opinion of Judge De Meyer.

[82] *Modise* v. *Botswana* (Comm. No. 97/93), Decision of 3 March 1993, para. 32.

[83] CommDH/Rec(2001)1.

State. Recent developments in human rights law have extended the territorial scope of the treaties to territories subject to the control of the State in question.[84] The United States has contested the view that its obligations under the major human rights treaties extend beyond its territory to places like Guantanamo Bay and the Abu Ghraib prison in Iraq.[85] An example of extra-territorial *refoulement* might be the surrender of Saddam Hussein by the United Kingdom and the United States to the Iraqi civilian authorities in June 2003, at the conclusion of the occupation. The United Kingdom and the United States were acting pursuant to an obligation in the fourth Geneva Convention,[86] but in exposing Saddam Hussein to the death penalty they may well have violated the principle of non-*refoulement.*

Conclusions: Towards Human Rights Compliance

Decades ago, the right of States to determine who could remain within their borders was essentially unlimited. Their reluctance to accept any encroachment on this can be seen in article 13 of the International Covenant on Civil and Political Rights, which confirms the right to expel aliens, subject to procedural safeguards (which arguably apply in any case, as a consequence of article 14). The major limitation was the 1951 Refugee Convention. Its temporal and territorial scope was seriously restricted, and the prohibition on *refoulement* contained in article 33 tempered by important exceptions. Even today, in the case of persons seriously suspected of terrorist activity who have a claim to refugee protection, article 33(2) of the Refugee Convention operates little or no constraint on States.

But gradually, States have accepted increasingly severe restrictions on their ability to expel or *refouler* those whom they do not desire to remain within their borders. Article 3 of

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[84] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, [2004] ICJ Reports 172; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, International Court of Justice, 19 December 2005.

[85] UN Doc. CAT/C/SR.706, para. 18.

[86] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, (1950) 75 UNTS 287, art. 77.

the Convention Against Torture is the paradigm, its provisions being largely reproduced in the more recent Convention on Forced Disappearance. The real development of the principle against non-*refoulement* is a consequence of generous and progressive treaty interpretation by the European Court of Human Rights and the United Nations Human Rights Committee. That many States have ratified the relevant treaties without reservation concerning non-*refoulement* since the position of the two bodies has crystallized may be taken as an implied confirmation, as well as a useful indicator of the evolving direction of customary international law. There has been some recent resistance to the broadening of the norm in the post-September 11 climate, manifested in such developments as the *Suresh* judgment of the Supreme Court of Canada, the objections of the United States at the time of presentation of its periodic report of the Human Rights Committee, the efforts of some European States to overturn the conclusions in *Chahal* and Tony Blair's threat to denounce the European Convention on Human Rights so as to ratify again with a reservation to the *Chahal* precedent.

To States concerned about terrorist suspects within their borders, one answer is for the exercise of criminal law jurisdiction themselves, under the principle of universal jurisdiction where this is required. Recently, the Special Rapporteur on torture reminded States of the possibility, and in some cases the obligation, of exercising universal jurisdiction over terrorist crimes.[87] Many States still lack adequate legislation so that their courts may employ universal jurisdiction. Those that do have been decidedly reluctant to use it.

So-called 'diplomatic assurances' have been widely denounced as offering inadequate protection against abuse in case of *refoulement.* In this respect, the position has evolved considerably. The leading case on non-*refoulement*, *Soering* v. *United Kingdom*, was in fact resolved when the United States provided diplomatic assurances to the satisfaction of the Committee of Ministers of the Council of Euopre.[88] As for the United Nations Human Rights Committee, it does not seem to have condemned 'diplomatic assurances' generally, but it has

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[87] 'Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel inhuman or degrading treatment or punishment', UN Doc. A/57/173, para. 34.

[88] Resolution DH (90) 8, appendix.

said that they must be used with 'utmost care'.[89] In the past, the Special Rapporteur on Torture appeared to accept the possibility of diplomatic assurances.[90] That position has, of course, changed, and the current Special Rapporteur has said unequivocally that 'diplomatic assurances' cannot be resorted to. In his view, they do nothing but 'circumvent the principle of non-refoulement'.[91] The practice has also been condemned by the High Commissioner for Human Rights.[92] In May 2005 the U.N. Committee against Torture ruled that Sweden had breached article 3 because assurances from Egypt that torture would not be imposed were insufficient, given Egypt's well-documented history of abuses, especially with respect to suspected terrorists. The Committee also considered that Sweden should have been alerted to the danger of torture when Agiza and another individual were subjected to ill-treatment and other humiliation at Stockholm's Bromma Airport, prior to their *refoulement*, and when United States intelligence agents were apparently already in control of the expulsion operation.[93]

According to the United Nations Security Council, 'States must ensure that any measure taken to combat terrorism comply with all their obligations under international law […] in particular international human rights, refugee, and humanitarian law'.[94] But because of the absolute interdiction of non-*refoulement*, coupled with the rejection of diplomatic assurances as a technique to deal with terrorist suspects, some believe that other abuses, such

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[89] 'Concluding Observations, United States', UN Doc. CCPR/C/USA/CO/3 (15 September 2006), para. 16.

[90] 'Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel inhuman or degrading treatment or punishment', UN Doc. A/57/173, para. 35.

[91] 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment', UN Doc. A/61/259, para. 58.

[92] Louise Arbour, 'In Our Name and On Our Behalf', (2006) 55 *International and Comparative Law Quarterly* 511, at p. 521.

[93] *Agiza* v. *Sweden* (Case No. 233/2003), UN Doc. CAT/C/34/D/233/2003. See the discussion of this and related issues by the Venice Commission: European Commission for Democracy Through Law, Opinion on the International legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, adopted by the Venice Commission at its 66th Plenary Session, Venice, 17-18 March 2006, Opinion no. 363 / 2005, CDL-AD(2006)009, paras. 62-66.

[94] UN Doc. S/RES/1456 (2003), para. 6.

as secret transfers and secret detentions, and illegal forms of rendition, may have been encouraged.[95] Yet any measures taken to combat terrorism must be consistent with the human rights obligations of States. On the one hand, international bodies insist upon counter-terrorism measures, calling upon States, for example, to enforce the exclusion clauses of the 1951 Refugee Convention.[96] Such exhortations appear, in fact, to be a misreading of the relevant provisions. The Refugee Convention excludes certain individuals from its general protections, but it in no way imposes obligations upon States to expel persons suspected of terrorism or of other acts inimical to the international community.

At the moral level, the non-*refoulement* debate cannot simply be immersed within the general argument of those who try to justify torture in exceptional circumstances. While there may be cases where *refoulement* may amount to a technique to do indirectly what a State cannot do directly, by in effect contracting out the torture to an ostensibly more repressive regime, to be entirely fair we must accept that many States who are themselves absolutely opposed to torture simply want to ensure the removal of individuals they judge to be a danger to society from their own sovereign territory. Rather than situate the non-*refoulement* issue in the context of counter-terrorism, it may be better to see it as a piece in the international struggle for the enforcement of fundamental rights. Approached in this way, States should not expel persons to a place where they may be threatened with torture, or the death penalty, or other serious abuses, because this is a method of promoting global observance of human rights.

To a large extent, the law in this area began to evolve with the *Soering* decision of the European Court of Human Rights. *Soering* has been considered in this essay for its contribution to the debate about non-*refoulement.* But to most experts and activists, *Soering* probably stands for the extraterritorial extension of the European commitment to the abolition of capital punishment. The European Court refused to allow a State party to the Convention to cooperate in the enforcement of a barbaric penalty within another State whose general

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95 These are discussed in: Louise Arbour, 'In Our Name and On Our Behalf', [2006] *European Human Rights Law Review* 371.

96 'Bucharest Plan of Action for Combating Terrorism', (2001), para. 26; 'OSCE Charter on Preventing and Combating Terrorism', para. 10. Also: UN Doc. S/RES/1269 (1999); para. 4; UN Doc. S/RES/1373 (2001), para. 3(f).

commitment to human rights was not seriously challenged. It seems obvious that the Court focused on the 'death row phenomenon' and the prohibition of torture rather than the right to life and the issue of capital punishment because of legal uncertainty within Europe itself about the abolition of the death penalty,[97] something that is no longer the case. The paradigm for non-*refoulement* is thus not a notorious regime known for a pattern of brutal torture but a modern democracy that in some respects has not kept pace with evolving human rights norms in one important respect.

Soering has become a landmark not so much in the non-*refoulement* context as in that of abolition of the death penalty. In 1989, when *Soering* was decided, a considerable majority of the world's States still employed the death penalty, according to the classic study by Amnesty International.[98] That balance has now shifted dramatically, and approximately two-thirds of the States in the world, including all members of the European Union and the Council of Europe, and virtually every member of the Organisation for Security and Cooperation in Europe, have put the practice behind them.[99] *Soering* played a seminal role in this process.

Viewed from this perspective, refusing *refoulement* where torture or other cruel, inhuman or degrading treatment may be imposed becomes a means to promote the international campaign for its abolition, rather than some perverse concession to terrorists,, which is how some may be tempted to see it. Elimination of torture, like the historic elimination of other evils such as slavery and *apartheid*, and the non quite imminent elimination of capital punishment, requires a refusal to cooperate in the practice even in an indirect manner. This is the best reason for the principle of non-*refoulement.*

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[97] Lest we forget, the last executions in France took place only eleven years before *Soering.*

[98] Amnesty International, *When the State Kills…*, New York: Amnesty International, 1989, at pp. 259-262.

[99] Roger Hood, *The Death Penalty, A Worldwide Perspective*, 3rd ed., Oxford: Oxford University Press, 2003.

PROCEDURAL GUARANTEES AND DUE PROCESS IN THE CONTEXT OF THE TRANSFER OF PERSONS IN THE FIGHT AGAINST TERRORISM

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Contents

I Introduction

1. The transfer of persons in the fight against terrorism may take place in several contexts, including extradition, deportation and the "rendition" of persons outside the latter established procedures. The trans-national transfer of persons is not a new phenomenon, nor one that is isolated to countering terrorism. Nevertheless, issues concerning the legitimacy of such action (including the suspected covert transfer of persons to places of secret detention) have been raised in recent years in the context of the fight against terrorism. The Council of Europe Committee on Legal Affairs and Human Rights was this year provided with a report by Rapporteur Dick Marty in which it was concluded that more than a hundred persons had been subject to 'extraordinary rendition', many to places of secret detention, in recent years.[1]

2. There can be no doubt that international cooperation in the fight against terrorism is necessary. Due to the trans-national nature of modern terrorism, this is particularly relevant to the gathering of evidence, mutual legal assistance, the conduct of investigations, and the extradition of alleged terrorists to stand trial. Advocacy of inter-State cooperation in the fight against terrorism is a feature of various resolutions and other documentation of the United Nations, including Security Council resolution 1373 (2001), paragraphs 2(f) and 3(c) in particular.[2]

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[1] Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, *Alleged secret detentions in Council of Europe member states*, Information Memorandum II of Rapporteur Mr Dick Marty of Switzerland, COE Doc AS/Jur (2006) 03 of 22 January 2006, para 66. See also European Group of National Institutions for the Protection and Promotion of Human Rights, *Position Paper on the use of diplomatic assurances in the context of expulsion procedures and the appropriateness of drafting a legal instrument relating to such use* (for consideration by the DH-S-TER during its first meeting, December 7-9, 2005).

[2] UNSC Res 1373 (2001) SCOR (4385th Mtg) UN Doc S/Res/1373.

3. It is also clear that States have a duty to comply with their international obligations when countering terrorism, including international human rights, international humanitarian law, and refugee law. This stems from the existence of those international obligations in the first place (through treaties and norms of customary international law), and has been emphasized within resolutions of the Security Council (see, for example, resolution 1456 (2003), paragraph 6, and resolution 1624 (2005), paragraph 4).[3] In his 2006 report *Uniting Against Terrorism*, setting out recommendations for a global counter-terrorism strategy, the UN Secretary-General likewise identified the defense of human rights as essential to the fulfillment of all aspects of a counter-terrorism strategy and identified human rights as having a central role in every substantive section of his report.[4] The same approach is reflected in the United Nations Global Counter-Terrorism Strategy adopted by the General Assembly on 8 September 2006.[5] The Plan of Action encompassing the body of that strategy deals as its fourth main pillar with measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism. It should be noted, however, that respect for human rights features as more than just one of the four pillars of a sustainable Plan of Action, since it also figures as a component in all other pillars of the strategy against terrorism.

4. This background paper focuses upon States' obligations under international human rights law, having regard to: positive obligations relating to extradition and deportation; due process requirements applicable to the transfer of persons beyond the procedures applicable to extradition and deportation; compensation and other forms of reparation for claims of human rights violations in this context; and the identification of possible preventive or interim measures where there is a risk of human rights violations. Before looking at each of those specific issues, consideration will be given to the nature of rights

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[3] UNSC Res 1456 (2003) SCOR (4668th Mtg) UN Doc S/Res/1456, and UNSC Res 1624 (2005) SCOR (5261st Mtg) UN Doc A/Res/1624.

[4] Report of the Secretary-General, *Uniting Against Terrorism: Recommendations for a Global Counter-terrorism Strategy*, UN Doc A/60/825 (2006).

[5] UNGA Res 60/288 GAOR (60th Sess, 99th Plen Mtg) UN Doc A/Res/60/288 (2006).

and freedoms involved and the consequent nature of obligations upon States. In light of the current absence of international case law in the context of 'rendition', much of Part IV of this paper (Rendition by Means other than Extradition or Deportation) is based upon the language of applicable conventions and practical observations and suggestions. It is to be expected that bodies such as the Human Rights Committee and the Committee Against Torture will sooner or later address many of the issues in the context of individual cases.

II Legal Rights: Liberty, Security of the Person, and the Prohibition against Torture

5. The forcible movement of a person from one jurisdiction to another (one that is without the consent of the person) necessarily involves an interference with that person's liberty and security. Amongst other international and regional instruments, liberty and the security of the person are legal rights guaranteed under the (European) *Convention on the Protection of Human Rights and Fundamental Freedoms* (ECHR)[6] and the *International Covenant on Civil and Political Rights* (CCPR).[7] Relevant to the way in which detained persons might be treated is the prohibition against torture, reflected within the two treaties just mentioned, the *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT),[8] and customary international law.

The Prohibition against Torture, and Cruel, Inhuman or Degrading Treatment

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[6] (European) *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

[7] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[8] *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 112 (entered into force 26 June 1987).

6. Fundamental to the dignity and personal security of a detained person is the prohibition against torture, a peremptory norm of customary international law applicable to all States and in all places, and one reflected within the ECHR Art 3, the ICCPR Art 7, and the *Convention against Torture*.[9] Linked to this is the prohibition against cruel, inhuman and degrading treatment which is a non-derogable right under each of the treaties just identified.[10]

The Right to Liberty

7. The key features of the right to liberty are as follows:

(a) Every person has the right not to be deprived of her/his liberty except in the following cases and in accordance with a procedure prescribed by law (ECHR Art 5(1)(a), (b) and (c)):

(i) following conviction by a competent court;

(ii) following non-compliance with a lawful court order for the purpose of securing compliance with an obligation prescribed by law; or

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[9] The prohibition against torture was identified by the International Law Commission, in its work on the *Vienna Convention on the Law of Treaties*, as a norm of *jus cogens*: see International Law Commission, "Commentary on the Vienna Convention on the Law of Treaties" (1966) 2 *Yearbook of the International Law Commission* 248. For further consideration of the *jus cogens* nature of the prohibition against torture, see, amongst others: Matthew Lippman, 'The Protection of Universal Human Rights: The Problem of Torture' (1979) 1(4) *Universal Human Rights* 25; Bruce Barenblat, 'Torture as a Violation of the Law of Nations: An Analysis of 28 U.S.C. 1350 Filartiga v. Pena-Irala' (1981) 16 *Texas International Law Journal* 117; Eyal Benvenisti, 'The Role of National Courts in Preventing Torture of Suspected Terrorists' (1997) 8 *European Journal of International Law* 596; Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford University Press, 2000) 381-382; and Erika de Wet, 'The Prohibition of torture as an International Norm of *Jus Cogens* and its Implications for National and Customary Law' (2004) 15(1) *European Journal of International Law* 97.

[10] See, in this regard, Art 15(2) of the ECHR (n 5) and Art 4(2) of the CCPR (n 6).

(iii) where a remand in custody pending trial is necessary to prevent the person committing an offence or fleeing after having done so.

(b) Special provisions exist concerning minors, persons of unsound mind, alcoholics or drug addicts and vagrants (ECHR Art 5(1)(d) and (e)).

(c) Of particular relevance to Part III of this paper (Extradition and Deportation), Article 5(1)(f) of the ECHR allows for "the lawful arrest or detention of a person… against whom action is being taken with a view to deportation or extradition" (so long as this is in accordance with a procedure prescribed by law, as with all other permissible deprivations of liberty).

8. Article 9(1) of the CCPR does not address the specific issues of extradition or deportation, nor contain any exhaustive list of situations where detention is permissible. It prohibits all forms of arbitrary detention and requires <u>any</u> arrest or detention to be in accordance with a procedure prescribed by law.

<u>Rights Consequent to Deprived Liberty</u>

9. Where a person's liberty has been deprived, certain further rights are triggered:

(a) In all situations, the detained person must be treated with humanity and with respect for the inherent dignity of the human person (CCPR Art 10(1); CAT);

(b) A person under arrest must be informed promptly, in a language understood by that person, of the reasons for the arrest and of any charge(s) against that person (ECHR Art 5(2); CCPR Art 9(2));

(c) In the case of a remand in custody pending trial (see para 7(a)(iii) above), the person must be brought promptly before a judicial officer and is entitled to trial within a reasonable time or to release pending trial (ECHR Art 5(3); CCPR Art 9(3));

(d) All detained persons have the right to take proceedings to determine the lawfulness of their detention (ECHR Art 5(4); CCPR Art 9(4)), the Human Rights Committee having emphasized that this standard must also be upheld during a state of emergency;[11]

(e) Where detention relates to a criminal charge against the person, certain further rights are triggered including, for example, the presumption of innocence and the right to legal representation (ECHR Art 6; CCPR Art 14).

10. Where a person's liberty has been unlawfully deprived, the person must be provided with an enforceable right to compensation (ECHR Art 5(5); CCPR Art 9(5)). This is of special relevance to Part V of this paper (Redress for Human Rights Violations).

11. Of further relevance to the right to liberty and security of the person, it should be noted that the *International Convention for the Protection of All Persons from Enforced Disappearance* was adopted and made open for signature by members of the United Nations on 23 September 2005.

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[11] Human Rights Committee, *States of Emergency (Article 4)*, CCPR General Comment 29 of 2001, reprinted UN Doc HRI/GEN/1/Rev.6 at 186 (2003).

III. Extradition and Deportation

12. The transfer of persons from one jurisdiction to another under extradition and deportation procedures is not an unusual event. Such procedures are well-established and regulated by law, and recognized within international human rights law. In the context of the ECHR, for example, Article 5(1)(f) of the Convention allows for "the lawful arrest or detention of a person… against whom action is being taken with a view to deportation or extradition", so long as this is in accordance with a procedure prescribed by law (see para 7(c) above).

Procedural Guarantees and Due Process

13. Procedural guarantees in the context of extradition or deportation arise in two ways: first, relating to the ability to detain a person for these purposes; and, secondly, concerning the protection and guarantee of rights of a person once detained.

14. To be able to limit a person's liberty for the purpose of extradition or deportation, as recognized within the opening words of Article 5(1) of the ECHR, the deprivation of liberty must be "in accordance with a procedure prescribed by law". The same language is used in Article 9(1) of the CCPR.

Substantive Rights Flowing from Detention for the Purpose of Extradition or Deportation

15. Where a person is detained with a view to her/his deportation or extradition, it is essential that the following sets or rights are secured to the detained person:

(a) Those rights triggered by virtue of the person's detention (as identified in para 9 above);

(b) Rights of appeal and review, as guaranteed (and qualified) by Article 1 of Protocol 7 to the ECHR and Article 13 of the CCPR; and

(c) The prohibition against *non-refoulment* in the case of refugees (considered in detail within the background paper of Professor William Schabas).

Extradition or Deportation and the Prohibition against Torture

16. The High Commissioner for Human Rights and the Special Rapporteur on the question of torture have emphasized the importance of remaining vigilant against practices that erode the absolute prohibition against torture in the context of counter-terrorism measures.[12] An earlier background paper to a workshop of the OSCE ODIHR, on legal cooperation in criminal matters related to terrorism, identified and discussed case law of the European Court of Human Rights establishing and confirming the principles that a State would be in violation of its obligations under the ECHR if it extradited (*Soering v The United Kingdom*)[13] or deported (*Chahal v The United Kingdom*)[14] an individual to a State where that person was likely to suffer inhuman or degrading treatment or torture

[12] See, for example: High Commissioner for Human Rights, *Statement on Human Rights Day* (Council of Europe Group of Specialists on Human Rights and the Fight against Terrorism, Strasbourg, DS-S-TER(2006)003, 17 March 2006); and Report of the Special Rapporteur on the question of torture (n 108) Chapter III.

[13] *Soering v The United Kingdom* (1989) 11 EHRR 439.

[14] *Chahal v The United Kingdom* ECtHR 15 November 1996.

contrary to Article 3 of the ECHR.[15] The Human Rights Committee[16] and the Committee Against Torture[17] have adopted similar positions.

17. The question that arises here is how an extraditing State is to determine the likelihood of such an outcome. In the context of *refoulement*, it is relevant to note that Article 3(1) of the CAT refers to "substantial grounds for believing that [the person] would be in danger of being subjected to torture". The Committee Against Torture has commented that this assessment must be made on grounds that go beyond mere theory or suspicion, although the risk does not have to meet a test of high probability.[18] This is considered further within the background paper of Professor William Schabas on Non-Refoulement (pages 13-16).

Obligations Particular to Extradition

18. Two further obligations exist that are particular to extradition, given that extradition is a measure of cooperation in criminal matters:

(a) First, the principle *ne bis in idem* (known as double jeopardy in common law jurisdictions) demands that extradition be refused if the individual whose

[15] OSCE Office for Democratic Institutions and Human Rights, *Background Paper on Extradition and Human Rights in the Context of Counter-terrorism* (Workshop on Legal Co-operation in Criminal Matters Related to Terrorism, held at Belgrade, 14-16 December 2005). See also the background paper of the same title prepared for the OSCE Experts Workshop on Enhancing Legal Co-operation in Criminal Matters Related to Terrorism, held at Warsaw, April 2005).

[16] See, for example, *C v Australia*, Communication No 832/1998 (Views of 25 July 2001) UN Doc CCPR/C/72/D/832/1998 and *Ahani v Canada*, Communication No 1051/2002 (Views of 29 March 2004) UN Doc CCPR/C/80/D/1051/2002.

[17] See, for example, *Mutombo v Switzerland*, Communication No 13/1993 (Views of 27 April 1994) UN Doc A/49/44 at 45 (1994)

[18] Committee Against Torture, *General Comment (Article 3)*, UN Doc A/53/44, Anne IX, para 6.

extradition is requested has already been tried for the same offence. In the domestic law of many nations, this is a mandatory restriction on the surrender of a person to an extradition country. It is a principle reflected within Article 20 of the *Statute of the International Criminal Court*.[19]

(b) In addition, and reflecting the fact that many States have abolished the death penalty but that this abolition remains optional under the *Second Optional Protocol to the International Covenant on Civil and Political Rights*,[20] the question of capital punishment may impact upon an extradition request. If the requested State is a party to the *Second Optional Protocol*, it must refuse extradition if the person whose extradition is requested is likely to be sentenced to death in the requesting State. In *GT v Australia*, for example, the Human Rights Committee had to consider whether by deporting GT to Malaysia, Australia exposed him to a real risk of a violation of his rights.[21] The Committee observed that the right to life under Article 6(1) and (2) of the CCPR, read together, allows the imposition of the death penalty for the most serious crimes, but that the *Second Optional Protocol* (to which Australia was a party) provided that no one within the jurisdiction of a State party shall be executed and that the State party shall take all necessary measures to abolish the death penalty in its jurisdiction. In cases like the present, the Committee considered that the intent of the country to which a person is to be deported, ascertainable from the pattern of conduct shown by the country in similar cases, should be taken into account. Extradition might be granted, however, if the requesting State provides sufficient assurance that the death penalty will not be sought or carried out. As a further example, the Human Rights Committee found,

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[19] *Rome Statue of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

[20] *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

[21] *GT v Australia*, Communication No 706/1996 (Views of 4 November 1997) UN Doc CCPR/C/61/D/706/1996.

in the case of *Judge v Canada*, that Canada had violated Article 6 of the CCPR as it had abolished the death penalty but despite this deported a person to the United States where he was under a sentence of death.[22] The Committee emphasized that this conclusion applies in respect of a State that has abolished capital punishment, irrespective of whether it is a party to the Second Optional Protocol or not.

IV. Rendition by Means Other Than Extradition or Deportation

19. The 'rendition' of a person by one State to another outside the established procedures of extradition or deportation raise serious concerns about the civil liberties of such a person. At the broadest level, the view of the authors is that the single most important requirement to ensure due process and the guarantee of rights is transparency, together with an appropriate level of sufficiently independent checks and balances. More specific issues also arise:

(a) What positive obligations exist common to all States involved (knowingly or not) in the rendition of persons by means other than extradition or deportation?

(b) What particular obligations relate to transit States; transiting States; and States in whose territory there exist places of secret detention?

<u>Positive Obligations of Cooperation to Guarantee Rights Protection</u>

[22] *Judge v Canada*, Communication No 829/1998 (Views of 5 August 2002) UN Doc CCPR/C/78/D/829/1998.

20. Particularly important to the issue of the trans-boundary movement of persons (whether by extradition, deportation, or 'rendition') is the existence of certain positive obligations upon States. These obligations stem from the *Charter of the United Nations* (UNC),[23] the ECHR, CCPR, and CAT as follows:

(a) By virtue of Article 56 of the UNC, all members of the United Nations are obliged to take joint and separate action in co-operation with the UN for the achievement of the purposes set out in Article 55 of the Charter, including the universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion (UNC Art 55(c)).

(b) Similarly, members of the ECHR must "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention" (ECHR Art 1), which includes the rights and freedoms identified in paras 6 to 9 above).

(c) The CCPR has an equivalent obligation to that in the ECHR, each party to the CCPR having undertaken "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (CCPR Art 2(1)).

(d) The *Convention against Torture* requires parties to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" (CAT Art 2(1)).

21. These provisions thus place the following <u>positive</u> obligations upon States:

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[23] *Charter of the United Nations*, opened for signature 26 June 1945 (entered into force 24 October 1945).

(a) A general obligation to take joint and separate action to achieve the universal respect for, and observance of, human rights and fundamental freedoms for all without distinction (UNC Arts 56 and 55(c), ECHR Art 1, CCPR Art 2(1), CAT Art 2(1));

(b) A particular obligation to ensure that every person within their territory and jurisdiction enjoys the rights and freedoms identified in paras 6 to 9 above (ECHR Art 1, CCPR Art 2(1); CAT Art 2(1)));

22. Without doubt, the latter general and particular obligations place a requirement upon each State to ensure that <u>any person within its territory and control</u> enjoys the rights and freedoms identified.

<u>Obligations of Transit States</u>

23. A more uncertain question is whether the general and particular requirements identified in para 20 also place a positive obligation upon a transit State to ensure that any person <u>within its territory</u> is not denied the rights and freedoms identified, <u>whether or not that person is within its direct control</u>. In other words, does a transit State have a positive obligation to ensure that its territory (whether land, air or sea) is not used for the transfer of persons where that person's rights (as identified in paras 6 to 9 above) are being, or may be, breached? Here, the terminology of Article 1 of the ECHR, Article 2(1) of the CCPR, and Article 2(1) of the CAT is of relevance.

Obligations concerning the prohibition against torture

24. The position is the clearest regarding the *Convention Against Torture*. Measures to prevent acts of torture within a State's territory must be taken in respect of "any territory under its jurisdiction". The language of Article 2(1) of the CAT thus places a positive obligation upon a transit State to ensure that any person detained while in transit through its territory is not subjected to torture. The problematic situation however, as identified in report to the COE Committee on Legal Affairs,[24] is where a detained person is in transit only within the territory of a State and unlikely to be subjected to torture until her/his arrival at a place of secret detention. The authors of this paper take the view that, in light of the positive obligations identified in paras 19(a) and 20(a) above, transit States have a positive duty to ensure that their territories are not used to transfer persons to places where they are likely to be subjected to torture. This raises two further questions:

    (a) When does the latter obligation arise? That is, how is a transit State to determine whether a detained person is being transported through its territory to a place where that person is likely to be subjected to torture?

    (b) What obligations, if any, does this situation present to the transporting State?

25. The latter question can be answered easily: a transporting State has no positive general duty to disclose the identity of its passengers, nor the ultimate destination of the crew and passengers. How, then, is a transit State to determine whether a rendition with a risk of torture is occurring through its territory? Given that there is a positive obligation to prevent one's territory from being used to transfer persons to places where they are likely to be tortured (as posited in the previous para), the author's take the view that transit

[24] Report to the Council of Europe (n 1).

States must take all practical steps to determine whether foreign movements through their territory (whether by sea, air, or land) are being used to transfer a detained person to a place where that person may be subjected to torture. Foreign civilian and military transport can only transit the territory of another State with the consent of that State. Consent should therefore only be granted upon the condition that sufficient information is disclosed for the transit State to make an assessment of the situation. It would be contrary to the positive obligation identified if a transit State did not seek such disclosure and thereby remained willfully ignorant of the potential for its territory to be used to transfer persons to places where they are likely to be tortured. Particular diligence is required when there is reliable information that the transporting state is involved in practices that entail a risk of torture subsequent to rendition.

26. In the context of *refoulement*, it is relevant to note that Article 3(1) of the CAT refers to "substantial grounds for believing that [the person] would be in danger of being subjected to torture". The Committee Against Torture has commented that this assessment must be made on grounds that go beyond mere theory or suspicion, although the risk does not have to meet a test of high probability.[25] This is considered further within the background paper of Professor William Schabas on Non-Refoulment (pages 13-16. Of particular relevance to risk assessments in the context of rendition, Rapporteur Dick Marty's report to the Council of Europe concludes that a known and accepted link exists between the torture of persons and their rendition by means other than extradition or deportation.[26] Likewise, the Human Rights Committee and the Inter-American Commission and Court have expressed concern about the legal rights of a detainee, including the possibility of the infliction of torture or ill-treatment, in the practice of incommunicado detention.[27]

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[25] Committee Against Torture, *General Comment (Article 3)*, UN Doc A/53/44, Anne IX, para 6.

[26] Report to the Council of Europe (n 1), Part E, e.g. para 85.

[27] See, for example: *Concluding Observations of the Human Rights Committee: Spain* UN Doc CCPR/C/79/Add.61 (1996) paras 12 and 18; *Concluding Observations of the Human Rights Committee: Egypt* UN Doc CCPR/CO/76/EGY (2002) para 16; and *Inter-American Commission on Human Rights:*

27. It is also relevant to note that a systematic failure on the part of any State to comply with the prohibition against torture (a norm of *jus cogens*) constitutes a "serious breach of obligations under peremptory norms of general international law": see Article 40 of the *Articles on the Responsibility of States for Internationally Wrongful Acts* (the 'Articles on State Responsibility').[28] As such, Article 41 of the Articles on State Responsibility recognizes the obligation of all other States to cooperate to bring to an end, through lawful means, any such breach. If it was proved, for example, that the United States was involved in the rendition of terrorist suspects to jurisdictions where those suspects were subjected to torture, this would amount to a "serious breach" within the terms of Article 40, thereby triggering the duty of all other States to cooperate in bringing an end to this practice.

Obligations concerning other legal rights

28. ECHR Article 1 makes reference to securing rights to those "within [each State's] jurisdiction". CCPR Article 2(1) imposes obligations upon a State concerning "all individuals within its territory and subject to its jurisdiction". A detained person will clearly be subject to a State's jurisdiction if that person is under the control of the State. In the situation of a transit State, however, such a State may argue that a detained person is not under its jurisdiction where the person is under the control of another State's authorities in the course of transit. This may be a particularly cogent argument if the transit State is not even aware of the fact that a person is being 'rendered' through its

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Fifth Report on the Situation of Human Rights in Guatemala OEA/Ser.L/V/II.111 doc 21 rev (2001) para 37.

[28] *Articles on the Responsibility of States for Internationally Wrongful Acts*, adopted under UNGA Res 56/83 GAOR (56th Sess, 85th Plen Mtg) UN Doc A/Res/56/83 (2001).

territory. This leaves the situation open to a significant level of uncertainty, and even the potential for willful (but not accountable) blindness.

29. Three alternative approaches may exist if one was to argue in favour of a positive obligation upon transit States. The first, drawing from the principles of State responsibility, is the clearest means of establishing a positive duty upon a transit State by considering whether its agents are/were involved in the rendering process to such an extent as would attribute responsibility upon the transit State. Consistent with the Articles on State Responsibility, the conduct of a (transit) State's agents would be attributable to the State even if those agents act in excess of their authority or contrary to instructions (Articles on State Responsibility Arts 4, 5 and 7). Attribution would also occur concerning the conduct of an agent of another State put at the disposal of the transit State (Articles on State Responsibility Art 6); or where acting under the direction or control of the transit State (Art 8);[29] or, as seen in the *Tehran Hostages Case*, where there is an absence of action by official authorities in circumstances such as to call for the exercise of those elements of authority (Art 9).[30]

30. The second means of arguing in favour of a positive obligation upon transit States to take steps to guarantee legal rights (those other than the prohibition of torture) to those transiting its territory concerns the potential jurisdiction of the transit State over any criminal conduct by transiting agents. Should agents of one State be engaged in criminal conduct during the course of rendering a detained person through the territory of another State, the latter transit State will have criminal jurisdiction over the agent by application of the territoriality principle. Territorial jurisdiction is the primary basis of jurisdiction since it directly affects a State's sovereign competence. This will not cover all instances of breaches of liberty and security rights (as identified in paras 6 to 9 above). Together

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[29] See, for example, *Zafiro Claim (United Kingdom v United States)* (1925) 6 RIAA 160.

[30] *United States Diplomatic and Consular Staff in Tehran (United States v Iran), Merits* (1980) ICJ Rep.

with the positive obligations identified in paras 19 and 20 above, however, it arguably places a burden upon a transit State to ascertain sufficient information to be satisfied that transiting State agents are not acting in breach of liberty and security rights that might also amount to criminal conduct within/through its territory.

31. Finally, and further strengthening the latter argument, the Articles on State Responsibility further recognize that assistance by one State in the commission of an internationally wrongful act by another can also result in an attribution of responsibility. Such attribution can only occur, however, where the aiding or assisting State has knowledge of the circumstances of the internationally wrongful act (Articles on State Responsibility Art 16).

Obligations of Transiting States

32. A transiting (transporting) State will have direct control over a person who is detained and in the process of rendition. Issues of the attribution of responsibility are therefore not in issue. Where a detained person is tortured while under the control of the transiting State authorities, the transiting State will bear responsibility for this. For the reasons considered above (paras 16 and 17), a transiting State would also bear responsibility for the rendition of a person to a place of interrogation where torture is likely to be employed.

33. The issue of controversy is whether a transiting State would bear responsibility for breaches of a person's liberty and security rights (as identified in paras 7 to 9 above) during the course of a rendition and while outside the State's own territory. This depends on whether international human rights obligations are applicable extraterritorially. The position of the Human Rights Committee is that international human rights obligations have extraterritorial application in circumstances where the relationship between the

State and the individual entails the exercise of jurisdiction in respect of the individual who is physically outside the territory of the State. As formulated in the Committee's *General Comment 31*: "…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".[31]

Obligations of (Receiving) States in whose Territory there Exist Places of Secret Detention

34. As with transit States, the CAT requires receiving States to take measures to prevent acts of torture within any territory under its jurisdiction. Concerning the rights to liberty and security of the person, the following considerations apply:

(a) Breaches of these rights by a person whose conduct is attributable to the receiving State will incur responsibility (see paras 27 and 28 above);

(b) The receiving State will have criminal jurisdiction over any person individually responsible for breaches of liberty and security rights (see para 29 above);

(c) Assistance by a receiving State in breaches, or of the continuance of breaches, of these rights will also incur responsibility (see para 30 above).

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[31] Human Rights Committee, *General Comment 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant)*, adopted on 29 March 2004, paragraph 10 (reproduced in HRI/GEN/1/Rev.8). See also: *Lopez v Uruguay*, Communication No 52/1979 (Views of 29 July 1981) UN Doc CCPR/C/PO/1 at 92 (1994); *Concluding Observations on Israel*, UN Doc CCPR/C/79/Add.93 (1998) and CCPR/CO/78/ISR (2003); and *Concluding Observations on the United States*, UN Doc CCPR/C/USA/CO/3 (2006).

V. Redress for Human Rights Violations

35. The transfer of persons by rendition, and thus outside the established and transparent procedures applicable to extradition and deportation, runs the risk of involving a violation of the human rights of such persons. This is particularly applicable to the covert transfer of persons to places of secret detention, where the conditions of detention and/or the treatment or questioning of persons is unlikely to be independently monitored. It should not be overlooked that human rights violations may also occur in the context of extradition or deportation procedures, depending upon the means by and circumstances in which this is carried out. As discussed, for example, extradition of a person to a State where that person is likely to be subjected to torture is in breach of the extraditing State's international obligations.

36. These risks raise the question of what compensation, or other forms of reparation, might and/or should be made available where claims of human rights violations are made. Broadly speaking, human rights treaties speak of "effective remedies" (ECHR Art 13; CCPR Art 2(3)) which may, in the context of rendition, include the need to provide psychological or emotional support to a victim. Action on the part of a victim's State of nationality should not be overlooked. Action for indirect State responsibility may be available in many situations and, against the background of the positive obligations of cooperation to guarantee rights protection (see paras 20 and 21 above), States should look to take such action whenever possible. Consideration should also be given to the *Basic Principles and Guidelines on the Right to Remedy and Reparation*, adopted by the UN General Assembly in 2005.[32]

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[32] UNGA Res 60/147, *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*, GAOR (60th Sess, 64th Plen Mtg) UN Doc A/Res/60/147 (2005).

Preventive or Interim Measures Where There is a Risk of Human Rights Violations

37. The Human Rights Committee, the Committee Against Torture and the European Court of Human Rights all issue requests for interim measures of protection when a complainant faces a risk of irreparable harm while his or her complaint is under consideration by the respective body. Although none of the treaties in question include a provision on interim measures of protection and the obligation of the State in question to comply with the request, the Human Rights Committee and, later also the European Court of Human Rights (following the HRC's line of reasoning), have taken the view that a State which acts contrary to a duly communicated request for interim measures of protection violates its legal obligations under international law. The reasoning is that where a State has accepted the right of international individual complaint, it has a consequent duty to respect that right in good faith. Executing or deporting a person despite being alerted of a risk of irreparable harm does not constitute a good faith application and is hence in breach of the State party's commitment to accept the right of individual complaint.[33]

38. All the bodies in question are capable of addressing and issuing a request for interim measures of protection on an urgent basis, if needed, within the same day it is submitted by the complainant.

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[33] Concerning the death penalty, see the Human Rights Committee Views in *Piandiong et al v the Philippines*, Communication No 869/1999 (Views of 19 October 2000) UN Doc CCPR/C/70/D/869/1999. On extradition and deportation, see the Human Rights Committee cases of *Weiss v Austria*, Communication 1086/2002 (Views of 3 April 2003) UN Doc CCPR/C/77/D/1086/2002, and *Ahani v Canada* (above n 17), as well as the European Court of Human Rights decision in *Mamatkulov v Turkey*, Case No 46827/99 (6 February 2003).

VI Summary

39. This paper can be summarized through a series of positions and propositions:

Position/Proposition	*Paras*
<u>General Principles</u>	
(i) The prohibition against torture is a peremptory norm of general international law, and recognized within the CAT, CCPR, and ECHR.	6
(ii) A person's liberty can only be deprived in accordance with a procedure prescribed by law and, where deprived of liberty, certain further rights are triggered.	7-9
<u>Extradition and Deportation</u>	
(iii) The detention of any person with a view to extradition or deportation must be in accordance with a procedure prescribed by law and, where deprived of liberty, such a person has certain rights as set out in para 15 above.	13-15
(iv) A rendering State may not extradite or deport any person to a State where the person is likely to suffer inhuman or degrading treatment, or torture.	16-17
(v) A rendering State may not extradite a person in contravention of the *neb is in idem* (double jeopardy) principle.	18(a)

(vi) In the case of a rendering State which has abolished the death penalty, it may not extradite any person to a requesting State where the person is likely to be sentenced to death.

18(b)

Rendition by Means Other than Extradition or Deportation

(vii) States have a positive obligation to take joint and separate action to achieve the universal respect for, and observance of, human rights for all, and to ensure that every person within their territory and jurisdiction enjoys the rights set out in paras 6 to 9 above.

19-22

(viii) A transit State has a positive obligation to ensure that its territory is not used to transfer persons to places where they are likely to be subjected to torture, including taking all practical steps to determine whether foreign movements through its territory are undertaking such practices.

20-27

(ix) A transit State should take steps to ensure that its territory is not being used to transfer persons against the liberty and security rights of such persons.

28-31

(x) A transiting State has an obligation not to torture any person, nor transfer persons to a place where they are likely to be subjected to torture.

32

(xi) By virtue of the extraterritorial application of international human rights obligations, a transiting State must at all times comply with liberty and security rights belonging to any persons being transferred by it.

33

(xii) Receiving States have an obligation to ensure that their territory is not used to subject any person to torture.

34

Remedies

(xiii) When a person's rights to liberty, security of the person, and freedom from torture have been violated, the person is entitled to effective remedies. The State of nationality should also look to take action for indirect State responsibility against the State infringing its national's rights.

10, 35-36

(xiv) Interim or preventive measures requested by human rights treaty-bodies must be complied with.

37-38

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Background Paper

The human rights implications of international listing mechanisms for 'terrorist' organisations

Professor Bill Bowring, Birkbeck College, University of London

Introduction

This background paper seeks to outline the various measures at the UN and EU level for asset-freezing in respect of organisations and individuals, in response to specific terrorist attacks, and "terrorism" in general. I have not attempted a comparative analysis of the legislation of the 55 OSCE member states; that would be far beyond the scope of this paper. I also provide references to, and in some instances quote from, the substantial scholarly literature which already exists. Every attempt has been made to ensure that the material is accurate, and I am especially grateful to Ben Hayes of "Statewatch" for his invaluable assistance. Any errors are my responsibility. In addition to presenting information, I have sought to analyse the measure s and their effects critically, and these are of course my own opinions and not those of the OSCE-ODIHR or the UN OHCHR..

I start with the OSCE commitments in this very difficult area. Following a brief survey of the powers under which the UN and EU have acted, I outline the various measures which have been taken, and the various human rights violations which may arise. I also look in more detail at the effects on the right to privacy, and, most important, in my view, the very damaging effect of these measures on procedural guarantees.

I have appended the tables prepared by Ben Hayes for "Statewatch". These give an admirable overview both of the measures taken, and of the many legal applications which have now been launched in order to challenge them.

OSCE commitments on terrorism and human rights

It goes without saying that the OSCE, with its 56 member states, includes not only the states of Western European, Central and Eastern European States, and states of the former USSR, but also the USA and Canada. Following the attacks on the United States of 7 August 1998 and 11 September 2001, all OSCE states have adopted new anti-terrorism measures. This "security environment", as its described on the ODIHR website, has the capacity to put at risk a number of fundamental rights and freedoms,

including the rights to a fair trial, privacy, freedom of association, and freedom of religion or belief, and, of special importance, the right to procedural guarantees.[1]

A comprehensive approach to combating terrorism requires preventive action. The ODIHR has initiated programmes intended to promote human rights, build democratic institutions, and strengthen the rule of law as key components that enable states to address the various social, economic, political, and other factors that engender conditions in which terrorist and extremist organizations may recruit or win support.

In November 2001, ODIHR's approach was summarised in the following way:

> "While we recognize that the threat of terrorism requires specific measures, we call on all governments to refrain from any excessive steps which would violate fundamental freedoms and undermine legitimate dissent. In pursuing the objective of eradicating terrorism, it is essential that States strictly adhere to their international obligations to uphold human rights and fundamental freedoms."[2]

This is also the approach of the UN Secretary General:

> "The danger is that in pursuit of security, we end up sacrificing crucial liberties, thereby weakening our common security, not strengthening it - and thereby corroding the vessel of democratic government from within."[3]

One concrete measure taken by ODIHR is particularly valuable. In 2004, the ODIHR collected and compiled anti-terrorism legislation from all OSCE participating States. This information can be found on the *Legislationline* website[4].

OSCE commitments on terrorism

The main OSCE documents outlining commitments to prevent and combat terrorism are the Bucharest Plan of Action (2001) and the OSCE Charter on Preventing and Combating Terrorism (2002).

The Bucharest Plan of Action established a framework for comprehensive OSCE action fully respecting international law, and in particular international human-rights law. It tasks the ODIHR to address factors that engender conditions in which terrorist organizations are able to recruit and win support and further states that the ODIHR

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[1] http://www.osce.org/odihr/13456.html

[2] Joint statement by the ODIHR, the UN High Commissioner for Human Rights and the Council of Europe, 29 November 2001

[3] UN Secretary-General Kofi Annan, 20 January 2003

[4] www.legislationline.org - Organized by subject and country, the online compilation is intended as a resource for lawmakers in the OSCE region, while also guiding the ODIHR's work in providing technical assistance to participating States with respect to their implementation of UN Security Council Resolution 1373 and the 12 international conventions and protocols on anti-terrorism.

will be active in the strengthening of democratic institutions and respect for human rights, tolerance, and multiculturalism.

Paragraph 3 of the Plan of Action states:

> "The aim of the Action Plan is to establish a framework for comprehensive OSCE action to be taken by participating States and the Organization as a whole to combat terrorism, fully respecting international law, including the international law of human rights and other relevant norms of international law." [5]

Article 7 of the 2002 Charter provides that the OSCE will:

> Undertake to implement effective and resolute measures against terrorism and to conduct all counter-terrorism measures and co-operation in accordance with the rule of law, the United Nations Charter and the relevant provisions of international law, international standards of human rights and, where applicable, international humanitarian law;" [6]

On 14-15 July 2005 the OSCE held a Supplementary Human Dimension meeting in Vienna on "Human Rights and the Fight Against Terrorism"[7].

The main objective of the Meeting was to discuss specific human rights at risk and challenges that the international community faces in the fight against terrorism. OSCE commitments, such as the 2001 Bucharest Plan of Action for Combating Terrorism and the 2004 Sofia Ministerial Statement on Preventing and Combating Terrorism re-emphasize the determination of OSCE participating States to combat terrorism with "respect for the rule of law and in accordance with (their) obligations under international law, in particular human rights, refugee and humanitarian law". Counter-terrorism measures that fall outside the framework of the rule of law and human rights

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[5] http://www1.osce.org/documents/html/pdftohtml/670_en.pdf.html

[6] http://www1.osce.org/documents/html/pdftohtml/1488_en.pdf.html

[7] See http://www1.osce.org/documents/html/pdftohtml/16203_en.pdf.html

standards effectively roll back established norms and lay the foundations for further insecurity.

In his opening remarks to the meeting, the Director of ODIHR stated that: "We must reinforce the common goals of those who point to the importance of upholding human rights and those who want to pursue the fight against terrorism … Nor can we sacrifice the principles of our free societies - democracy, human rights and the rule of law - in the fight against terrorism. That would play into the hands of the very terrorists we fight."

It is clear that the importance of protecting human rights in relation to measures against terrorism was not a main consideration in drafting the initial OSCE documents on this topic. Of course, the issues have come into much sharper focus since 2002, as shown by the more recent ODIHR comments, and as I demonstrate below.

The definition of "terrorism"

A starting point in considering the issues should be the implications for human rights protection of the lack of any precision in the definition of 'terrorism'.

In this background paper I align myself with the position of Professor John Dugard.[8] In 1974 Dugard wrote a seminal essay on the problems of the definition of terrorism[9]. In the Rhodes University Centenary Lecture delivered in 2004[10], he argued that:

> The Security Council of the United Nations, guided by the major powers (or power?) has shown little interest in … a search for definition or balance; in a search for a definition that takes account of the causes of terrorism and condemns both non-State terrorist and State terrorists even handedly.

> In the wake of 9/11 the Security Council adopted two resolutions, resolution 1368 (of 12 September 2001) and resolution 1373 (of 28 September 2001), which condemn terrorism in the strongest terms and direct States to act against it, but make no attempt to define it.
>
> Terrorism for the Security Council is what obscenity was for the American judge who remarked that he knew obscenity when he saw it! The danger of this approach is that it gives each State a wide discretion to define terrorism for itself, as it sees fit. It encourages States to define terrorism widely, to settle political scores by treating their political opponents as terrorists. It is a licence for oppression.

He extended this criticism to the European Union:

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[8] Dugard is now the UN's Special Rapporteur on the situation the situation of human rights in the occupied Palestinian territories

[9] Dugard, John (1974) "International terrorism: Problems of Definition" v.50 n.1 *International Affairs* pp.67-81

[10] Text at http://www.ru.ac.za/centenary/lectures/johndugardlecture.doc

> Of course, we in South Africa have experienced this before. Remember the Terrorism Act of 1967 which defined terrorism as any act, committed with the intent to endanger the maintenance of law and order? Such an intention was presumed if the act was likely to encourage hostility between whites and blacks or to embarrass the administration of the affairs of the State!....
>
> The European Union is no better. In 2002 it has adopted anti-terrorism legislation which would include unlawful protest actions (Council Framework Decision of 13 June 2002).

Martin Scheinin, the UN's Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, made a similar point in his report for 2005, published in 2006[11]:

> "Of particular concern to the Special Rapporteur's mandate is that repeated calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, may give rise to adverse consequences for human rights.
>
> Calls by the international community to combat terrorism, without defining the term, can be understood as leaving it to individual States to define what is meant by the term. This carries the potential for unintended human rights abuses and even the deliberate misuse of the term. Besides situations where some States resort to the deliberate misuse of the term, the Special Rapporteur is also concerned about the more frequent adoption in domestic anti-terrorism legislation of terminology that is not properly confined to the countering of terrorism. Furthermore, there is a risk that the international community's use of the notion of "terrorism", without defining the term, results in the unintentional international legitimization of conduct undertaken by oppressive regimes, through delivering the message that the international community wants strong action against "terrorism" however defined."

These authoritative comments from persons at the highest levels of the UN, who are equally leading scholarly authorities in the field, are clear indications of the dangers inherent in anti-terror legislation, and especially asset freezing.

McCulloch and Pickering have denounced the new anti-terror regime in even stronger terms:[12]

> The targeting of non-government and non-Western systems and programmes as terrorist suspects under the financial 'war on terror' creates an artificial island of intense financial regulation in a sea of free markets. This intense financial regulation is directed primarily at activities outside the corporate mainstream of investment capital and is aimed at not-for-profit organizations, charities and solidarity groups that challenge the political status quo, as well as communities and individuals popularly stereotyped as terrorists. The mandated regulation of informal financial systems is an example of cultural and economic imperialism that is accompanying the progressive colonization of the global commons that exist outside of corporate control. Under the auspices of the financial 'war on terror', 21st-century warriors on

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[11] Scheinin, Martin (2006) "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism" UN Doc: E/CN.4/2006/98, 28 December 2005

[12] McCulloch, Jude and Pickering, Sharon (2005) "Suppressing the Financing of Terrorism: Proliferating State Crime, Eroding Censure and Extending Neo-colonialism" v.45 British Journal of Criminology pp.470-486

> the neo-liberal frontier are more likely to be wearing suits than combat gear, and armed with briefcases rather than weapons.[13]

This paper concerns the human rights implications of international, in particular European, listing of individuals. Professor Colin Warbrick has urged[14] that:

> "… the insistence on the application and observance of international legal standards on human rights, even if they must be modified in extremis, should be an essential feature of any response to terrorism, even a war against terrorism, which is waged to protect the rule of law."

As requested, I have focused on the issue of "asset freezing". This paper follows my earlier Joint Opinion, written with Professor Douwe Korff.[15]

The powers of the UN Security Council

The UN Security Council has adopted a number of Resolutions on terrorist financing and asset freezing acting under powers contained in Article 24(1), Article 25, Article 41, Article 48(2), and Article 103 of the Charter of the United Nations.[16]

These are as follows:

> 24 (1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

> 25. The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

> 41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

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[13] Ibid, p.482

[14] Warbrick, Colin (2004) "The European Response to Terrorism in an Age of Human Rights" v.15 n.5 *European Journal of Human Rights* pp.989-1018, at 989

[15] "Terrorist Designation with Regard to European and International Law: The Case of the PMOI" Joint Opinion by Prof. Bill Bowring, Director of Human Rights and Social Justice Research Institute, London Metropolitan University and Prof. Douwe Korff, Professor of International Law, London Metropolitan University, November 2003, at http://www.statewatch.org/news/2005/feb/bb-dk-joint-paper.pdf

[16] See Bantekas, Ilias (2003) "The International Law of Terrorist Financing" v.97 n.2 American Journal of International Law pp.315-333

> 48 (1) The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
>
> (2) Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.
>
> 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.

Some scholars have expressed grave reservations as to whether, in adopting certain resolutions under Chapter VII, the UN Security Council is engaging in unwarranted legislation. This is particularly the case with UNSC Resolution 1373 of 28 September 2001.

Clémentine Olivier has commented:

> Allowing the Security Council to enjoy legislative power and modify States' obligations under international human rights law would not only be legally incorrect; it would also, from a political perspective, be unwise.[17]

In the view of Matthew Happold[18], by laying down a series of general and abstract rules binding on all UN member states, the UNSC in Resolution 1373, purported to legislate.[19] In doing so it acted *ultra vires* the UN Charter. He recognises that Security Council Resolutions are generally seen as being legal, at least prima facie.[20] For him, the real issue is whether the Resolution will serve as a precedent for future Security Council legislation.[21] He also notes that Resolution 1373 differed from all previous Security Council decisions in Chapter VII, in that "the threat to the peace is identified is not any specific situation but rather a form of behaviour, 'terrorist acts'. Indeed, it is a form of behaviour that the resolution leaves undefined."[22]

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[17] Olivier, Clémentine (2004) "Human Rights Law and the International Fight Against Terrorism: How do Security Council Resolutions Impact on States' Obligations Under International Human Rights Law? (Revisiting Security Council Resolution 1373)" v.73 Nordic Journal of International Law pp.399-419, p.419

[18] Happold, Matthew (2003) "Security Council Resolution 1373 and the Constitution of the United Nations" 16 *Leiden Journal of International Law* pp.593-610

[19] See also Szasz, Paul (2002) "The Security Council Starts Legislating" 96 *American Journal of International Law* 901

[20] See *Certain Expenses of the United Nations* (Advisory Opinion), [1962] ICJ Rep. 151, at 168

[21] Happold, ibid, p.609

[22] Happold, ibid, p.598

EU powers

The EU sets out its position and activities in response to UN Security Council resolutions on its Common Foreign and Security Policy (CFSP) web-site[23].

The EU acts under the powers set out in Article 11 of the Treaty of European Union.[24] This states:

> 1. The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:
>
> - to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter to strengthen the security of the Union in all ways,
> - to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders,
> - to promote international cooperation,
> - to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.
>
> 2. The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity.
>
> The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.
>
> The Council shall ensure that these principles are complied with.

Where Community action is required, a Common Position must be adopted under Article 15 of the Treaty establishing the European Union. As an instrument of the CFSP, the adoption of a new Common Position requires unanimity from EU Member States in Council.

Where restrictive measures target persons, groups and entities which are not directly linked to the regime of a third country, Articles 60, 301 and 308 of the Treaty establishing the European Community apply. In this case, adoption of the Regulation by the Council requires unanimity and prior consultation of the European Parliament.

Council Regulations imposing sanctions and implementing Commission Regulations are part of Community law. It is standing case-law that Community law takes precedence over conflicting legislation of the Member States. Such Council and Commission Regulations are directly applicable and have direct effect in the Member States. Their application and enforcement is a task attributed to the competent authorities of the Member States and the Commission.

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[23] http://ec.europa.eu/comm/external_relations/cfsp/sanctions/index.htm

[24] http://eur-lex.europa.eu/en/treaties/dat/12002M/htm/C_2002325EN.000501.html

If the Common Position calls for Community action implementing some or all of the restrictive measures, the Commission will present a proposal for a Council Regulation to Council in accordance with Articles 60 and 301 of the Treaty establishing the European Community. The proposal will subsequently be examined by RELEX and COREPER, before being adopted by Council. Formally the proposal for a Council Regulation should be presented after adoption of a Common Position. However, for reasons of expediency the Commission usually presents its proposals for Council Regulations implementing restrictive measures in time to allow for a parallel discussion of both texts in Council, and, if possible, the simultaneous adoption of both legal instruments.[25]

The European Council Declaration of 25 March 2004 set out the following seven strategic objectives for the EU's Action Plan against Terrorism[26]:

> 1. To deepen the international consensus and enhance international efforts to combat terrorism;
>
> 2. To reduce the access of terrorists to financial and economic resources;
>
> 3. To maximise the capacity within EU bodies and Member States to detect, investigate and prosecute terrorists and to prevent terrorist attacks;
>
> 4. To protect the security of international transport and ensure effective systems of border control;
>
> 5. To enhance the capability of the European Union and of member States to deal with the consequences of a terrorist attack;
>
> 6. To address the factors which contribute to support for, and recruitment into, terrorism;
>
> 7. To target actions under EU external relations towards priority Third Countries where counter-terrorist capacity or commitment to combating terrorism needs to be enhanced.

On 30 November 2005 the European Council adopted the "European Counter-Terrorism Strategy".[27] This sets out the EU's strategic commitment to combat terrorism globally while respecting human rights. The four 'pillars' of the EU's Counter Terrorism Strategy are: "Prevent, Protect, Pursue, Respond." The Strategic Commitment is "To combat terrorism globally while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice."

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[25] See also Kreuz, Joakim "Hard measures by a Soft Power? Sanctions policy of the European Union 1981-2004", *Bonn International Center for Conversion (BICC)* Working Paper 45, at http://www.bicc.de/publications/papers/paper45/paper45.pdf

[26] http://ue.eu.int/uedocs/cmsUpload/EUplan16090.pdf

[27] http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf

On 2 December 2005 the EU published "Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy".[28] These were agreed by the Foreign Relations Counsellors Working Party on 1 December 2005.

The latest report on implementation of the Action Plan was published on 19 May 2006 Council of the EU "Implementation of the Action Plan to Combat Terrorism" 9589/06.[29]

Paragraph 26 of the Report stated:

> "The EU asset freezing procedures have been updated, though the unanimity requirement does not make for swift decisions. FATF[30] mutual evaluations of Member States' implementation of FATF standards are now proceeding and so far three Member States have been found to be partially non compliant with FATF Special Recommendation III. All Member States should be encouraged to ensure that their national asset freezing mechanisms reflect the relevant international standards."

I explore below recent arguments that the EU measures themselves are illegal.

A disturbing point of comparison within the OSCE area - the Shanghai Cooperation Organisation (SCO)

The criticisms which I and others express concerning the measures taken by the EU, and their effects on human rights, should be tempered by a comparison with a parallel development in the eastern part of the OSCE's space. The SCO is an intergovernmental organisation founded on 15 June 2001 by China, Russia, Kazakhstan, Kyrgyzstan and Tajikistan.[31]

According to the SCO Charter and the Declaration on the Establishment of the SCO, the main purposes of the SCO include: strengthening mutual trust and good-neighbourliness and friendship among member states, and other noble aims, including

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[28] See http://register.consilium.europa.eu/pdf/en/05/st15/st15114.en05.pdf

[29] Council of the EU: "Implementation of the Action Plan to Combat Terrorism" 9589/06. at http://register.consilium.europa.eu/pdf/en/06/st09/st09589.en06.pdf

[30] The Financial Action Task Force. The FATF is an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. The FATF is therefore a "policy-making body" created in 1989 that works to generate the necessary political will to bring about legislative and regulatory reforms in these areas. See http://www.fatf-gafi.org

[31] See http://202.101.38.80/sco/intro.php

"promoting the creation of a new international political and economic order featuring democracy, justice and rationality."

The SCO states that it abides by the following basic principles: adherence to the purposes and principles of the Charter of the United Nations; respect for each other's independence, sovereignty and territorial integrity, non-interference in each other's internal affairs, mutual non-use or threat of use of force; equality among all member states; settlement of all questions through consultations; non-alignment and no directing against any other country or organization; opening to the outside world and willingness to carry out all forms of dialogues, exchanges and cooperation with other countries and relevant international or regional organizations. It should be noted that this list nowhere mentions human rights.

The SCO institutions consist of two parts: the meeting mechanism and the permanent organs. The highest SCO organ is the Council of Heads of State. The host country of the session of the Council of Heads of State assumes the rotating presidency of the organization. Uzbekistan is the current state of presidency. It is very well known that Uzbekistan present special problems where the human rights of members of banned organisations are concerned[32].

Concern at the SCO's strategy was raised at an early stage by Human Rights Watch, which

> "warned that in China, Uzbekistan, and Russia, serious violations of international human rights and humanitarian law are being committed in the name of combating terrorism, including:
>
> - a crackdown on Uighur activists and religious groups in Xinjiang, China;
> - a relentless assault on independent Muslims in Uzbekistan; and
> - the torture and arbitrary arrest of scores of civilians in Chechnya by Russian forces."

and stressed that "… a commitment to abiding by human rights law in fighting terrorism is important not only as a matter of principle but also as a matter of efficacy."[33]

These concerns have recently been repeated. On 17 May 2006 Carl Gershman of the US foundation National Endowment for Democracy addressed the Commission on Security and Cooperation in Europe with a presentation entitled "The Assault on Democracy Assistance: the Challenge to the OSCE."[34]

He declared that:

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[32] Numerous international organisations and observers have reliably reported on the killing, disappearance, and torture of members of Hizb ut-Tahrir in Uzbekistan - see Amnesty International's World Reports for the last 10 years. In February 2003, the U.N. Special Rapporteur on Torture issued a report that concluded that torture or similar ill-treatment was systematic. The US State Department Country Report on Uzbekistan for 2004, published in February 2005, lists many examples of persecution, killing and torture of supporters of Hizb ut-Tahrir

[33] http://hrw.org/english/docs/2002/01/05/china3452_txt.htm

[34] http://www.ned.org/about/carl/carl051706.html

> "A complicating and ominous factor, however, in strengthening the OSCE's role in this field is Russia's promotion of a new authoritarian axis. Last December Russian Foreign Minister Sergei Lavrov attacked what he called the ODIHR's "unacceptable autonomy" in monitoring elections. But, having failed to undermine ODIHR's democratic purpose, Russia now seems set on using the Shanghai Cooperation Organization (SCO) as a countervailing force to the OSCE. The SCO comprises China, as well as OSCE members Kyrgyzstan, Kazakhstan, Uzbekistan and Tajikistan.
>
> At the July 2005 Russia-China summit in Moscow, Vladimir Putin and Hu Jintao issued an open attack on democracy promotion in a declaration that explicitly rejected attempts to "ignore objective processes of social development of sovereign states and impose on them alien models of social and political systems." In the same month, a similar statement from the Shanghai group's summit in Astana, Kazakhstan, stated that "concrete models of social development cannot be exported" and, in a more coded attack on democracy assistance, insisted that "the right of every people to its own path of development must be fully guaranteed."
>
> Just this week it is reported that preparatory talks for next month's summit of the SCO 's have produced agreement on a transformation of the SCO into a military-political alliance that will enable SCO members "to fight the frustrating conclusions of OSCE missions" and act as a counterweight to the democratic states. Ominously, reports suggest that the June summit will also grant SCO membership to Iran (currently an observer)."

I can report that the Russian Federation, with which I am familiar, has now introduced draconian anti-terror legislation, namely the Federal Law "On Suppression of Terrorism" of 1998, which has recently been used to penalise members of the Islamic political party, Hizb ut-Tahrir[35], including refugees from Uzbekistan. One case, *Kasymakhunov v. Russia*[36], is now under consideration by the European Court of Human Rights. The party was banned on 14 February 2003 by Judge Romanenkov, a single judge of the Supreme Court of the Russian Federation sitting *in camera*, no notice of the hearing having been given. He granted a declaration that Hizb ut-Tahrir and 14 other Islamic organisations were "terrorist organisations"; and ordered the ban of their activities throughout Russia. The applicant was sentenced to eight years imprisonment. Membership of the banned party was a particularly aggravating factor in his conviction and sentence.

The example set by the EU is thus of crucial importance for other members of the OSCE.

The UN resolutions and EU responses in relation to the Taliban

On Aug. 7, 1998, the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, were bombed by terrorists, leaving 258 people dead and more than 5,000 injured. In response, the U.S. launched cruise missiles on Aug. 20, 1998, striking a terrorism training complex in Afghanistan and destroying a pharmaceutical manufacturing facility in Khartoum, Sudan, that reportedly produced nerve gas. Both targets were believed to have been financed by wealthy Islamic radical Osama bin Laden, who was

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[35] This party is not proscribed in the UK.

[36] App. no. 26261/05

allegedly behind the embassy bombings as well as an international terrorism network targeting the United States.[37]

The UN Security Council adopted UNSC Resolution 1267(1999) on 15 October 1999.

According to Paragraph 4(b) states must:

> "freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorised by the Committee on a case-by-case basis on the ground of humanitarian need."

Paragraph 6 established a committee of the Security Council composed of all its members ('the Sanctions Committee') responsible in particular for ensuring that States implement the measures imposed by paragraph 4, designating the funds or other financial resources referred to…

It will be noted that in this and all subsequent cases the EU promptly adopted measures to implement UNSC decisions.

Thus, on 15 November 1999, the Council adopted Common Position 1999/727/CFSP concerning restrictive measures against the Taliban (OJ 1999 L 294, p.1). On 14 February 2000, on the basis of articles 60 EC and 301 EC, the Council adopted Regulation (EC) No 337/2000 concerning a flight ban and a freeze of funds and other financial resources (OJ 2000 L 43, p.1).

On 19 December 2000 the UNSC adopted Resolution 1333 (2000) demanding inter alia that the Taliban should comply with Resolution 1267 (1999). Paragraph 8 (c) strengthens flight ban and freezing. On 26 February 2001 the Council adopted Common Position 2001/154/CFSP concerning additional restrictive measures and amending Common Position 96/746/CFSP (OJ 2001 L57, p.1). On 6 March 2001, the Council adopted Regulation (EC) No 467/2001 prohibiting the export of certain goods, and repealing Regulation No 337/2000 (OJ 2001 L 67, p.1)

On 16 January 2002, the UNSC adopted Resolution 1390 (2002), which provides that the freezing of funds is to be maintained. On 27 May 2002 the Council adopted Common Position 2002/402/CFSP, and also adopted Regulation (EC) No 881/2002.

On 20 December 2002 the UNSC adopted Resolution 1455 (2003) to improve the implementation of the measures imposed in paragraph 4(b) of Resolution 1267 (1999). On 27 February 2003, Council adopted Common Position 2003/140/CFSP (OJ 2003 L 53, p.62), followed, on 27 March 2003, by Regulation (EC) No 561/2003 (OJ 2003 L 82, p.1)

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[37] See http://www.infoplecase.com/spot/newsfacts-sudanstrikes.html

On 12 November 2003 Sanctions Committee adopted an addendum to its consolidated list of entities and individuals to be subject to the freezing of funds.[38]

The UN response to 9/11

Within days of "9/11" the UNSC adopted Resolution 1373 (Terrorism) which continues to be the focus of action by governments around the world against Al-Qa'ida financing. UNSC Resolution 1373 makes the connection between terrorism and organised crime, drug trafficking, arms trafficking and the illegal movement of weapons of mass destruction. Inter alia, the Resolution contained the following::

> "Decides that all States shall:
>
> (a) Prevent and suppress the financing of terrorist acts;
>
> (b) Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
>
> (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
>
> (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;"
>
> and
>
> "Notes with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard emphasizes the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;
>
> 5. Declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations."

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[38] See also Kruse, Anders (2005) "Financial and Economic Sanctions – From a Perspective of International Law and Human Rights" v.12 n.3 *Journal of Financial Crime* pp.217-220 – Kruse is the Director, EU Legal Secretariat, Ministry for Foreign Affairs, Sweden; and Marks, Jonathan H (2006) "9/11 = 3/11 = 7/7 = ? What Counts in Counterterrorism" v.37 *Columbia Human Rights Law Review* pp.101-161

On 27 December 2001, taking the view that action by the Community was needed in order to implement UNSC Resolution 1373 (2001), the Council adopted Common Position 2001/930/CFSP on combating terrorism (OJ 2001 L 344, p. 90) and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93). Article 2 of Common Position 2001/931 states:

> "The European Community, acting within the limits of the powers conferred on it by the Treaty establishing the European Community, shall order the freezing of the funds and other financial assets or economic resources of persons, groups and entities listed in the Annex."

On 27 December 2001, the Council adopted Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70). Article 2 of Regulation No 2580/2001 provides:

> "1) Except as permitted under Articles 5 and 6:
>
> (a) all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included in the list referred to in paragraph 3 shall be frozen;
>
> (b) no funds, other financial assets and economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3.
>
> (2) Except as permitted under Articles 5 and 6, it shall be prohibited to provide financial services to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3.
>
> (3) The Council, acting by unanimity, shall establish, review and amend the list of persons, groups and entities to which this Regulation applies, in accordance with the provisions laid down in Article 1(4), (5) and (6) of Common Position 2001/931/CFSP; such list shall consist of:
>
> (i) natural persons committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;
>
> (ii) legal persons, groups or entities committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;
>
> (iii) legal persons, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred to in points (i) and (ii); or
>
> (iv) natural [or] legal persons, groups or entities acting on behalf of or at the direction of one or more natural or legal persons, groups or entities referred to in points (i) and (ii)."

On 2 May 2002, the Council adopted Decision 2002/334/EC implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 2001/927/EC (OJ 2002 L 116, p. 33).

That decision included the PKK in the list referred to in Article 2(3) of Regulation No 2580/2001. Osman Ocalan (brother of PKK leader Abdullah Ocalan, who is imprisoned in Turkey) brought an action against that decision on behalf of the Kurdistan Workers' Party (PKK) together with Serif Vanly, on behalf of the Kurdistan National Congress (KNK).

The EU Court of First Instance (CFI) dismissed the cases in February 2005 as inadmissible on the grounds that Mr Ocalan was unable to prove that he represented the PKK (he had argued that it no longer existed) and that the KNK was not individually affected by the Council's decision to proscribe the PKK. Both applicants lodged appeals with the Court of Justice.

It should be noted that on 27 September 2006 the Advocate General called for a Court of First Instance (CFI) ruling on the PKK application to be set aside. In his opinion, the CFI made an error of law in its assessment of the admissibility of the PKK application.[39] If the ECJ follows the opinion of its Advocate General the PKK will at last be able to challenge the substance of the EU decision to designate it as "terrorist".

ECHR standards to be applied to the freezing of the assets of a blacklisted organisation or individual

The right to "the peaceful enjoyment of [one's] possessions" is set out in Article 1 of the First Protocol (P1) to the European Convention on Human Rights (ECHR). This provision is structured somewhat differently from Arts. 8 – 11 of the ECHR, but in practice, the former Commission and Court have adopted a very similar approach to their assessment of cases under this article. Specifically, under Art. 1 P1, as under those other rights, the first, preliminary question that arises is whether the right at issue in any particular case falls within the ambit of the right. After that, the question must again be addressed whether the right in question has been interfered with (i.e. whether someone was "deprived" of his property or whether such property was subjected to measures of "control"). And finally, if so, the question is whether the interference was justified.

As far as the preliminary question is concerned, the European Court of Human Rights (ECtHR) has said, in the *Marckx* case:

> "Article 1 [of P1] is in substance guaranteeing the right to property."[40]

The scope of Article 1 P1 is therefore wide. For the purpose of this Background Paper, it suffices to note that, in view of the case-law of the organs of the Convention, title to assets held in bank accounts undoubtedly constitutes a "property right" in the sense of Article 1 P1.

The question then arises as to when this right may be restricted. The text of Article 1 P1 speaks of "depriv[ation] of … possessions" and "control [of] the use of property". However, the organs of the Convention have discerned in the text a series of more general "rules". As the Court put it in the case of *Sporrong and Lönnroth v Sweden*:

> ".. [Article 1 of the First Protocol] comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of general nature and enunciates the principle of peaceful enjoyment of property; the second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions; and the third rule, stated in the second paragraph, recognises the contracting states are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not 'distinct' in the sense of being unconnected: the second and third rules are concerned with particular instances of interferences with

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[39] AG Opinion in Case C-229/05 P; see http://www.statewatch.org/terrorlists/docs/AG-PKK.html

[40] *Marckx v. Belgium*, Judgment of 13 June 1979, para. 63, emphasis added.

> the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule …"[41]

Perhaps not surprisingly, this approach to Article 1 First Protocol is markedly similar to the general approach by the Strasbourg organs to the other substantive provisions of the Convention - as described in the previous sub-section with reference to Arts. 10 and 11: first, one has to establish whether there has been an "interference"; and then, whether the interference was justified.

In assessing whether an interference with a property right is compatible with the Convention, the Convention organs apply the so-called "fair balance" test, first set out in the *Sporrong and Lönnroth* case in the following terms:

> "For the purposes of [the first sentence of Article 1 P1] … the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 [of P1]."[42]

In fact, although the text of Article 1 P1 allows for much more complex (not to say convoluted) distinctions:

> "The clear tendency in the jurisprudence has … been to assimilate the assessment of all interferences with the peaceful enjoyment of possessions under the single principle of fair balance set out in the *Sporrong and Lönnroth* case, this despite the language of Article 1 of the First Protocol suggesting different standards for measures which deprive a person of his property and measures which seek to control property. …"[43]

The "fair balance" test is very similar to the "necessity" and "proportionality" test applied under Article 8 – 11 of the Convention. However, there are some special features. First, States are granted a very wide "margin of appreciation" with regard to the imposition of restrictions on property rights. Generally speaking, this margin is wider than the margin applied under other Convention articles. Indeed, the main question in this regard is often whether the measure in question is provided for in domestic law, and whether that law allows the right kind of considerations to be taken into account.[44] The wide "margin of appreciation", in other words, is not unlimited. The Strasbourg organs will generally accept a State's assessment of the various factors to be taken into account - but an assessment there must have been, a "balancing" must have taken place.

For the purpose of this Background Paper, it is of crucial importance to note that a legal rule, or an administrative practice, which does not allow for a balancing

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41 *Sporrong and Lönnroth v Sweden*, Judgment of 23 September 1982, para. 61.

42 *Sporrong*, para. 69.

43 Harris, O'Boyle & Warbrick, ibid, p. 525.

44 Ibid, p. 525, emphasis added, footnotes omitted.

of public and private interests, but which imposes restrictions on the property rights of certain organisations without any consideration of the interests of the private persons or entities vested with those rights, is incompatible with the Convention.

Procedural guarantees

Moreover, and this is of great importance for this Background Paper, the assessment by the national authorities of the need for an interference with a property right must be subject to procedural guarantees: there must be an avenue of appeal from the decision of a national authority to interfere with someone's property rights. While the procedural protection of rights is also a separate issue under the Convention, discussed in the next sub-section, it is important to note the particularly close link between the availability of such remedies and appeals over interferences with property rights and the question of whether or not the interference was justified:

> "The applicants succeeded in the *Sporrong and Lönnroth* case because there was no procedure by which they could challenge the long-continued application of the expropriation permits which were blighting their property nor were they entitled to any compensation for the loss that this situation had brought about."[45]

By contrast:

> "One of the factors which counted against the applicant in [the case of] *Katte Klitsche de la Grange v Italy* … was that he had not used a procedure available to him."[46]

Often the "process" in question will involve the "determination of a civil right", in which case the procedure should comply with the requirements of Article 6(1) of the Convention, as further discussed in the next sub-section. In any case the process must, moreover, be "effective", as required by Art. 13 of the Convention, also discussed below.

As just noted, in particular as concerns Article 1 of P1, the ECtHR often includes the question of the procedural protection of a right in its assessment of whether the substance of that right is adequately ensured. Procedural issues can also relate closely to the so-called "margin of appreciation" doctrine. In particular, the Convention organs do not want to become a "fourth instance" (*"quatrième instance"*) of appeal from national judicial decisions.[47] Basically, while the width of the margin of appreciation varies from case to case and context to context,[48] and while some matters are subjected to closer review than others, the Court will be loath to intervene with domestic decisions concerning the justification of interferences with Convention

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45 Harris, O'Boyle & Warbrick, ibid, p. 526, emphasis added.

46 Ibid p. 525, with reference to para. 46 of the judgment in the case mentioned, emphasis added.

47 Ibid, pp. 12 – 15.

48 Cf. D Korff, ibid p. 147.

rights, if these decisions were reached or substantively reviewed in judicial proceedings in which all the relevant matters were fully considered and given their proper weight. Conversely, an absence of procedural protection will lend credence to a claim that an interference is not justified - or at least, the Respondent Government will find it difficult to show that the various interests were indeed carefully balanced.

Moreover, the Convention lays down express requirements concerning the procedural protection of the rights enshrined in it, in two ways. First of all, and at the most basic level, Article 13 stipulates that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority". Secondly, Article 6(1) requires, more specifically, that "in the determination of his civil rights and obligations or on any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

To the extent that blacklisting of an organisation or individual interferes with (indeed, effectively renders impossible) the exercise of the rights to freedom of association and expression of the organisation in question, the organisation or individual is thus entitled to the procedural protection of Art. 13. The ECtHR has summarised the main principles it applies in this regard as follows:

> "(a) where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (...);
>
> (b) the authority referred to in Article 13 may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective (...);
>
> (c) although no single remedy may itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (...);
>
> (d) neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention - for example, by incorporating the Convention into domestic law (...).
>
> It follows from the last-mentioned principle that the application of Article 13 in a given case will depend upon the manner in which the Contracting State concerned has chosen to discharge its obligation under Article 1 directly to secure to anyone within its jurisdiction the rights and freedoms set out in section I (...)."[49]

The first principle is of particular importance; it includes a number of more specific requirements. First of all, it is clear that the Court considers a *judicial* remedy to be the best option. States should show why a judicial remedy is not made available. If a State does not provide a full judicial remedy, the alternative must be as close as possible to it; the remedy must have some of the crucial trappings of a court. The arbiters, if they are not judges, should at least be impartial and, if not granted full judicial independence, should still be manifestly free from influence by the executive.

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[49] *Silver and others v. the UK*, Judgment of 25 March 1983, para. 113. References to other cases in which the principles mentioned were first adduced (indicated by brackets) omitted.

The procedure should be fair and allow a victim an effective opportunity to challenge the interference in question.

It also follows from the first principle that the authority in question must be able to review the substance of the case.[50] It must be able to review the legality and the necessity of any interference, to decide on the adequacy or otherwise of the reasoning underpinning the interference, and to review the factual basis for the interference.

Thus, the decision to include an organisation on a blacklist must be subject to full remedial proceedings: the organisation must be able to challenge the designation of it as a "terrorist organisation", and the factual basis for that designation, in effective and fair proceedings (preferably a court). The *dictum* of the ECtHR in respect of Art. 6 (discussed below) that "a determination on questions of both fact and law cannot be displaced by the *ipse dixit* of the executive", also applies to remedies under Art. 13.

Finally, the review body must be able to grant "appropriate relief":[51] its rulings should be binding on the State (subject to relevant appeal proceedings). A merely advisory body cannot provide an "effective remedy".

More importantly, any "deprivation of possessions" or "control [of] the use of property" by a State must be challengeable in judicial proceedings fully conforming to the "fair trial" requirements of Art. 6 ECHR. As Harris, O'Boyle and Warbrick put it, with reference to the case-law:

> "… the right to a fair trial in Article 6 applies to the determination of 'civil rights and obligations'. This is a term with an autonomous Convention meaning that has been interpreted as including pecuniary rights. The coherence of the Convention as a whole demands that the autonomous concept of 'possessions' in Article 1 of the First Protocol be no less a category than the concept of pecuniary rights for the purposes of Article 6: the reasoning about the essence of the interest measured by its nature and importance to an individual should apply to its formal protection (Article 6(1)) and its substance (Article 1, First Protocol) alike. The minimum in each case is that the applicant shows that he is entitled to some real, if yet unattrributed, economic benefit."[52]

For the present case, it suffices that "freezing orders" undoubtedly affect the property rights, and thus the civil rights (*droits de caractère civil*), of the blacklisted organisations or individuals concerned - and that these must therefore be able to challenge such orders in proper courts, in full and fair judicial proceedings in which the relevant matters can be argued in substance.[53] Specifically, the courts must be

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[50] Cf. *Vilvarajah v. the UK*, Judgment of 30 October 1991, para. 122: "[The effect of Art. 13] is thus to require the provision of a domestic remedy allowing the competent 'national authority' both to deal with the substance of the relevant Convention complaint and to grant appropriate relief."

[51] Cf. the quote in the previous footnote.

[52] Harris, O'Boyle & Warbrick, ibid, p. 518, with reference, in particular, to the cases of *Feldbrugge v the Netherlands* and *Deumeland v FRG*, and to further academic opinion.

[53] Note that it does not matter whether one qualifies the effect of a freezing order as "deprivation of possessions" or "control of property": as Harris, O'Boyle and Warbrick make clear in the passage quoted in the text, in either case, Art. 6(1) applies. At most, the difference could affect the question of

regular courts, and the judges regular, independent and impartial judges; and the procedure must ensure "equality of arms" to the parties.[54]

Crucially, moreover, in proceedings covered by Art. 6(1), the court must be able to address the full substance of the issue. In the present context, this means that the court must be able to assess the lawfulness (in a Convention sense), as well the factual basis and reasonableness of the designation of a particular organisation as "terrorist". Although certain modifications may be made to trial proceedings involving national security or terrorist matters, States can not fully "hide" the purported evidence in support of a freezing order behind the veil of national security or the need to protect sources or intelligence.

This is made clear in the case of *Tinnelly & Sons Ltd. and others and McElduff and others v. the UK*.[55] The case concerned decisions by the Northern Ireland Electricity Services (NIE) not to grant work to certain firms in the province on the basis of security considerations, and the limitations placed on the Fair Employment Agency's and the courts' reviews of these decisions. These limitations resulted from a certificate issued by the Secretary of State for Northern Ireland which, by law, constituted "conclusive evidence" of the fact that the refusal to grant the work was "done for the purpose of safeguarding national security or of protecting public safety or public order". The Court found that that the issue by the Secretary of State of [conclusive] certificates constituted a disproportionate restriction on the applicants' right of access to a court or tribunal, and that there had been a breach of Article 6 § 1 of the Convention. The detail of the Court's decision is well worth studying.

Blacklisting an organisation or individual and freezing assets, without granting the right to challenge this blacklisting and freezing, in a court fully satisfying the requirements of Art. 6(1) ECHR, in proceedings in which the factual and legal basis for the blacklisting and freezing is properly and fully, judicially examined, violates the right of access to court as guaranteed by that provision of the Convention.

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proportionality, but even then the issue is the actual, practical effect of a freezing order on a particular organisation, rather than the formal classification of that effect.

[54] Under Art. 15 ECHR, States can derogate from the right to a fair trial in a "public emergency threatening the life of the nation", but no State Party to the Convention has invoked this provision in relation to blacklisting. The UK has derogated from Art. 5 in order to allow detention without trial of foreign nationals suspected of involvement in terrorism, but it has not extended the derogation to Art. 1 First Protocol or Art. 6 in relation to civil trials.

[55] Judgment of 10 July 1998.

The Council of Europe *Guidelines on Human Rights and the Fight Against Terrorism*

Before ending this section on the requirements of the European Convention on Human Rights, it is useful to point out that these requirements are clearly and expressly reflected in the Council of Europe *Guidelines of the Committee of Ministers on Human Rights and the Fight Against Terrorism*,[56] already mentioned.

First of all, in line with the remark of the Court that safeguarding national security concerns need not involve a denial of justice, the Committee of Ministers:

> "[recalls] that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law;" and
>
> "[reaffirms] states' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member states in particular, the Convention for the protection of Human Rights and Fundamental Freedoms [i.e. the ECHR] and the case-law of the European Court of Human Rights"
>
> (Preambles (d) and (i))

More specifically, the Guidelines stipulate the following basic principles of direct relevance to this Background Paper:[57]

> II
>
> **Prohibition of arbitrariness**
>
> All measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.
>
> III
>
> **Lawfulness of anti-terrorist measures**
>
> 1. All measures taken by states to combat terrorism must be lawful.

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[56] Appendix 3 to the Decisions of the Committee of Ministers, adopted at their 804th meeting on 11 July 2002, CM/Del/Dec(2002)804 of 15 July 2002,

https://wcm.coe.int/ViewDoc.jsp?id=296009&Lang=en.

[57] The Guidelines also contain a paragraph (Paragraph XV) concerning derogations for "[w]hen the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation", i.e. for when Art. 15 of the Convention applies (and is formally invoked: the Guidelines expressly note the duty to notify the competent authorities [in the case of the Convention, the Secretary-General of the Council of Europe]). However, as noted above, I am considering the current situation, in which organisations are blacklisted but in which Art. 15 has not been invoked (or at least, as concerns the UK, not in respect of Art. 1 P1 and Art. 6 of the ECHR).

2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

XIV

Right to property

The use of the property of persons or organisations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property have the possibility to challenge the lawfulness of such a decision before a court.

These principles clearly echo the Convention and the case-law of the ECtHR in relation both to the substantive articles (Arts. 10 and 11 of the Convention and Art. 1 of the First Protocol) and the articles requiring procedural protection (Art. 6 and 13 of the Convention), discussed above. In particular, they recall the requirements relating to "law" which seek to counter arbitrariness, and those requiring that all restrictions on fundamental rights are "necessary" and "proportionate" to a clearly-defined "legitimate aim". They also expressly affirm that it must be possible to challenge freezing before a court.

Concerns as to the legality of EU responses to UN measures

Olivier[58] notes that

> While ordering numerous far-reaching anti-terrorist measures, which potentially impact on civil liberties and domestic criminal law, Resolution 1373 does not explicitly make these measures conditional on the duty of States to respect international law, in particular human rights and international humanitarian law (IHL). The potential impact of this lack of qualification must be underlined for several reasons: (1) the Security Council does not define terrorism; (2) the Resolution is very broad in its content; (3) its effects are not limited to a particular country, and (4) it has neither implicit nor explicit time limitation. Consequently, representatives of the Office of the High Commissioner for Human Rights (OHCHR) were anxious about a possible misapplication of Resolution 1373 which would have a negative impact on human rights and civil liberties.[59]

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[58] Olivier, Clémentine (2004) "Human Rights Law and the International Fight Against Terrorism: How do Security Council Resolutions Impact on States' Obligations Under International Human Rights Law? (Revisiting Security Council Resolution 1373)" v.73 Nordic Journal of International Law pp.399-419

[59] The United Nations High Commissioner for Human Rights indeed considered that "serious human rights concerns...could arise from the misapplication of resolution 1373 (2001)" (Report of the High Commissioner submitted pursuant to General Assembly 48/14, 'Human rights: a uniting framework'(E/CN.4/2002/18), para. 31). Similarly, the Director of the New York Office of the OHCHR considered that "[t]he misapplication of Security Council resolution1373 could lead to unwarranted infringement on civil liberties" (Presentation given to the CTC by the Director of the New York Office of the Office of the High Commissioner for Human Rights, Mr. Bacre Waly Ndiaye, 11 December 2001 (S/2001/1227)).

Andersson, Cameron and Nordback have taken an uncompromising stance on the EU regime.[60] They wrote, in 2003:

> "We consider that Council Regulations 467/2001 (now repealed) and 881/2002, and
>
> the relevant Commission Regulations issued under these, are invalid. We consider that the system of blacklisting created by Regulation 2580/2001 is not an appropriate
>
> way to deal effectively with the problem of freezing terrorist assets. The question, might, however, be asked as to what good it would do for the CFI/ECJ to find these regulations invalid? After all, the Security Council Resolutions underlying regulations 467/2001 and 881/2002 continue to bind EU states individually. We feel we have shown that there are sufficient good reasons at the EU level for abandoning the present system, whatever happens at UN level."[61]

Cameron has strengthened his position in an article published in 2003,[62] and in his paper prepared for the Council of Europe in 2006.[63] He wrote, in the latter paper:

> "The position taken in the present study is that either the adoption by ECHR state parties acting in the Security Council of targeted anti-terrorist sanctions containing no equivalent safeguards and/or the implementation by ECHR state parties of these sanctions in their territories is contrary to general human rights principles as embodied in the ECHR… But as there is no necessary conflict between UN targeted sanctions and the ECHR, the principle of good faith means that Article 103 cannot be invoked by a state party to the ECHR, either when it is acting within the Security Council and/or when it is implementing a Security Council resolution, to avoid its obligations under the ECHR, and to avoid responsibility for breaching the ECHR."[64]

At least one Swedish colleague of Cameron's disagrees. Göran Lysén wrote:

> "Accordingly, the conclusion is inevitable, namely that the UN Security Council acted legally in naming suspected individual terrorists in its resolutions, and that states acting upon these resolutions performed their obligations according to the Charter… This absence of legal remedies may appear disturbing at first glance but the resolutions are nevertheless valid according to the Charter and take precedence over all other international obligations as well as domestic law."[65]

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[60] Andersson, Torbjörn; Cameron, Ian; and Nordback, Kenneth (2003) "EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale" European Business Law Review pp.111-141

[61] Ibid at p.141

[62] Cameron, Iain (2003) "UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights"v.72 n.2 *Nordic Journal of International Law* pp. 159-214(56)

[63] Cameron, Iain (2006) "The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions" Report for the Council of Europe, at http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/Texts_&_Documents/2006/I.%20Cameron%20Report%2006.pdf

[64] Ibid, p.3

[65] Lysén, Göran (2003) "Targeted UN Sanctions: On the issue of legal sources and their application and also some procedural matters" *Swedish Institute of International Law, Uppsala University*

at www-hotel.uu.se/juri/sii/pdf/sancorr.pdf, at p.9

Legal challenges

I have already noted grave concerns concerning the impact of these measures expressed by a number of scholars and human rights protection NGOs.[66] It should come as no surprise that attempts have been made to seek remedies in national and European (ECJ and ECtHR) judicial instances.

The Watson Institute notes:

> There are 15 known cases of targeted individuals and organizations who have initiated legal proceedings before national and regional courts. Legal challenges have been presented to the national courts of Belgium, Italy, Switzerland, The Netherlands, Pakistan, Turkey, and the United States of America. Before those national courts, individuals complained about being listed by the UN or directly about the sanctions themselves. In other cases, the national designation was challenged, or the court was asked to compel the home state to start a delisting procedure. Consequently, the character of national cases varies. Most of these cases are still pending. In addition to these national cases, claimants have also turned to regional European courts.

Neither the legislation on the "terrorist" lists (Common Position 2001/931 and Regulation 2580/2001) or on the incorporation of UN sanctions framework (Regulation 881/2002) make any provision for individuals or groups to challenge the incorrect freezing of assets as a result of erroneously being included. Moreover, the validity of EU Common Positions cannot be challenged before the Court of Justice, and national courts cannot ask the European Court questions about their validity or interpretation. However, those subject to freezing orders can apply to a member state requesting a "specific authorisation" to unfreeze funds and resources. After consultation with the other Member States, the Council of the EU and the European Commission the requested state can reject the application or grant the specific authorisation.

The Regulation and Decisions implementing them are subject to possible rulings by the European Court of Justice on their interpretation or validity, but this is undermined for Regulations connected to the Common Position. Thus, the only possible legal remedies are general principles of EU/EC law. There are two methods formally available at the EU level and several other possible avenues which commence with national litigation.

First, a Council Decision can be challenged by an annulment action according to Article 230 TEC. Second, damages may be sought from the Community institutions if there is harm as a result of their unlawful acts under Article 288 EC (the unlawful act for EU external blacklisted people and groups would be the freezing of their assets, whereas EU internal blacklisted people and groups would probably only be able to

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[66] See also Cole, David (2003) "The New McCarthyism: Repeating History in the War on Terrorism" v.38 *Harvard Civil Rights – Civil Liberties Law Review* pp.1-30; and Human Rights Watch (2003) "In the Name of Counter-Terrorism: Human Rights Abuses Worldwide" 25 March, briefing paper for the 59th Session of the UN Commission on Human Rights

complain about damage to reputation). A number of cases have been lodged on these grounds (see the first Annex below).

Less likely is the possibility that a listed "EU external" person or entity has assets (for example, a bank account) within an EU state which is frozen. That person or entity could, theoretically, bring an action under national law for breach of national law (for example, contract law) against the entity (the bank) for refusing to allow access to the asset (the account). The bank in turn will defend its action by reference to the regulation. The national court would than have to decide the issue of the lawfulness of the regulation, in turn (usually) requiring a request to the ECJ for a preliminary ruling under Article 234.

It is also possible to argue, before the European Court of First Instance, on the basis of the "Borelli principle" that the Council decision is invalid because there is no valid and correct decision by a national competent authority justifying a blacklisting. Under EC case law, national decisions must be motivated by reference to objective and reviewable criteria, including where this is relevant, expert opinions and recommendations. Alternatively, one can challenge whether the considerations by the Council justifying the blacklisting decision are reasonable and proportional.

Finally, one can argue that the preparatory decisions of the competent national authority and/or the Council decision violate fundamental rights. Even though the Charter on Fundamental Rights does not (yet) have a binding legal status, according to the well established case-law of the ECJ and Article 6 TEU, the EC is bound to respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law.[67]

Lawyers for one of the proscribed individuals have also challenged - unsuccessfully - the EU Council's decision to refuse access to the documents relating to the decision to include their client on the "terrorist" list.

These measures were challenged most recently in the cases of *Faraj Hassan v Council of the European Union and European Commission*[68] and *Chafiq Ayadi v Council of the EU*[69], heard by the Court of First Instance on 12 July 2006

Mr. Ayadi is a Tunisian national resident in Dublin while Faraj Hassan is a Libyan national held in Brixton Prison pending extradition to Italy. Both challenged their inclusion on the UN "terrorist list" (of supporters of Al-Qaeda or the Taleban), which is incorporated into EU law under Council Regulations. Both cases were dismissed - taking the number of unsuccessful challenges to proscription at the CFI to 8 - though there an interesting spin was put on the rights of the individuals concerned to compel

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[67] See Cameron, Iain (2003) "UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights"v.72 n.2 Nordic Journal of International Law pp. 159-214(56)

[68] Case T-49/04

[69] Case T-253/02

their governments to raise questions in the Security Council. This so-called "diplomatic remedy" is currently the only chance of de-listing on offer to affected individuals.

Ben Hayes of *Statewatch* commented:

> "With respect, the repeated rulings by the CFI that being listed by the UN Security Council as a supporter or associate of Osama Bin Laden, Al Qaeda or the Taleban "does not prevent the individuals concerned from leading a satisfactory personal, family and social life" is plainly wrong. In today's political climate it is hard to think of a more serious allegation than being publicly branded a "terrorist" – whether by the UN, EU or national governments – never mind the crippling effect of the sanctions themselves. The fact remains that these regimes are a recipe for arbitrary, secretive and unjust decision-making. Unless procedures are introduced allowing affected parties to know and challenge the allegations against them in a court of law the "terrorist lists" will continue to lack legitimacy." [70]

Mr Ayadi had been in custody in the UK since 16 May 2002

The threat to the right to privacy

The *Anti-terrorism Crime and Security Act 2001* ("ACSA") and the *Terrorism Act 2000* are the statutory basis for United Kingdom response to terrorism. Statutory instruments such as the *Terrorism (UN Measures) Order 2001* and the *Al-Qa'ida and Taliban (UN Measures) Order 2002* implement the various United Nations measures against terrorism.

The United Kingdom had within a year frozen the assets of over 100 organisations and over 200 individuals acting under these Orders but no executive orders have yet been made by the United Kingdom Treasury under ACSA. ACSA brought in new provisions for the seizure and detention of terrorist cash (section 1), the freezing of assets by Executive Order (section 4), the enhanced obligation to disclose information for the regulated sector only (section 3 and Schedule II, Part III), disclosure of information between government bodies (sections 17-20), powers to obtain financial information (Schedule II amending section 38 and Schedule VI *Terrorism Act 2000*) and restraint and forfeiture (Schedule 2).

Part 3 ACSA provides for the extension of existing disclosure powers which is perhaps one of the most wide ranging changes brought about by ACSA.

These provisions apply to "any criminal investigation whatever which is being or may be carried out, whether in the United Kingdom or elsewhere" as well as any criminal proceedings, the initiation or bringing to an end of any such investigation or proceedings and for facilitating a determination of whether any such investigation or proceedings should be initiated or brought to an end.

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[70] See Statewatch *'Terrorist' Lists: Monitoring proscription, designation and asset-freezing* http://www.statewatch.org/terrorlists/listslatest.html

Writing about the effect of UNSC 1373, and its enactment into UK law by the *Anti-terrorism Crime and Security Act 2001*, Peter Binning commented:

> Whether the wide ranging measures outlined above will prove to be effective in the fight against terrorism remains to be seen. What is certain is that the price of justice is changing and the protections for the privacy and property rights of the citizen are changing with it; not just in relation to terrorism, but for all criminal investigations. The powers of disclosure of information provided in Part 3 of ACSA, relating as they do to all criminal offences, gives rise to serious questions of accountability. There is no mechanism for individuals or organisations to obtain information about any disclosure made which could cause substantial reputational and commercial damage both domestically and overseas. The disclosure powers are extremely wide ranging in that disclosure can be made merely for the purpose of determining whether criminal investigation should be initiated. Existing powers to obtain information by means of mutual assistance in criminal matters are limited to those cases where an investigation has already begun.[71]

It is plain that similar problems exist with regard to other EU and OSCE states.

The threat to procedural human rights guarantees

In the last months there have a number of judicial decisions which appear to nullify the right to procedural guarantees. The problem is as follows: Article 103 of the Charter provides that obligations under the Charter prevail over obligations under any other international agreement. There is no argument that resolutions and decisions of the Security Council are obligations under the Charter. Does this mean that a Security Council resolution can have the effect of "trumping" treaty obligations under human rights treaties?

In a paper for the *European Society of International Law*[72], Noel Birkhäuser raised the following point:

> "A more central question is whether the right to a fair trial and access to court prevails over Article 103 UNC. Affected individuals who are unable to challenge Security Council action against them, cannot assert the violation of other human rights. It is therefore essential for them to be able to obtain some kind of effective review of their situation. Since the Security Council action excludes all forms of challenging its measures before some form of independent tribunal that satisfies the standards of the ECHR and the ICCPR, 'the very essence of the right of access to court is impaired'. Even though Article 14 of the ICCPR is not included in the list of nonderogable rights of Article 4 paragraph 2 of the ICCPR, its core must remain untouchable even to the Security Council. Judicial guarantees relating to due process can even be counted to the *jus cogens*."

On 21 September 2005 the Court of First Instance of the EU's European Court of Justice decided the first two cases on "acts adopted in the fight against terrorism", *Ahmed Ali Yusuf and Al Barakaat International Foundation,* and *Yassin Abdullah*

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[71] Binning, Peter (2002) " 'In Safe Hands?' Striking the Balance Between Privacy and Security – Anti-Terrorist Finance Measures" 6 European Human Rights Law Review pp.737-749, p.748

[72] Birkhäuser, Noah (2005) "Sanctions of the Security Council Against Individuals – Some Human Rights Problems" *European Society of International Law* at http://www.esil-sedi.org/english/pdf/Birkhauser.PDF

Kadi v Council of the European Union and Commission of the European Communities (ECJ Court of First Instance, Case T-306/01 and Case T-315/01)[73].

The cases concerned UN resolutions aimed at Al-Quaeda, Taliban etc, under which all member states are called on to freeze funds and other financial resources. A UN Sanctions Committee has the task of identifying the persons concerned and of considering requests for exemption. The judgments established a "rule of paramountcy": "According to international law, the obligations of Member States of the UN under the Charter of the UN prevail over any other obligation, including their obligations under the ECHR and under the EC Treaty. This paramountcy extends to decisions of the Security Council."

The CFI dealt expressly with the question of Article 103:

> 233. As regards, second, the relationship between the Charter of the United Nations and international treaty law, that rule of primacy is expressly laid down in Article 103 of the Charter which provides that, '[i]n 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'. In accordance with Article 30 of the Vienna Convention on the Law of Treaties, and contrary to the rules usually applicable to successive treaties, that rule holds good in respect of Treaties made earlier as well as later than the Charter of the United Nations. According to the International Court of Justice, all regional, bilateral, and even multilateral, arrangements that the parties may have made must be made always subject to the provisions of Article 103 of the Charter of the United Nations (judgment of 26 November 1984, delivered in the case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), *ICJ Reports*, 1984, p. 392, paragraph 107).

The CFI further decided:

> 271 Where, acting pursuant to Chapter VII of the Charter of the United Nations, the Security Council, through its Sanctions Committee, decides that the funds of certain individuals or entities must be frozen, its decision is binding on the members of the United Nations, in accordance with Article 48 of the Charter.
>
> 272 In light of the considerations set out in paragraphs 243 to 254 above, the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of such a decision according to the standard of protection of fundamental rights as recognised by the Community legal order, cannot be justified either on the basis of international law or on the basis of Community law

The CFI drew a clear distinction between *jus cogens* rights, for example the right not to be tortured or subjected to inhuman or degrading treatment, and other human rights, for example procedural rights, or other fundamental rights.

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[73] Press release at europa.eu.int/cj/en/actu/communiques/cp05/aff/cp050079en.pdf; text of the judgments at http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=T-306/01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100; and http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=T-315/01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

> 337 In this action for annulment, the Court has moreover held that it has jurisdiction to review the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person.
>
> 338 On the other hand, as has already been observed in paragraph 276 above, it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order.

Professor Steve Peers has commented:

> "The Court then rules that it cannot examine the legality of Security Council acts from the perspective of EC law, even from the perspective of human rights law. But it can examine the legality of Security Council resolutions to see if they violate *'jus cogens'* -- the rule of international law that there are some international rules so important that they take precedence over every other form of international law. This is believed to be the first time that an EU Court has even referred to the principle of *'jus cogens'*, never mind applied it to a specific case. Finally, the Court then examines whether any *jus cogens* rules are violated in this case as regards the right to property (with a brief mention of the right to be free from inhuman or degrading treatment), the right to a fair hearing and the right to a judicial remedy. It concludes that such rules have not been broken."[74]

The English Court of Appeal summarised the effect of the cases as follows:

> "… the court held (at paras 213-226) that the obligations of the members of the European Union to enforce sanctions required by a Chapter VII UN Security Council resolution prevailed over fundamental rights as protected by the Community legal order or by the principles of that legal order. The court also held that it had no jurisdiction to inquire into the lawfulness of a Security Council resolution other than to check, indirectly, whether it infringed *ius cogens*, "understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible… [restricted to] aggression, genocide, slavery and racial discrimination, crimes against humanity and torture, and the right to self-determination."

The Court of Appeal case referred to above was the decision, on 29 March 2006, in *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda)* v *Secretary of State for Defence*[75] .

The Court of Appeal followed the ECJ in holding that a UN Security Council Resolution, in this case UNSCR 1546 (2004) of 8 June 2004, purporting both to end the occupation and to permit internment, trumps all human rights except *jus cogens*. The Court concluded:

> "There is inevitably a conflict between a power to intern for imperative reasons of security during the course of an emergency, and a right to due process by a court in more settled times. In my judgment, Article 103 does give UNSCR 1546 (2004) precedence, in so far as there is a conflict. This is not to say that those whose task it is to determine whether internment is necessary for imperative reasons of security must not approach their duties with all due seriousness, when the right to personal liberty is in question. In particular they should ask themselves whether internment is a proportionate response to the threat to security posed by

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[74] http://www.statewatch.org/terrorlists/terrorlists.html

[75] C1/2005/2251, [2006] EWCA CIV 327

the internee. It has not been suggested that either of the major-generals who were concerned with the review decisions (see para 10 above) could be faulted in their approach…"

Lord Justice Brooke concluded with a chilling Addendum:

> 111 As an addendum to this judgment it is worth noting that in the last great emergency imperilling this nation's legislation was enacted to confer powers of internment similar to those that are in issue in the present case. Section 1 of the Emergency Powers (Defence) Act 1939 created the rule-making power and Regulation 18B(1) of the Defence (General) Regulations 1939, whose terms are set out in a footnote in *Liversidge v Anderson* [1942] AC 206, 207, created the power of detention. Lord Denning describes in The Family Story (Butterworths, 1981) at pp 129-130 how that power was exercised in practice in 1940 and 1941 when in the persona of Alfred Denning QC he was the legal adviser to the regional commissioner for the North-East Region:
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> > "Most of my work in Leeds was to detain people under Regulation 18B. We detained people, without trial, on suspicion that they were a danger. The military authorities used to receive -- or collect -- information about any person who was suspected: and lay it before me. If it was proper for investigation I used to see the person -- and ask him questions -- so as to judge for myself if the suspicion was justified. He could not be represented by lawyers."
>
> 112 The equivalent arrangements, for the purposes of the emergency in Iraq, are described by General Rollo in his witness statement. Apart from the technical matters which the Divisional Court put right there is no challenge to the appropriateness of the procedures adopted for internment in accordance with the Security Council's mandate. The issue is rather that Mr Al-Jedda should be permitted access to a court of law where he could answer a charge against him and test the evidence against him before an independent judicial tribunal. I am satisfied that he has no such entitlement."

The case of Professor Sison

This a particularly striking case of inclusion in the list, and asset-freezing, with respect to an individual. Jose Maria Sison, Founding Chairman of the Communist Party of the Philippines and currently Chief Political Consultant of the National Democratic Front of the Philippines, as since 1987 resided in the Netherlands where he is seeking asylum as a political refugee. He has been placed on "terrorist lists" by the USA, by the Netherlands Government, and finally by the European Union.[76] On 6 February 2003 he applied to the CFI for the following remedy:

> "Partial Annulment in regard to the inclusion of Professor Jose Maria Sison of Council Decision of 12 December 2002 (2002/974/EC) implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/848/EC (OJ of the European Communities, n° L 337 of 13/12/2002, p.85 and 86)".[77]

On December 27, 2001, the Council of the European Union adopted Council regulation 2580/2001 on specific restrictive measures against certain persons and

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[76] See http://www.defendsison.be/index.php?menu=1

[77] The text of his application is to be found at: http://www.defendsison.be/pdf/ApplicationSison.pdf

entities with a view to combating terrorism (OJ of the European Communities, n° L 344 of the 28/12/2001, p. 70-75). This regulation (in Article 2 thereof) imposes sanctions which includes: freezing of funds and prohibiting the rendering of financial services:

"1. Except as permitted under Articles 5 and 6:

(a) all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included in the list referred to in paragraph 3 shall be frozen;

(b) no funds, other financial assets and economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3.

2. Except as permitted under Articles 5 and 6, it shall be prohibited to provide financial services to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3."

These sanctions are without doubt very serious, since Article 1 of the regulation defines the notions of financial assets and economic resources so broadly.

The background is as follows. On 9 August 2002 the US Secretary of State designated the Communist Party of the Philippines/New People's Army (CPP/NPA) as a "foreign terrorist organization". The US Treasury Department, particularly its Office of Foreign Assets Control, listed on 12 August 2002 the CPP/NPA and the applicant as targets for asset freeze. The Dutch Foreign Minister issued on 13 August 2002 the "sanction regulation against terrorism" listing the NPA/CPP and the applicant as the alleged Armando Liwanag, chairman of the CC of the CPP as subject to sanctions

On 28 October 2002, the Council adopted the decision 2002/848/EC by which Mr. Jose Maria SISON as a natural person (Article 1, 1.9. "SISON, Jose Maria (aka Armando Liwanag, aka Joma, in charge of NPA) born 8.2.1939 in Cabugao, Philippines" and the New People's Army (NPA), as a group or entity presumed erroneously to be linked to the applicant (Article 1, 2. 13. "New Peoples Army (NPA), Philippines, linked to Sison Jose Maria C. (aka Armando Liwanag, aka Joma, in charge of NPA", were included in the list pertinent to art. 2 § 3 of Regulation 2580/2001. This decision drew up the fourth list adopted under the terms of Regulation 2580/2001.

On 12 December 2002, the Council adopted the decision 2002/974/EC repealing the previous decision 2002/848/EC. The new decision mentioned Mr Sison under art. 1, 1.25 and 2.19 in identical terms as the previous decision. This was the act being contested insofar as it included Prof. Jose Maria Sison in the list and thereby allegedly violated his democratic rights and interests.

His application listed the following consequences for him of inclusion in the list:

> "Such a provision involves the loss of free disposition and a total dispossession of all the financial assets of the applicant. He can no longer make the least use of the entirety of his assets.

> Excluding the applicant from all bank- and financial services deprives him from the possibility to obtain effective compensation for the violation of his basic human rights by the Marcos-regime as granted to him by a US court as well as from the possibility to benefit from an income from lectures and publishing books and articles and from possible regular employment as a teacher.
>
> The freezing of Prof Sison's joint bank account with his wife and the termination of social benefits from the Dutch state agencies deprive him of basic necessities and violate his basic human right to life. The termination of said benefits should never be done for an undefined period of time under the pretext of antiterrorism.
>
> The practical consequences of the decision are extremely harsh and cannot be justified by the avowed objectives of the Regulation to combat the financing of terrorism."

The proceedings, in which Prof Sison is represented by Jan Ferman and other advocates from Belgium and The Netherlands, are continuing. On 26 April 2005, in Joined Cases T-110/03, T-150/03, T-405/03 *Jose Maria Sison v Council*, the CFI dismissed Mr Sison's action for the annulment of three Council decisions refusing him access to the documents underlying the Council's decision to include him on the list of persons subject to specific restrictive measures aimed at the combating of terrorism – Article 2(3) of Regulation (EC) No 2580/2001.

This application has been made alongside his proceedings under Article 230 EC for the partial annulment of Council Decision 2002/974, which retained his name on the list of persons whose assets are to be frozen pursuant to Regulation No 2580/2001 under Article 241 EC – Case no T-47/03.

The latest development in Case C-266/05 P *Jose Maria Sison v Council* is the Opinion of Advocate General Geelhoed, delivered on 22 Jun 2006.[78] The Advocate General recommends rejection of Prof Sison's application for disclosure of documents.

The *SEGI* cases

The fundamental right to judicial review, the procedural right referred to above, has been considered by both the CFI[79], and by the European Court of Human Rights[80] in the *SEGI* case. SEGI was a Basque youth movement, which requested the CFI to award damages for its allegedly illegitimate inclusion in the list annexed to Common Position 2001/931/CFSP, noted above, which implemented UNSC Resolution 1373 (2001). In the first pillar the Common Position initiated concrete measures by the

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[78] See http://www.statewatch.org/news/2006/jun/sison-ecj-ad-gen-opinion.pdf

[79] T-338/02 *Segi and others v Council*, order of 7 June 2004, [2004] ECR II-01647

[80] *SEGI and others v 15 Member States (SEGI and Gestoras Pro-Amnistia v Germany and others)* App No. 6422/02, decision of inadmissibility of 23 May 2002

Community, such as the freezing of funds (Articles 2,3). In the third, it called upon Member States to exchange information (Article 4). In Article 1 it provided for a definition of the term "terrorist act", applicable across all three pillars. In its Annex it set out a list of persons to whom the measures applied, including SEGI. A footnote to the list specified that SEGI, among others, should be the subject of Article 4 only. Article 4 was addressed to Member States and called upon them to assist each other through police and judicial cooperation. Thus, Articles 2 and 3 did not apply to SEGI, and the Community was not required to freeze its funds.

The Second Chamber of the CFI rejected SEGI's action on competence grounds only, and did not consider the substance of its grievances. In brief, it had no remedy because it had not been made subject to a Community measure, that is, asset freezing.

As Christina Eckes comments:

> "SEGI was left without any legal protection… the… case demonstrates forcefully that being listed as someone supporting terrorism will not in itself open the way to the Courts."[81]

She disagrees strongly with the Court's rejection of the argument that the rule of law and fundamental rights, in particular the rights to access to justice enshrined in articles 6 and 13 of the ECHR, require the exercise of judicial control – "even in the absence of a specific competence norm".[82] She points out that "A listing in an anti-terrorist measure constitutes a considerable impairment of the target's right to reputation[83], as well as her property rights."[84]

The European Court of Human Rights also refused to consider the substance of the applications, but dealt with them on the issue of standing. It noted that:

> "…these two common positions are designed to combat terrorism through various measures aimed in particular at blocking the financing of terrorist networks and the harbouring of terrorists. They form part of wider international action undertaken by the United Nations Security Council through its Resolution 1373 (2001), which lays down strategies for combating terrorism, and the financing of terrorism in particular, by every possible means. In that connection, the Court reaffirms the importance of combating terrorism and the legitimate right of democratic societies to protect themselves against the activities of terrorist organisations (see *Zana v. Turkey*, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2548, § 55, and *Mattei v. France* (dec.), no. 40307/98, 15 May 2001)."[85]

The Court reiterated that

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[81] Eckes, Christine (2006) "How Not Being Sanctioned by a Community Instrument Infringes a Person's Fundamental Rights: The Case of *Segi*" v.17 n.1 *Kings College Law Journal* pp.144-154

[82] Eckes, ibid, p.148

[83] As in *Bladet Tromso and Stensaas v Norway* Application no. 21980/93, judgment of 20 May 1999

[84] Eckes, ibid, p.149

[85] decision of inadmissibility of 23 May 2002, pp.7-8

> "… Article 34 of the Convention "requires that an individual applicant should claim to have been actually affected by the violation he alleges" and "does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment" (see *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, pp. 17-18, § 33)."[86]

It further stated

> Moreover, the applicants have not adduced any evidence to show that any particular measures have been taken against them pursuant to Common Position 2001/931/CFSP. The mere fact that the names of two of the applicants (Segi and Gestoras Pro-Amnistía) appear in the list referred to in that provision as "groups or entities involved in terrorist acts" may be embarrassing, but the link is much too tenuous to justify application of the Convention.[87]

Eckes comments that "the Court's conclusions that the listing "*peut être gênant*" amounts to an ironic comment in the light of its effects on the situation, or even the existence, of the applicants."[88] She concludes:

> "The CFI… did not satisfy the fundamental principles upon which the Union is built and which the Courts have upheld in the past. This is deplorable. It not only infringes fundamental rights in the individual case, but it also harms the objective of promoting fundamental rights as such. Additionally, the doubtful factual basis on which the European blacklists are drawn up and the fact that the ECtHR did not show itself ready to grant protection of last resort, render the situation even more alarming."[89]

Her conclusion is also of great relevance to this Background Paper as a whole.

Safeguards

Two sets of safeguards have been proposed by authoritative sources.

On 27 April 2006, the United Nations Secretary General launched "Uniting against terrorism: recommendations for a global counter-terrorism strategy"[90]. This included the following:

> 117. Another highly important issue relates to the topic of due process and listing. In paragraph 109 of the 2005 World Summit Outcome, the Security Council is called upon, with my support, to ensure that fair and clear procedures exist for placing individuals and entities

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[86] decision of inadmissibility of 23 May 2002, p.6

[87] decision of inadmissibility of 23 May 2002, p.9

[88] Eckes, ibid, p.152

[89] Eckes, ibid, p.154

[90] www.un.org/unitingagainstterrorism/contents.htm

on sanctions list and removing them, as well as for granting humanitarian exemptions. Pursuant to that mandate, and in accordance with paragraph 20 of the report on the implementation of decisions from the 2005 World Summit Outcome for action by the Secretary-General (A/60/430), I have asked the Office of Legal Affairs of the Secretariat to begin an interdepartmental process, in close cooperation with the Department of Political Affairs and OHCHR, to develop proposals and guidelines that would be available for consideration by the Security Council. In the meantime, the Committee established pursuant to resolution 12671999) has approved a partial revision of its Guidelines and is urged to continue its discussions of listing and de-listing, including those recommendations from the reports of the Analytical Support and Sanctions Monitoring Team of the Committee, which has consistently pointed to the need to address these issues.

118. Upholding and defending human rights — not only of those suspected of terrorism, but also of those victimized by terrorism and those affected by the consequences of terrorism — is essential to all components of an effective counterterrorism strategy. Only by honouring and strengthening the human rights of all can the international community succeed in its efforts to fight this scourge.

Bardo Fassbender was commissioned by the United Nations Office of Legal Affairs – Office of the Legal Counsel to prepare a study as part of this strategy. He proposed the following:[91]

"Every measure having a negative impact on human rights and freedoms of a particular group or category of persons must be necessary and proportionate to the aim the measure is meant to achieve."

(p.8) "12. While the circumstances and modalities of particular sanctions regimes may re quire certain adjustments or exceptions, the rights of due process, or "fair and clear procedures", to be guaranteed by the Security Council in the case of sanctions imposed on individuals and "entities" under Chapter VII of the UN Charter should include the following elements:

(a) the right of a person or entity against whom measures have been taken to be informed about those measures by the Council, as soon as this is possible without thwarting their purpose;
(b) the right of such a person or entity to be heard by the Council, or a subsidiary body, within a reasonable time;
(c) the right of such a person or entity of being advised and represented in his or her dealings with the Council;
(d) the right of such a person or entity to an effective remedy against an individual measure before an impartial institution or body previously established. "

Iain Cameron, in his recent study for the Council of Europe's CAHDI (Committee of Legal Adviser on Public International Law)[92] has also argued as follows:

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[91] Fassbender, Bardo (2006) "Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter." Report for CAHDI (Committee of Legal Advisers on Public International Law) Doc. CAHDI (2006) 23, 17 August 2006, commissioned by the UN Office of Legal Affairs – Office of the Legal Counsel, 20 March 2006, at www.un.org/law/counsel/Fassbender_study.pdf. The views expressed in the study are solely those of the author and do not necessarily reflect the views of the UN

> "… if a system of legal safeguards can be devised to reconcile UN and regional human rights norms with targeted sanctions norms, then there is no conflict between these two sets of norms. The lack of safeguards built into the UN system is not inherent, or unavoidable. Thus, there is no logical incompatibility between the requirements of human rights and the obligations flowing from the UNC. The whole purpose of human rights is to place reasonable limits on absolute power. If states' obligations to comply with human rights are to have any significance, then it must mean that these states bound by human rights, when acting together in the Security Council must design targeted sanctions, and other states must implement them, so as not to violate human rights. For all the actors involved – the ECJ, the ECtHR, the European members of the Security Council and the Security Council itself - it would presumably be greatly preferable if the necessary equivalent standards were put in place at the UN level, thus avoiding the risk of a confrontation."

I associate myself with this position – which should, in an ideal world, be implemented.

Furthermore, the Watson Institute for International Studies at Brown University has made some useful proposals[93]:

> To address shortcomings of existing UN Security Council sanctions committee procedures, we recommend the following proposals:
>
> **Listing**
>
> 1. Criteria for listing should be detailed, but non-exhaustive, in Security Council resolutions.
>
> 2. Establish norms and general standards for statements of case.
>
> 3. Extend time for review of listing proposals from two or three to five to ten working days for all sanctions committees.
>
> 4. To the extent possible, targets should be (a) notified by a UN body of their listing, the measures being imposed, and information about procedures for exemptions and delisting, and (b) provided with a redacted statement of case indicating the basis for listing.
>
> **Procedural issues**
>
> 1. Designate an administrative focal point within the Secretariat to handle all delisting and exemption requests, as well as to notify targets of listing.
>
> 2. Establish a biennial review of listings.

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[92] See http://www.coe.int/t/e/legal_affairs/legal_co%2Doperation/public_international_law/Texts_&_Documents/2006/I.%20Cameron%20Report%2006.pdf

[93] Watson Institute (2006) "Strengthening Targeted sanctions Through Fair and Clear Procedures" White Paper prepared by *Targeted Sanctions Project, Brown University*, at http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf

3. Enhance the effectiveness of sanctions committees by establishing time limits for responding to listing, delisting, and exemption requests, as well as by promulgating clear standards and criteria for delisting.

4. Increase the transparency of committee practices through improved websites, more frequent

press statements, and a broader dissemination of committee procedures.

Options for a Review Mechanism

Beyond procedural improvements, there is a need for some form of review mechanism to which individuals and entities may appeal decisions regarding their listing. Options to be considered include:

1. A review mechanism under the authority of the Security Council for consideration of delisting proposals.

a) Monitoring Team–expand the existing group's mandate.

b) Ombudsman–appoint an eminent person to serve as interface with UN.

c) Panel of Experts–create panel to hear requests.

2. An independent arbitral panel to consider delisting proposals.

3. Judicial review of delisting decisions.

All of these proposals should be taken into account in a comprehensive survey of the human rights issues raised by asset freezing.

Conclusion – asset-freezing

Christian Tomuschat has commented:

> "In the long run, such a denial of legal remedies is untenable. To be sure, no one wishes to protect Al-Qaeda or the Taliban. But the freezing of assets is directed against persons alleged to have close ties to these two organisations. Everyone must be free to show that he/she has been unjustifiably placed under suspicion and that therefore the freezing of his/her assets has no valid foundation." [94]

This is the conclusion also reached by Mark Bossuyt, in his working paper "The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights"[95]

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[94] Tomuschat, Christian (2003) *Human Rights: Between Idealism and Realism* (Oxford: OUP), p.90

[95] "The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights

105. When serious allegations of violations under a sanctions regime are brought to the attention of the sanctions-imposing body, that body should be deemed to have received "notice" and accordingly should undertake immediate review of and make appropriate adjustments to the sanctions regime. A sanctions regime deemed to have gone on too long and with inadequate results should be ended.

106. The full array of legal remedies should be available for victims of sanctions regimes that are at any point in violation of international law, if the imposer refuses to alter them. In this light the relevance of the Sub-Commission study on compensation (98) and ongoing initiatives in this area should be pointed out. Thus, complaints against specific sanctions-imposing countries could be lodged by either a civilian victim or the sanctioned country itself in a national court, in a United Nations human rights body having competence over the matter, or in a regional body. A sanctioned country could also bring an action before the International Court of Justice providing that the requisite declarations have been made pursuant to article 36, paragraph 2, of the Court's Statute.

107. Difficulties in regard to remedies for civilian victims arise when the sanctions are imposed by the United Nations itself or by a regional body. Victims may not be able to file directly against the entity itself. However, the sanctions-imposing entity may still be in violation of international norms. What is needed is for these entities - the Security Council, regional governmental organizations or regional defence pacts - to establish special mechanisms or procedures for relevant input from non-governmental sources regarding sanctions, including, especially, civilian victims.

This Report associates itself with the recommendations for safeguards set out above. In particular, the recent case-law of the ECtHR and the CFI shows that guarantees of procedural safeguards are now of vital importance.

Review of Further Developments in Fields with Which the Subcommission Has Been or May Be Concerned" *The Bossuyt Report* Economic and Social CouncilUN doc. E/CN.4/Sub.2/2000/33, at http://www.globalpolicy.org/security/sanction/unreports/bossuyt.htm

OSCE/OHCHR Workshop on Judicial Co-operation

Liechtenstein, 15-17 November 2006

Human Rights Law and Judicial Co-operation in the field of counter-terrorist activities

Françoise J. Hampson*

1. INTRODUCTION

When States seek to introduce new measures to address the threat of terrorist attack, they often encounter the argument that such changes violate human rights law. It is not necessarily the case that a change in domestic procedures and practices entails a violation of human rights law.

This paper seeks to identify the human rights issues raised by judicial co-operation in the area of counter-terrorism. It is not examining the arrangements in place at the regional and international level in the field of judicial co-operation.[1] Those are taken as a given. Nor is it dealing with judicial co-operation in relation to every type of criminal conduct. It is limited to judicial co-operation in the sphere of what a State defines, in its own legal system, as a terrorist activity.[2] It does not address the full range of human rights issues which are raised by counter-terrorist measures but only those which arise in the context of inter-State judicial co-operation.

The report starts by examining certain general introductory issues in relation to human rights law. It then adopts a chronological approach to the issues, starting with the gathering of information at the request of another State and its transfer to

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[1] It is hoped that, some time after the workshop, a link will be established via the web-site of the Human Rights Centre of the University of Essex (http://www2.essex.ac.uk/human_rights_centre/) to a site providing materials or the web-site address of materials relating to judicial co-operation. It would include treaties, resolutions, judgments, some domestic legislation and reports. It would not claim to be comprehensive but it would be substantial.

[2] For this reason, it has not been thought necessary or desirable to attempt to define "terrorist" activity. The breadth or vagueness of a national definition may give rise to difficulties; see further the discussion of criminal offences below.

that State and followed by a brief examination of extradition. Judicial proceedings involving evidence gathered abroad are then considered, before a brief examination of what happens after those proceedings are concluded.

The aim is to identify the relevant human rights issues but not necessarily to resolve them. This is for two principal reasons. First, States have different human rights obligations. Judicial co-operation is not limited to OSCE States, which may have a higher rate of ratification of human rights treaties than at least some non-OSCE States. Second, a determination that human rights law has been violated is usually situation-specific and depends on an examination of the facts in the context of specific national laws.

2. GENERAL ISSUES UNDER HUMAN RIGHTS LAW

Two general human rights issues need to be addressed at the outset. The first concerns the relationship between national law and international law. The second relates to the possibility of modification of the human rights norm when dealing with terrorist activities.

(a) relationship between national law and international law

Whilst NGOs naturally tend to focus on those States whose law or practice does not conform to their international obligations, many States provide better protection, particularly with regard to due process, than is required by human rights law. Let us take the hypothetical example of such a State. An individual alleges that national authorities violated due process guarantees, thereby violating international human rights law. This poses a problem for a human rights body. It does not want to appear to condone a breach of the State's own national laws, since one of its functions is to uphold the rule of law. It may be that the *fact* of a breach of domestic law itself constitutes a breach of human rights law but that does not necessarily mean that the *content* of the domestic law did not exceed the minimum required for the purposes of human rights law.[3] For example, a State may have very strict rules concerning the protection of privacy and may regard as inadmissible any evidence obtained, directly or indirectly, as a result of a breach of those rules.[4] This may be the standard they use

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[3] In relation to certain rights, the domestic legality of the impugned measure is a prerequisite for the absence of a violation. For example, in a case where the rules with regard to privacy are better protected than required under human rights law but for some other technical reason the search occurs in breach of national law, a human rights body will have to find the search in violation of the treaty, not because the protection of privacy is inadequate but because the search was in violation of domestic law. The converse is not true. Where the measure is lawful under national law, it may nevertheless be unlawful under international human rights law.

[4] E.g., see admissibility of illegally obtained evidence in criminal proceedings in Spain, in *Opinion on the status of illegally obtained evidence in criminal procedures in the Member States of the European Union,* EU Network of Independent Experts on Fundamental Rights, CFR-CDF opinion 3-2003, 30 November 2003, p 24., available at: http://cridho.cpdr.ucl.ac.be/AVIS%20CFR-CDF/Avis2003/CFR-CDF.opinion3-2003.pdf

when refusing to gather information for another State or when declaring inadmissible evidence gathered in another State, in breach of these rules but in conformity with both the other State's national law and international human rights law. In many circumstances, this may be acceptable, as tending to maximise human rights protection. In this particular context, however, two additional arguments need to be taken into consideration. First, States have an obligation to *protect* those in their jurisdiction. Alleged terrorists pose a very real threat to the safety of others. Is it legitimate to acquit an individual on account of the exclusion of evidence where such exclusion is not required by human rights law and where the consequence is the setting free of an individual who would have been convicted but for that exclusion? That issue can also arise in a purely national context. A similar argument can be made in the framework of judicial co-operation. A State requesting co-operation may be able to insist on the requested State acting in conformity with internationally agreed human rights standards but there would appear to be no basis on which the former can insist on the latter acting in conformity with the domestic law of the requesting State. Such a claim would be insulting to the requested State, as it implies that its own standards are not high enough. It would also be impracticable. It would require each requested State to be familiar with police powers, the laws of evidence and other laws in each and every requesting State.

Whilst the more frequently encountered problem is likely to be evidence gathered in breach of human rights law, the more intractable problem may be evidence gathered in conformity with international human rights law but in violation of the law of the requesting State.

(b) Modification of the generally applicable human rights standard in the case of counter-terrorist measures

In the previous sub-section, it was seen that human rights law is a bottom line. Anything below that line is a violation of human rights law but the practice of some States may be well above that line.

A further complication is that, at least in the case of certain rights, that bottom line may not be fixed. Due process guarantees are designed to ensure that the trial as a whole is fair.[5] What that means in the case of burglary may be different from what it means in the case of drug trafficking and different again from what it means in the case of terrorist offences. The normal rule is that evidence against an accused must be given in open court and he has the right to cross-examine witnesses.[6] In a case before

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[5] *Kostovski v. the Netherlands,* ECHR, 20 November 1989, Series A-166, para. 39; *Doorson v. the Netherlands*, ECHR, 26 March 1996, 1996-II, paras. 67; *Lüdi v Switzerland*, ECHR, 15 June 1992, Series A-238, para. 43.

[6] Article 6 of ECHR provides:

"1. In the determination of …any criminal charge against him, everyone is entitled to a fair and public hearing …by an independent and impartial tribunal established by law. …

3. Everyone charged with a criminal offence has the following minimum rights:

(d) to examine or have examined witnesses against him and to

the European Court of Human Rights involving drug trafficking, it was accepted that there was a need to protect the identity of a witness who was an undercover agent.[7] This did not mean that the general rule was simply abandoned. The Court found no violation where the witness was present in court and was cross-examined but was not identified. The attitude of the Court is clear. The normal rule represents the default position. Exceptions may be justified but only if the need for them is established and the solution must make the minimum inroad into the rule necessary to meet the particular need. It may be appropriate to put in place other safeguards.[8] A State will find it difficult to justify a measure which departs markedly from the general rule if there is a possibility of a lesser departure which has not been tried.[9]

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obtain the attendance and examination of witnesses on his behalf

under the same conditions as witnesses against him;

..."

Article 14 of ICCPR provides:

> "1. ... In the determination of any criminal charge against him, …, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> …"

[7] *Van Mechelen and others v. the Netherlands*, 21363/93, 21364/93, 21427/93 and 22056/93, [1997] ECHR 22, judgement of 23 April 1997, para.57 (anonymous testimony by police). Also see, *Kostovski v. the Netherlands,* 11454/85 [1989] ECHR 20, judgement of 20 November 1989; *Lüdi v Switzerland*, *12433/86*, [1992] ECHR 50, judgement of 15 June 1992 (anonymous testimony by an infiltrated officer); *Doorson v. the Netherlands*, 20524/92 [1996] ECHR 14, judgement of 26 March 1996, paras. 69-70 (anonymous testimony by private citizen); *Teixeira de Castro v. Portugal*, 25829/94 [1998] ECHR 52, judgement of 9 June 1998 (anonymous infiltrated police officers); *Fitt v the United Kingdom*, 29777/96 [2000] ECHR 89, judgement of 16 February 2000; *Windisch v. Austria*, 12489/86 [1990] ECHR 23, judgement of 27 September 1990.

[8] E.g. when extending the normal maximum period of detention permitted before a detainee has to be brought before a "judicial officer authorised by law" to confirm the detention; e.g. *Brogan and others v. United Kingdom,* No. 11209/84; 11234/84; 11266/84; 11386/85, [1988] 11 *EHRR* 117, judgement of 29 November 1988; *Brannigan & McBride v. United Kingdom,* 14553/89; 14554/89, [1993] 17 *EHRR* 539, judgement of 26 May 1993; and *Aksoy v. Turkey*, 21987/93 [1996] 23 *EHRR* 553, judgement of 18 December 1996.

[9] General comment No.29 – States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, (adopted at the 1950th meeting, on 24 July 2001), para. 4:

> "4. A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is

This type of flexibility is most likely to arise in relation to due process guarantees, the protection of privacy in relation to surveillance, searches and data exchange and in relation to what is required for an investigation to be regarded as effective. One right where there appears to be no, or virtually no, room for flexibility is the prohibition of torture, cruel, inhuman or degrading treatment and another is the prohibition of unacknowledged detention ("disappearances").

In addition to flexibility in the *application* of a human rights norm in different situations, there is the possibility of modifying the *scope* of the norms themselves. This is not the occasion for a detailed discussion of derogation but it is necessary to address the issue briefly.[10]

The Covenant on Civil and Political Rights, the American Convention on Human Rights and the European Convention on Human Rights all make express provision for derogation.[11] This enables a State, in certain defined circumstances, to modify the scope of some, but not all, human rights provision. In order to invoke such a provision, the State has to establish that there exists a "public emergency which threatens the life of the nation".[12] The State should indicate what particular measures it is taking and why they are necessary. The monitoring body will also require that

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> clearlydistinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant. Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party. When considering States parties' reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality."

Also, the case-law of the European Court states that the right to a fair trial is inherent to any democratic society. The court has held that:

"Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied." (*Van Mechelen v. the Netherlands,* note 8, *supra*, para 58).

[10] See generally General comment No.29, *ibid.*

[11] Article 4 of International Covenant on Civil and Political Rights, 1966; Article 15 of European Convention on Human Rights 1950; and Article 27 of the American Convention on Human Rights, 1969.

[12] Declaring a state of emergency at the national level is not sufficient to constitute a derogation. In addition, national law may permit the declaring of a State of Emergency in a wide range of situations than would justify derogation.

any such measures are proportionate to the need. Even potentially derogable rights have a non-derogable core[13] and certain rights are identified as being non-derogable, most notably in this context the prohibition of torture, cruel, inhuman and degrading treatment.[14] In the cases in which a human rights body has had to determine whether or not a State could derogate, the State was faced with *actual* organised political violence of such a scale and character as to interfere significantly with the ordinary functioning of State institutions. It is not clear whether the *threat* of terrorist attack and/or isolated terrorist attacks would be found to justify derogation.[15] Where a human rights norm already includes a degree of flexibility, the State would have to show that that was not sufficient to meet the need. Derogation is potentially most relevant to search and surveillance, detention and due process guarantees.

The State cannot simply invoke its ability to derogate when challenged before a human rights body. There are formal procedural requirements and the derogation would need to be in place at the time of the alleged human rights violation.

It is now possible to examine the issues which may arise during the course of the different phases of judicial co-operation.

3. GATHERING INFORMATION

(a) institutional origin of the information

In the initial phase, the State may not yet have been requested to provide information. It may be gathering it at its own initiative and for its own purposes. Those doing the gathering of the information may be from the police, the military or the intelligence services. Subsequently, particularly in the event of judicial proceedings, the original source of any information may make a difference. Some States, most notably the United States, have erected "firewalls" to prevent the intermingling of intelligence and evidence which may be used in criminal proceedings.[16] This may result in

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[13] General Comment No.29, note 10, *supra*, paras. 6, 8 and 9.

[14] The treaty texts themselves identify which norms are non-derogable. The list varies in different treaties.

[15] The UK submitted a notice of derogation under the ECHR and the ICCPR in relation to a measure taken *post* 9/11, so as to permit detention of foreigners on grounds only applicable to foreigners. The House of Lords ruled that the measure was in breach of the Human Rights Act 1998, before the ECHR or the HRC had the opportunity to comment on it. *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent),* Session 2004-05, [2004] UKHL 56. Also see, the Human Rights Commissioner of the Council of Europe, Opinion 1/2002 -- the exemption to Article 5 § 1 ECHR, adopted by the United Kingdom in 2001, (Dov. Comm DH (2002) 7, 28 August 2002), para 33.

[16] Philip A. Thomas, "Emergency and Anti-Terrorist Power: 9/11: USA and UK", 26 *Fordham International Law Journal* 1193 (2003). Similarly, several EU Member States struggle to improve coordination between the police and intelligence services at the national level (e.g. in France and Germany). The lack of such national coordination makes it especially difficult to coordinate efforts at the European level. See Mirjam Dittrich, *Facing the global terrorist threat: a European response*, European Policy Centre Working Paper No. 14, January 2005, available at:

duplication of effort but does avoid the risk of confused sources of legal authority and reduces the risk of inadvertently revealing the sources of the intelligence. The domestic legal basis on which the police and intelligence services may gather evidence is likely to be significantly different. The distinction between those gathering the information does not, *as such*, appear to raise an issue under human rights law but it may, directly or indirectly, give rise to problems, particularly in any criminal proceedings.

To make the most effective use of the intelligence, there is a need for some degree of information-sharing between different agencies, even if the information retains the particular character imposed by its origin. If intelligence services, for example, are keeping a group under observation and obtain evidence of suspicious activities but do not notify the police, whether or not the police may be able to prevent the commission of a serious criminal offence may depend on whether they happened to be monitoring the same individuals. There may even be an argument that the State is failing in its duty under human rights law to protect those in its jurisdiction if it fails to ensure that evidence of threatening activity is acted upon.

(b) Whether the activity is criminal in each jurisdiction

Once the issue of possible criminal proceedings and trans-border judicial co-operation arises, there may be a problem in relating the information gathered to particular offences in the two jurisdictions. Certain activities may be criminal in one jurisdiction but not in the other or two apparently similar offences may have a different scope in the two places. If the basis for judicial co-operation, as opposed to co-operation between intelligence services, is the possibility of criminal proceedings, differences between the two jurisdictions concerning what is regarded as criminal behaviour could give rise to difficulties. State A might request evidence from State B which the latter would not be able to gather under domestic law because it does not relate to criminal behaviour. Conversely, State A might gather evidence and transfer it to State B, in the expectation that it would be acted upon, when State B's law does not provide a relevant criminal offence. It is not clear that this problem would automatically give rise to a human rights issue but in some circumstances it could do so. It would probably depend on the form and manner of the investigation in question. If it constituted an intrusion into privacy and if that could only be justified by reference to possible criminal charges, then the lack of a relevant criminal offence would result in the investigation violating the human rights of the suspect. The difficulty is that the search would be in one jurisdiction, in which there would be a possible charge, but the determination of the lack of a relevant offence would occur in a different jurisdiction.

The problem is different from the one that may arise at a later stage, where information is needed to assist in the prosecution of an offence that is too vaguely or broadly defined to satisfy the requirement of legality.[17] The problem in this context is that in one jurisdiction the activity is not regarded as criminal. The issue is here is whether it is lawful to gather the information *at all*.

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http://www.theepc.be/en/iwp.asp?TYP=TEWN&LV=187&see=y&t=&PG=TEWN/EN/detail&l=9&AI=459 (accessed on 10 October 2006).

[17] See further below.

(c) the manner in which the evidence is gathered

The issue here is the manner in which the evidence is gathered and not its admissibility in subsequent legal proceedings. Some of the general questions discussed above may be relevant: the requested State may have national rules that have a standard that is higher than human rights law and therefore not gather information which they could have gathered; the standard in the requesting State may be higher than required by international law, as a result of which they do not even make indirect use of information; the requested State may violate human rights law in the gathering of evidence, either as a matter of routine or in the specific case and the requesting State may be widely known to disregard due process guarantees as a matter of routine. Each of those permutations is potentially applicable to the issues identified below.

The manner of gathering the evidence will be affected by the type of evidence being gathered. The legal issues arise from the interplay of those two elements. There would appear to be at least five types of evidence. They cannot be neatly categorised into matters involving people and involving things. The five types include interrogation evidence, whether involving the suspect or witnesses; forensic evidence; interception of communications; search; surveillance and data exchange. National laws often provide general rules for evidence in criminal proceedings and additional special rules regarding evidence of a particular type. Some provisions may apply in all criminal cases, others may apply in a different way depending on the type of crime being investigated and some may only be applicable in the case of certain crimes. Forensic evidence, for example, may be needed in relation to any type of criminal investigation. On the other hand, authorisation to search bank accounts may only be given in relation to certain types of crime. There may be rules of search applicable to all criminal offences but the scope of the rules may be modified when dealing with terrorist offences. All these variables may apply in each jurisdiction.

The manner of gathering the information may give rise to three human rights issues. The first, probably only relevant to interrogation, is the prohibition of torture, cruel, inhuman and degrading treatment. The second, potentially applicable to all the other types of evidence, is the prohibition of unlawful interferences with privacy and, related to that, the right to a remedy for the violation of a human right.

The advantage of the prohibition of torture, cruel, inhuman and degrading treatment is that it provides more certainty than other human rights issues, even if there are difficulties in determining what constitutes inhuman treatment. The prohibition is absolute. It applies irrespective of the offence. The rule itself is not flexible.

None of those advantages attach to the protection under human rights law of the right to privacy. There is no absolute right to privacy. Under the International Covenant on Civil and Political Rights, what is prohibited are "arbitrary and unlawful interferences" in privacy.[18] The concept of arbitrariness requires that the interference

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[18] Article 17 of ICCPR provides:

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

be lawful under national law and necessary and proportionate to the need. The application of those criteria in practice will yield different results depending on whether one is dealing with petty theft or suspected terrorist activities. It is not that the criteria themselves change. That degree of inherent flexibility is both useful and sensible but it does not make life easier for those seeking to determine in advance what will be regarded as a legitimate interference. In addition to inherent flexibility, the right is subject to derogation. Superficially, greater clarity is provided by the European Convention on Human Rights. There can be no interference "by a public authority with the exercise of this right [privacy] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, … for the prevention of … crime, … or for the protection of the rights and freedoms of others." [19]As in the case of the ICCPR, the measure needs to be lawful under domestic law, necessary and proportionate. The ECHR restricts possible necessity to one or more of certain listed grounds. Since what is at issue, in at last one jurisdiction, is the prevention of something it regards as criminal, the grounds for the measure are not likely to give rise to difficulties. Again, under the ECHR, the protection of privacy is potentially derogable.

In practice, it is likely that there will be two problems. In some jurisdictions, national rules on the powers of the police and other security services may not provide adequate protection for the right to privacy. It is perhaps likely that the more frequently encountered problem will be that national laws meet the required standard but a particular application of those laws in an individual case will be found to have violated human rights law.

The right to a remedy is likely to give rise to particular problems in relation to surveillance. The right is applicable not only in the event of what has previously been found to be a violation. In order for a State to provide an effective remedy, it has to ensure that it possible for an individual to raise an *alleged* violation. Is it sufficient if individuals can raise the issue of whether or not they were under surveillance and, if that is answered in the affirmative, then challenge the justification or is it necessary to inform them at some stage that, whether they suspected it or not, they were under surveillance? The European Court of Human Rights has recognised that it will not always be possible to inform the individual, even after the end of surveillance.[20] In its

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It should be noted that this is one of those examples where the fact that an intrusion is unlawful under domestic law may be sufficient to make it a violation of human right law even if the Human Rights Committee would not otherwise have found the search to be unlawful.

[19] Article 8 of ECHR provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[20] *Klass and others v. Germany*, 5029/71 [1978] ECHR 4, judgement of 6 September 1978.

reasoning, the Court laid considerable emphasis on the safeguards against abuse against unwarranted authorisation of surveillance. This suggests that if the national law is seen as easily authorising surveillance measures, more will be expected of the State to enable the individual to challenge the authorisation. In other words, if a State wishes to avoid the problem of being required to notify the individual after the event, its best course of action is to ensure that there are strict criteria and stringent safeguards with regard to the initial authorisation of surveillance.

(d) the transfer of the information gathered

The key issue here concerns what will happen to the information once it is transferred. In this precise context, the question of whether the information was obtained lawfully or not is not generally relevant. The issue is rather the responsibility of the sending State for what will happen subsequently, in the receiving State. A sending State may transfer information without a prior request. It may also transfer information because it has been requested to do so. In that case, it may either already have had the information or, following the request, it may have had to gather the information. It is not clear that the existence or non-existence of a prior request makes any difference to its legal responsibility.

There is an exception to the general rule that, in this context, whether the information was obtained unlawfully or not is irrelevant. The exception concerns evidence obtained as a result of torture, cruel, inhuman and degrading treatment. Activities associated with torture are often characterised as international crimes. If it is an international crime to handle information which is known or can be presumed to have been obtained through such means, then the person effecting the transfer may be potentially subject to criminal proceedings in any jurisdiction.[21] It is far from clear whether, first, it is unlawful to transfer such evidence and, if so, whether it is an international crime. This is in contrast with, for example, transferring the information resulting from an unlawful search. The State may bear responsibility for the unlawfulness of the search but there appears to be no basis on which to suggest that the State bears legal responsibility specifically for the transfer of the resulting information.

There may be both practical and legal issues when transferring information. There is presumably a concern that the receiving State should not reveal the identity of informants and undercover agents and the techniques used to obtain the information. This is not a legal issue, unless the receiving State breaks an agreement entered into with the sending State, in which it is a question of general international law. The legal questions which arise concern the use which will be made of the evidence. There would appear to be basically two issues. The information may be transferred with no expectation that it will be used in criminal proceedings but may be used to commit a human rights violation. The requested State, for example, may have transferred information on the basis of which the requesting State subjected a suspect to interrogation including torture. Generally speaking, this would appear to be too far removed from the actions of the sending State in transferring the information for it to

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[21] This was the concern of Craig Murray, formerly H.M. Ambassador to Uzbekistan. The advice he received from the Foreign Office legal advisers was that the transfer of such information did not constitute complicity under the Convention against Torture.

bear any responsibility for the subsequent torture. Where, however, the receiving State has a widespread practice of torture, the sending State would be expected to know that any suspect might be tortured. Again, this appears to be too abstract and remote a connection to engage the responsibility of the sending State. If, however, the sending State transferred information and specifically requested the interrogation of a suspect and if the receiving State was known to have a widespread practice of torture, the sending State might be expected to address the issue in its request for interrogation. The problem would not be transfer of the information but the request for interrogation.[22]

The other area of potential difficulty concerns the use made of the information transferred in judicial proceedings. Issues of inadmissibility of evidence will be considered below. The question here arises before the start of criminal proceedings. Where a State is notorious for its abuse of due process guarantees, is a State obliged to refrain from the transfer of evidence that would be used in such proceedings? There is reasoning in the decisions of human rights bodies which suggests that it may not be compatible with human rights law to transfer a *person* to a place where he will be subjected to flagrantly unfair proceedings.[23] Does the same reasoning apply to the transfer of information which will be used in such proceedings? Does it make any difference whether the evidence makes an essential contribution to the determination of guilt or is it enough that it will be used in such proceedings, irrespective of the outcome?

The final problem concerns information that is transferred not knowing that it will be used in criminal proceedings but where it is subsequently so used. In such a situation, it would seem unreasonable for the sending State to bear any responsibility for the transfer of information used in flagrantly unfair proceedings, since it did not know that it would be used in that way.

4. TRANSFER OF PERSONS

The transfer of persons occurs in three ways: by means of extradition, acknowledged transfer or unacknowledged transfer

(a) extradition

Another report has dealt with extradition. The only issues which will be briefly touched on here are the possible human rights questions to which extradition can give

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[22] "Cooperation with foreign interrogators abroad", *The UN Convention against Torture (UNCAT)*, House of Lords/House of Commons – Joint Committee on Human Rights, Nineteenth Report of the Session 2005-06, Vol.1, HL Paper 185-I, HC 701 – I, pp. 24-25. The Joint Committee on Human Rights recommended that: "60. In working co-operatively with foreign intelligence agents, whether relying on information supplied by them, attending interrogations, or providing information to enable their apprehension or to be used in such interrogations, safeguards are required to ensure that UK officials do not support or become complicit in the use of torture or inhuman or degrading treatment."

[23] Joint partly dissenting judgments of Judges Bratza, Bonello, Hedigan and Rozakis in *Mamatkulov & Askarov v. Turkey*, 46827/99 & 46951/99, [2005] ECHR 64, judgement of 4 February 2005.

rise. The legal proceedings in the requested State appear to be regarded as public in character.[24] As such, they do not attract the protection of the due process guarantees applicable to civil claims. An individual cannot be transferred to a State where there is a real risk that they will be subjected to torture, cruel, inhuman or degrading treatment.[25] It is not clear whether the existence of guarantees or undertakings would ever be capable of making an otherwise unlawful transfer acceptable. If so, what undertakings are required and what must the sending State do to ensure that the undertakings are respected?[26] A particular difficulty arises where the receiving State has been plausibly alleged to engage in such practices in a systematic or widespread way.[27] It should be noted that prison conditions, in and of themselves, can amount to inhuman treatment. The only solution to the problem to which that gives rise, however unattractive, is for the receiving State to ensure that at least one prison in the State conforms to the Council of Europe's requirements in this field.[28] Finally, there is an argument that it is unlawful to transfer a person to a State in which he is likely to receive a flagrantly unjust trial.[29]

(b) acknowledged transfer

An acknowledged transfer arises where the State admits that it is detaining the individual, whether lawfully or otherwise, and threatens to transfer him other than through the extradition process. This may occur through deportation procedures, whether as a disguised form of extradition or for genuine reasons under the sending State's rules on deportation. Unlike extradition, the transfer has not been sought in the context of future criminal proceedings in the requesting State. It is unlikely that a request for the transfer of the individual will appear on the face of the record but such a request may well have prompted the interest of the sending State. Such transfers will be subject to legal proceedings. Again, they will be regarded as public, rather than civil, in character.[30] The issue of the risk of torture, cruel, inhuman or degrading treatment in the receiving State is again relevant. In addition, since the transfer does not appear to be related to criminal proceedings in the receiving State, the applicant may also be able to invoke the protection of the right to family life, where the deportation would have the effect of breaking up a family unit. The factors that will

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[24] *ibid,* para.80.

[25] For a recent illustration, see *Said v. the Netherlands*, 2345/02 (*sic*), judgment of 5 July 2005.

[26] *Agiza v. Sweden,* Communication No. 233/2003: Sweden. 24/05/2005, UN Doc. CAT/C/34/D/233/2003 (2005). The Committee held that "diplomatic assurances which provided no mechanism for their enforcement did not suffice to protect against the risk of torture and thus did not absolve sending State of its responsibility under CAT article 3." (para 13.4)

[27] The current UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has stated that undertakings would not provide a sufficient protection in the case of States in which torture had been found to occur on a widespread or systematic basis.

[28] Whether detainees in other prisons in the State would successfully be able to invoke discrimination in relation to the prohibition of inhuman treatment is beyond the scope of this paper.

[29] Note 24, *supra*.

[30] *Mamatkulov*, note 24, *supra*, para.80.

be taken into account include the length of time the applicant has spent in the sending State and his family ties there, the extent and nature of his connections with the receiving State and the number and gravity of any criminal convictions.[31]

Another form of acknowledged transfer is likely to be at best only half acknowledged. A State might detain a person and simply put him on a plane, without recourse to any legal proceedings at all.[32] The victim would have no opportunity to challenge what was occurring. If the State admitted publicly or did not deny a plausible allegation that it had acted in this way, it would be difficult to put the case into the same category as the cases in which nothing is known or admitted about the victim. If the detention itself was lawful (e.g. detained on suspicion of having committed an arrestable offence and then immediately put on a plane), the next of kin of the applicant could still raise the interference in the right to family life and the denial of a remedy. In practice, the detention itself may be unlawful, as being in breach of domestic law. The denial of the ability to challenge the lawfulness of the detention would be an aggravating element. In addition to the violations of human rights carried out by the State agents of the sending States, the same issues would arise as in the previous paragraph with regard to what might await the individual in the receiving State.

(c) unacknowledged transfer

In the case of unacknowledged transfer, the individual is detained but the State does not admit that it is detaining him. He is then transferred to another State, where again his detention is not acknowledged. Whilst the term "extraordinary rendition" originally applied to the type of transfers discussed under (b) above, it has increasingly been used to describe this sort of transfer. The process involves multiple and serious violations of human rights law on the part of any State involved in such a process. Many, perhaps most, cases would also come within the definition of a "disappearance". A widespread or systematic practice of "disappearances" is a crime against humanity, under the definition of the Statute of the International Criminal Court.[33] This may give rise to international criminal responsibility.

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[31] See, for example, *Boultif v. Switzerland*, 54273/00 [2001] ECHR 497, judgment of 2 August 2001 and *Üner v. the Netherlands*, 46410/99 [2006] ECHR 873, judgment of 18 October 2006.

[32] *Amerkrane v. United Kingdom*, Application 5961/72:16 *Yearbook European Convention on Human Rights* 356; the case resulted in a friendly settlement.

[33] Article 7 of the Rome Statute of the International Criminal Court, 1998 on 'Crimes Against Humanity' provides:

> "1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
> (i) Enforced disappearance of persons;"

5. CRIMINAL PROCEEDINGS

Where judicial co-operation is occurring with a view to the bringing of criminal proceedings, a variety of legal questions arise. It is being assumed, in this context, that the proceedings will not constitute a flagrant denial of due process. It is also being assumed that the proceedings would be conducted in accordance with the national law of the trial State. No assumption is being made as to whether they would conform in every particular to the due process standard of international human rights law.

(a) definition of offences

There are two problems in this area. First, the law with regard to terrorist offences in the State which brings proceedings may not be in conformity with the requirements of human rights law. It is up to national law to define criminal offences but the definition is required to comply with the principle of legality in order for it to be consistent with human rights law. This requires that the law be sufficiently clear and sufficiently certain for the individual to know what (s)he can/cannot do, In many States, the definition of terrorist offences in national law does not satisfy this requirement. In order to facilitate judicial co-operation, it is necessary for national definitions of terrorist activity to be as close to one another as possible. This is likely to require a certain measure of flexibility. Civil law systems, for example, generally have difficulties with inchoate offences, such as attempt, incitement or conspiracy, in the mistaken belief that such crimes have no *actus reus*. Recent attempts to criminalise the "glorification" of terrorism or "apologies" for terrorism, insofar as they do not come within the category of incitement, raise difficulties of vagueness. The report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism includes an excellent analysis of the elements necessary to the definition of a terrorist offence.[34] It offers clear guidance to States seeking to create new terrorist offences or to bring old national law into conformity with human rights standards.

Second, problems may arise where the two co-operating jurisdictions characterize the offence in different ways or define it as having different constituent elements.[35] The characterization or classification of the offence may determine the police powers applicable (e.g. whether a search can be authorized and the scope of the search), the rules of evidence applicable and the applicability of any presumptions. For example, if the offence to be charged is more serious in the requested State, it may have been able to gather types of evidence which will be inadmissible in the proceedings, not because the requesting State never allows such evidence but because it does not allow it in that type of case. Conversely, if the offence charged is more serious in the requesting State, the requested State may not have submitted evidence which it could lawfully have gathered but not in relation to that particular charge. Where the offence has different constitutive elements, the requested State may have failed to gather evidence which it could lawfully have gathered, simply because that would not be necessary in its own jurisdiction. These problems could perhaps best be avoided by

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[34] E/CN.4/2006/98, paras. 26-50

[35] The issue here is not whether the conduct is criminal at all but which particular crime it constitutes.

listing different forms of behaviour and saying to what charges they could give rise in each jurisdiction. In any particular case, once it becomes clear that criminal proceedings are contemplated, the requested State should confirm with the requesting State what needs to be established in order to prove the offence.

(b) use of confession evidence

In some jurisdictions, a suspect cannot be convicted without a confession. It is not clear how this can be reconciled with the rule against self-incrimination. In others, a confession alone can never be a sufficient basis for a conviction; there needs to be other corroborating evidence. Confession evidence does not raise an issue *per se* under human rights law. The manner in which it was obtained, however, might well raise a human rights issue.

A confession obtained as a result of torture, cruel, inhuman or degrading treatment should not be admissible. That would appear to apply equally to a confession obtained abroad in such circumstances. A more difficult question concerns confessions *allegedly* obtained under such duress. The State in whose territory the confession was allegedly made can, and should, halt the principal proceedings, in order to determine whether or not the confession was unlawfully obtained. If the principal proceedings continue, the confession cannot be admitted in evidence until it has been determined how it was obtained. Even though the principal proceedings are criminal in character, that issue is civil. The person who alleges that the confession was unlawfully obtained should only have to establish the case on the balance of probabilities. At some point during that determination, the burden of proof may shift. If the individual can establish that they did not have a mark on them when they were detained but that, after the making of the confession, they had bruises or other evidence of ill-treatment, there is a presumption of ill-treatment and it is up to the State authorities to establish that ill-treatment did not in fact occur or that they were not responsible for the harm in question. In certain jurisdictions, whilst ill-treatment is unlawful, it is not clear that a confession obtained through coercion is inadmissible, that the criminal proceedings are suspended pending a determination of the admissibility of the confession, that the determination of whether a person was ill-treated is based on a civil standard of proof and that, at some point, the burden of proof shifts to the State.[36]

Where the trial State is the place where the alleged ill-treatment occurred, the problem of judicial co-operation arises for a State requested to transfer the suspect. In such circumstances, there may well be a fear of (renewed) ill-treatment. Even if that is not the case, the defects in the rules discussed above might be found to prevent transfer, even if proceedings as a whole are not flagrantly unfair. This is on account of the

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[36] The Committee Against Torture in a summary account of the results of the proceedings of the inquiry under Article 20 on Turkey recommended, "28. A judge who receives a complaint concerning statements obtained under duress should be instructed to examine in substance the lawfulness of such "evidence" without awaiting the outcome of a related procedure that is far too long. In addition, government procurators appointed to make inquiries into allegations of torture or ill-treatment, in accordance with the provisions of the Turkish Code of Criminal Procedure, should act promptly and effectively; they should be given precise instructions on this question, in accordance with article 12 of the Convention."*Activities of the Committee against Torture pursuant to article 20 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment : Turkey. 15/11/93,* A/48/44/Add.1. (Inquiry under Article 20)

particular significance attached to the prohibition of torture and the development of a considerable number of subordinate rules, so as to deter the practice.

Where the case involves the transfer of both the confession and the suspect, the transferring State will need to consider the existence of the safeguards set out above in the trial State. This might seem strange since it is the same State as the one that allegedly inflicted the ill-treatment. In fact, the situation is not as odd as it may seem. A State may well itself have all the necessary safeguards in place. Nevertheless, in even the best regulated systems, there will always be the risk that occasionally ill-treatment will occur. At the national level, the means would exist to ensure that an inadmissible confession was not used. Where, however, the State is asked to transfer the suspect and the confession to a jurisdiction where such safeguards do not exist, it would not be in a position to correct the consequential harm. It would, of course, still be able to investigate and to prosecute the alleged perpetrators of the ill-treatment.

For the trial State, the issue would be the admissibility of the confession. The human rights rule requiring the exclusion of evidence obtained under torture would appear to be applicable to confessions obtained both nationally and abroad.[37] There is, however, a very real practical difficulty, which gives rise to a legal problem. It may be clear that confession evidence has to be excluded when it is *established* that it was unlawfully obtained. Initially, however, the suspect makes an *allegation* of ill-treatment. It is one thing for the trial State to apply the principles set out above when the alleged ill-treatment occurred in its own jurisdiction. It is much more difficult for it to do so when the confession was obtained abroad. To investigate would require the co-operation of the police and other authorities in the State alleged to have engaged in the torture. That raises both diplomatic and practical difficulties. If the trial State cannot itself conduct an investigation to enable it to determine whether or not ill-treatment occurred, it needs some other test. It will be important to determine what that test should be. Is a confession obtained in another jurisdiction to be inadmissible if it is virtually certain/probable/reasonably likely/possible that it was obtained through unlawful coercion? On whom does the burden of proof lie? The answer is not clear.[38]

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[37] By virtue of Article 15 of the Convention Against Torture, parties to that treaty are required to exclude the use of *any* evidence obtained as a result of torture in *any* proceedings. That would clearly apply to evidence obtained abroad. It should be noted that the provision only refers to torture and not to cruel, inhuman or degrading treatment, in contrast to Art. 12 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 3452 (XXX), 9 December 1975.

[38] In *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent),* Session 2005-06, [2005] UKHL 71, the seven members of the House of Lords were in agreement, first, that the national authorities could make indirect use of evidence obtained abroad as a result of torture, provided that British officials were not complicit in the infliction of torture. So, for example, on the basis of "torture evidence" a search might be ordered. The results of that search would be admissible. The Court was also in agreement that, where it was *established* that foreign evidence was obtained as a result of torture, it would be inadmissible. They were divided on the appropriate test where it was *alleged* that the evidence might have been so obtained. In essence, three judges were of the opinion that if there was a real risk that it might have been so obtained, the burden of proof would fall on the tribunal to establish that it had not in fact been so obtained, failing which the evidence would be inadmissible. The majority were of the view that it had to be *established* that the evidence *was* obtained as a result of torture (i.e. a positive test rather than a negative test) but that that should be determined

Finally, an issue may arise with regard to self-incrimination. As has been seen, there is an argument that a person cannot be transferred to a place where any trial would be flagrantly unfair. One may ask whether it is possible for one particular aspect of the trial to have such significance that, on that ground alone, co-operation should be refused. Where the transferring State has strong rules against self-incrimination, it might object in principle to transferring a suspect or a confession where the confession alone would be the basis of a conviction. It does not yet appear to be the case under human rights law that it would be required to refuse to co-operate. If domestic law requires such a refusal, it would be an example of domestic law having a higher standard than human rights law.

(c) witness evidence

Two different types of issues arise in the case of witnesses. First, if the witness alleges that the statement was obtained as a result of unlawful coercion, similar considerations will apply to those considered above in relation to confessions.

The second issue raises very real problems for judicial co-operation. It concerns the rules of the trial State for protecting the identity of witnesses. The information may have been transferred from one intelligence service to another and then been transferred by the latter to its own police services. The sending State may not have taken steps to protect the identity of witnesses in the material it transferred, not knowing that it might be used in judicial proceedings. Another possibility is that the information was transferred by a State which does take steps to protect the identity of witnesses in certain cases to a trial State which does not have such a practice. Or again, the sending State might assume that the evidence was of a background nature, since it would not be admissible in its own jurisdiction, and find that it was being used in open court in the trial State. Special measures might be needed either so as to protect the safety of the witness or also to protect the identity of witnesses such as undercover agents. Problems in practice could arise either because of conflicting rules of evidence or as a result of a practical mix-up.[39] This is probably a one-way issue, in that it only arises where the trial State uses the evidence without safeguards or in circumstances in which the transferring State would not use it. Whilst human rights law may *permit* restrictions on the giving of evidence in open court in some circumstances, it does not generally require it. The trial State is therefore not acting in violation of international law. This raises the difficulty, mentioned at the outset, of States seeking to rely on domestic rules of evidence that may be of a "higher" standard than required by human rights law.[40] Where the safety of a witness is concerned, there may be circumstances in which human rights law would require protective measures to be taken. If the co-operating State is asked to assist by

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on the balance of probabilities. It should be noted that the issue arose in the context of a special procedure in which the individual has no access to the evidence against him.

[39] For example, if the evidence ended up almost by accident in the hands of the police in the trial State (intelligence services > intelligence services > police), it might find its way into the proceedings, even if the rules of evidence were identical in the two States.

[40] See notes 4 and 5 and accompanying text.

transferring the witness, it may have an obligation to ensure that steps have been put in place by the trial State to secure the safety of the witness, by analogy with the principle that a person cannot be sent to a State where there is a real risk that they would be tortured.[41]

It should be noted that the use of confession and witness evidence does not only arise in criminal proceedings. It could be used in deportation proceedings or other proceedings imposing restrictions on the individual. If the proceedings are of an exceptional character, the rules of evidence normally applicable within that State may not apply. For example, in many States it is necessary for a witness to be present and available for cross-examination in order for any statement made by him/her to be relied on in the proceedings. In exceptional proceedings, it may be possible for the court or tribunal to rely on a wider range of evidence than usual. This may include witness statements obtained outside the jurisdiction made by persons not available for cross-examination. Furthermore, the defendant may not even be informed of the existence of such a statement, never mind of its content or author. The cases referred to above normally arose before the "ordinary" criminal courts.[42] It was the nature of the charge that led to special rules being applicable to protect the identity of the witness. In this case, however, there are three separate issues. First, the exceptional character of the court probably does not as such give rise to problems under human rights law, provided that it has a legal basis in national law, but a human rights court would probably expect additional safeguards if the normal rules were not applicable. Second, and more important, is the fact that evidence can be used of the existence of which the defendant is in complete ignorance. That raises serious difficulties as the defendant does not know what is alleged against him and, as a result, is incapable of defending himself. Paradoxically, the more innocent he is the harder it will be for him to speculate intelligently as to which of his contacts may have said what. Third, the evidence of the unknown witness may have been obtained as a result of torture or other unlawful coercion. That is not only objectionable in and of itself but may make the statement particularly unreliable. Where a State receiving information is known to have such exceptional proceedings, the State providing information would be best advised to enquire into the safeguards the other State has put in place to mitigate the potential risks. The question whether the exceptional character of a terrorist threat justifies such an exceptional measure is likely to come before the European Court of Human Rights sooner rather than later. If the threat is found not to justify the measure then States supplying information which will be used in that way may also be acting in breach of human rights law, at least where they know that that is how it will be used.

(d) evidence resulting from searches, surveillance, data exchange etc.

The question in relation to this type of evidence concerns its admissibility. There would seem to be two main issues. First, the evidence may have been obtained unlawfully in the originating jurisdiction. Is that, in and of itself, sufficient to require it to be excluded? There are two elements to this question. As a matter of human rights law is it required that evidence obtained unlawfully be excluded? Separately,

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[41] *Soering v. United Kingdom*, 14038/88 [1989] ECHR 14, judgement of 7 July 1989

[42] Note 8, *supra*. This was the issue in *A (FC) & others*, note 39, *supra*.

where a domestic legal system excludes evidence obtained unlawfully should that also apply to evidence obtained unlawfully in a foreign jurisdiction, even if it was obtained in compliance with the law of the trial State and human rights law? The due process guarantees of human rights law do not always require the exclusion of evidence obtained in violation of international law, most notably the right to privacy.[43] It is not clear whether the due process guarantees require the exclusion of evidence obtained in breach of the national law of the place where it was gathered. Whether such evidence has to be excluded will depend on its impact on the fairness of the trial as a whole. The second element is a matter of the domestic law of the trial State and again raises the possibility that the barrier to judicial co-operation is often not human rights law but the application of "normal" rules of national law to terrorist offences where, in the circumstances, the national law regards as inadmissible evidence which would be acceptable under human rights law.

The second issue concerns evidence lawfully obtained in the originating jurisdiction but which would not have been lawful in the trial State. *Prima facie*, that is only a matter of domestic law in the trial State. One can understand that the national courts will not wish to encourage the use of evidence obtained abroad as a way of circumventing its own rules of evidence. We are not, however, dealing with a market in goods. Just because evidence exists in one place does not mean that it exists in another. The foreign evidence is not usually an alternative to local evidence. The problem is again one of domestic law requiring a higher standard than that required by human rights law. Where the evidence was obtained in violation of human rights law, real issues do arise. The evidence-gathering State may be in violation of human rights law (e.g. the right to privacy) but that does not necessarily require the evidence to be excluded under the due process guarantees, which would be the only issue facing the trial State. The test would appear to be the fairness of the proceedings as a whole.

(e) burden of proof, standard of proof and presumptions

In addition to rules regarding the admissibility of evidence, there are other rules in the trial State which may have an impact on the effect of foreign-gathered evidence and on whether the suspect is convicted. The co-operating jurisdiction may have an interest both in how its evidence is used and, separately, in the outcome of the proceedings, if some of the activities of the suspect have occurred or were intended to occur in its own jurisdiction. Co-operating States need to take into account not only what is criminal, how a crime is characterized and classified and the rules of evidence but also any presumptions that may be applicable and the burden and standard of proof. Human rights bodies have had to address these issues in relation to their own proceedings but less attention has been paid to these matters as an element in the fairness of judicial proceedings. It does appear that, in criminal proceedings, human rights bodies assume that the burden of proof is on the prosecution and that the case must be established beyond reasonable doubt. Whilst that is true of the proceedings as

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[43] For example, *Schenk v. Switzerland,* 10862/84 [1988] ECHR 17, judgement of 12 July 1988. (In this case the intercept evidence used against the applicant in a trial for attempted incitement to murder had been obtained unlawfully in domestic law and in contravention of Article 8. The Court found no violation of Article 6.) It should be noted that this is not the case where the violation of human rights law alleged is torture, cruel, inhuman or degrading treatment.

a whole, it cannot be excluded that certain issues which arise during the course of the proceedings may attract a different standard or even a different burden of proof.[44]

6. AFTER CONVICTION

(a) The sentence

The penalties prescribed in different States for specific terrorist crimes vary. The penalties incurred by a person accused of terrorist activities must be provided for by law, the act must have constituted a criminal offence at the time when it was committed and no heavier penalty may be imposed than the one that was applicable at the time when the criminal offence was committed.[45]

Sentencing gives rise to two issues: the first concerns non-financial aspects of the sentence and the second whether the assets of the convicted person can be seized. The non-financial aspect of the sentence raises the issue of the death penalty and the question of the length of the sentence. Member States of the Council of Europe appear to accept that they cannot transfer a person to a State where, if convicted, he would face a real risk of the imposition of the death penalty. If requesting States give an undertaking to the requested State not to seek the death penalty, this may give rise to claims of discrimination within their own jurisdiction. Another solution, where appropriate, would be to modify the charge to one not carrying the death penalty. Another possibility would be for the requesting State to enable the requested State to bring proceedings before its own courts, by transferring evidence etc. Practically speaking, this might be difficult. It would be necessary to ensure that the laws of the requested State permitted the exercise of jurisdiction in such cases.

The length of the sentence may give rise to three issues. The question in this context is not whether the sentence itself violates human rights law but rather whether a State can or must refuse to transfer a suspect on account of a possible problem with the sentence. The European Court of Human Rights has indicated that a person must have some idea of how long he will have to serve. On that basis it objects to indeterminate sentences.[46] It also requires that the sentence be determined by a court and not by a political figure. The second concern is that the sentence should not be disproportionate to the crime charged. The third issue is that the sentence should not be disproportionate to wrong established. If, for example, an individual was convicted for conspiracy to commit explosions but his only involvement was to transmit a

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[44] See paragraph 5b above.

[45] *S.W. v. United Kingdom,* 20166/92 [1995] ECHR 52, judgment of 22 November 1995, para 35; and *C.R. v. United Kingdom,* 20190/92 [1995] ECHR 51, judgment of 22 November 1995, para 33; *Ecer and Zeyrek v. Turkey*, 29295/95;29363/95 [2001] ECHR 107, judgement of 27 February 2001, para. 29.

[46] Where a person is sentenced to life imprisonment but where the judge determines the time that must be served as a punitive element (the tariff), any detention beyond that period can only be justified by considerations such as the continuing danger posed by the criminal. Since that is susceptible to change, a means needs to exist to enable the individual to challenge the lawfulness of detention outside the tariff period; *Stafford v. United Kingdom*, 46295/99, [2002] ECHR 470, judgment of 28 May 2002.

message to a person, telling them where to buy a given quantity of fertilizer, it would seem disproportionate to impose the same sentence as on the person who made the explosive devices or who attempted to plant them. Prison sentences must bear "reasonable relationship of proportionality with what actually happened."[47] Where the convicted person was under eighteen years of age, special considerations may apply to the determination of an appropriate sentence. To the best of the author's knowledge, there is no case in which these types of sentencing issues have been raised before a human rights body in the context of judicial co-operation. That would not prevent their being raised in the future. The most likely outcome is that transfers would only be prohibited where sentencing in the trial State was routinely flagrantly disproportionate, at least with regard to terrorist and terrorist-related crimes. The argument could be made either on the basis of the due process guarantees or on the basis that a disproportionate sentence constitutes inhuman treatment.

A State may be requested to transfer a person convicted following a trial *in absentia*. Unless there is a provision in the law of the requesting State requiring the re-opening of proceedings when the alleged criminal re-enters the jurisdiction, it may be a breach of human rights law for the State to transfer the person. At the very least, the requested State would be expected to seek guarantees that the proceedings would in fact be re-opened.

If the defendant is acquitted, (s)he may not wish to return to their country of origin, if there is a real risk of ill-treatment there. In that regard, it has been alleged, in some cases, that the mere fact of having stood trial for a terrorist offence in one place, may make it likely that the person would be prosecuted in their country of origin.

(b) Prison conditions

In certain circumstances, prison conditions may constitute inhuman treatment.[48] It is necessary to establish that the conditions are significantly worse than the conditions in prisons in many, if not most, other States. A person might seek to challenge their transfer to another State for the purpose of criminal proceedings on the grounds that, if convicted, the prison conditions would be inhuman. The complaint would probably refer both to pre-trial and post-conviction prison conditions. If the applicant was able to establish that the prison conditions in the requesting State were inhuman, the requested State would be required to refuse to transfer the suspect.[49]

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[47] *Weeks v. United Kingdom*, 9787/82 [1988] ECHR 18, judgement of 5 October 1988, para. 47 (opinion of Judge de Meyer).

[48] For example, *Dougoz v. Greece*, 40907/98 [2001] ECHR 213, judgment of 6 March 2001. See generally, ICCPR General Comment 21 (Forty-fourth session, 1992): Article 10: Replaces General Comment 9 *Concerning Humane Treatment of Persons Deprived of Liberty*, A/47/40 (1992) 195. *Simpson v. Jamaica* (695/1996), ICCPR, A/57/40 vol. II (31 October 2001) 67 (CCPR/C/73/D/695/1996) at paras. 2.1, 2.5-2.7, 3.2, 4.6, 7.2, 8 and 9. The Committee Against Torture in its Concluding Observations to Denmark report expressed concern regarding the issue of imposing solitary confinement upon persons servicing sentence. Concluding Observations of CAT: Denmark, CAT/C/CR/28/1, 28 May 2002, para.7(d)

[49] By analogy with *Soering v. United Kingdom*, note 42, *supra*.

(c) Place in which the sentence is served

There is no right under human rights law to serve your sentence in your own country, even though serving a sentence abroad will have an even more disruptive effect on family life than a sentence served at home. Many States have arrangements in place with other State to permit a convicted person to serve their sentence in their home countries. Whilst there is no such right in human rights law, the operation of such a system under other arrangements may give rise to human rights issues. Where the system with regard to parole in the receiving State is in violation of human rights law, it is conceivable that an argument could be raised that the transferring State should not transfer the criminal. It is difficult to imagine circumstances in which this could arise. A more common problem is likely to be the conditions of detention in the receiving State. The criminal may object to being transferred on those grounds. The same rule as discussed in relation to other stages of the proceedings would apply here. A more difficult question would arise where the criminal *wanted* to be transferred, so as to be closer to his family. Can he waive his right to be free from inhuman treatment? The European Court of Human Rights has had to consider an analogous situation, where individuals consented to serious sado-masochistic assault in private.[50] In this case the legal issue would be different. It would be whether a State is free to expose someone to inhuman treatment where he consents to it, rather than whether the State is free to prosecute even though the individuals were consenting. It would involve the prohibition of ill-treatment, a non-derogable right, rather than the protection of privacy. On public policy grounds, there is a real possibility, perhaps even a likelihood, that a human rights body would prohibit a State from transferring a criminal in these circumstances. Since the potential victim is consenting, one might wonder how the case would reach a human rights body. Whilst this makes it much less likely that the issue would be raised, one cannot exclude the possibility of a family member or an NGO of finding a way to circumvent the jurisdictional hurdle.

(d) Confiscation of assets

Where a suspect has been convicted, attempts may be made to seize his assets. This is particularly likely to arise in those terrorist cases in which the terrorists are said to finance their activities through the commission of other crimes. The trial State may request another State to confiscate and possibly to transfer assets in the latter. Alternatively, another State may seek to confiscate assets solely on the basis of the conviction in the trial State. The confiscation of assets, as part of a criminal penalty, does not *per se* appear to raise issues under human rights law, on condition that national rules provided for such a penalty at the time of the commission of the offence.[51] Issues of concern to human rights law may arise if the confiscation is disproportionate to the crime or if it is based on a presumption that all the assets of the criminal are presumed to have been the result of criminal activities.[52] It would appear

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[50] *Laskey, Jaggard and Brown v. United* Kingdom, 21627//93, 21826/93 and 21974/93 [1997] ECHR 4, judgment of 19 February 1997. On consent to waiver of rights in the context of detention, see *De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium*, 2832/66, 2835/66 and 2899/66 [1971] ECHR 1, judgment of 18 June 1971

[51] *Welch v. United Kingdom*, 17440/90 [1995] ECHR 4, judgment of 9 February 1995.

[52] See generally *Phillips v. United Kingdom*, 41087/98 [2001] ECHR 437, judgment of 5 July 2001; confiscation of assets in relation to drug trafficking.

that no violation of human rights law will occur, provided that the criminal has the opportunity to displace any presumption regarding the source and quantity of assets and that the tribunal takes a realistic view of the value of the assets.

7. CONCLUSION

It is undoubtedly the case that real human rights concerns arise in relation to the already complicated interplay of judicial co-operation and counter-terrorist measures. They concern principally the implications of the prohibition of torture, cruel, inhuman and degrading treatment, due process guarantees, the protection of privacy and, in certain cases, the right to a remedy. That is not to say, however, that all alleged human rights issues are in fact violations of human rights law. The more frequently occurring problem may be co-operation with States which violate human rights law, whether or not violating domestic law in the process. In a significant number of cases, however, problems of judicial co-operation arise in practice where one State is acting in conformity with national law and the requirements of human rights law but the other State invokes "higher" domestic law requirements, using the language of human rights. In these cases, the problem is not caused by human rights law. It is caused by the domestic law, as interpreted by the domestic courts, of the second State. The fact that, in some cases, the rule in question may be a constitutional provision simply exacerbates the problem. A solution needs to be found but does not involve human rights law. The second State may need to recognise a difference between what is acceptable in internal proceedings and what is acceptable in proceedings involving judicial co-operation, on condition that it at no time condones a violation of international human rights law. It might seek to restrict such a concession to certain categories of crimes, such as those that can genuinely be regarded as offences involving terrorist activities. It may also need to address the issue of the admissibility of evidence owing its origins indirectly to inadmissible evidence, such as the result of a lawful search carried out on the basis of information received which had been obtained as a result of torture in another jurisdiction.

Such problems are important but they serve as a distraction from the more common problem – States whose national rules or national practices are in flagrant violation of the human rights law rules regarding torture, cruel, inhuman or degrading treatment, privacy, due process, detention and the right to a remedy. States seeking judicial co-operation with such a partner would appear to have one of two choices. They can either take effective action, through technical assistance and other similar means, probably in co-operation with other States and/or the OHCHR to improve the respect for human rights of the State in question or they can live with the consequences. What they cannot do is to turn a blind eye to the violations of human rights law and to allow them to seep into and tarnish their own legal system.