

**WORLD JUSTICE PROJECT COUNTER-TERRORISM  
EXPERT NETWORK**

***REPORT OF KEY FINDINGS  
AND RECOMMENDATIONS ON THE RULE OF LAW  
AND COUNTER-TERRORISM***

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## BACKGROUND

The current report seeks to capture wider observations, and to summarize the key findings and recommendations of a three year multi-national, multi-disciplinary project, regarding what the rule of law means in the context of counter-terrorism. The project's partners are the University of Nottingham, UK (Dr Katja Samuel and Professor Nigel White); the Club of Madrid and its former Secretary-General, Fernando Perpiñá-Robert (80 former heads of state from 56 democratic countries committed to furthering democratic values worldwide); Dr Silvia Casale (formerly President of the Council of Europe's Committee for the Prevention of Torture and UN Subcommittee on Prevention of Torture); and the University of Málaga, Spain (Professor Ana María Salinas de Frías).

The project was conceived in 2008 under the umbrella of the World Justice Project (WJP), an ambitious independent and politically neutral, multi-national and multi-disciplinary, initiative which aims to strengthen the rule of law worldwide at the local, national, regional, and/or international level within legal and non-legal disciplines ([www.worldjusticeproject.org](http://www.worldjusticeproject.org)). To date, many projects have been initiated and the WJP has engaged with experts drawn from approximately 100 countries. During 2009, two preliminary workshops, involving approximately 40 experts, took place to identify the project's overarching themes and many of the currently most pressing issues on which it could best add value and be solution-orientated. Furthermore, in order to strengthen the global legitimacy, appeal, and relevance of the project's findings and recommendations, great care was taken in the selection of contributing experts, in particular to ensure that most key areas of expertise and perspectives are reflected within its substance.

The current report draws heavily upon and in some cases develops the contributions and recommendations of over 40 multi-national, multi-disciplinary experts – drawn from *inter alia* judicial, practitioner, policy-maker, institutional, academic, policing, military, and civil society perspectives, and from every major region of the world – which culminated in the publication of a significant 1200 page book: AM Salinas de Friás, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012). Additionally, a number of further expert submissions were made to the project for the purpose of writing this report, and the report's authors have contributed new sections also. In the space available, one can only hope to capture the key themes, trends, and recommendations of the more detailed analysis contained in the book. Therefore, while this report is intended to stand on its own - not least in terms of considering the wider framework and context for the issues examined, and including some recent important developments - the reader may benefit from also consulting the book for the more detailed examination of particular issues and principles.

By its very nature, attempting to summarize and capture the essence of these materials is a somewhat difficult and daunting task, not least due to the number and diversity of the authors which is such that some may disagree on the balance to be achieved between various legal frameworks and paradigms, and how international institutions should implement legal standards and principles. As such, the fact that a particular expert has contributed to the substance of the current report should not necessarily be interpreted as his or her agreement

with all comments and recommendations made. Nevertheless, it is important to attempt to draw together legal principles in what might be called a nascent corpus of counter-terrorist law and its mechanisms, which are of universal relevance.

As with any project, there are many people to thank, without whose often tireless and sacrificial involvement, support, and encouragement - in so many different ways - the current project and its outputs would not have been possible. In particular, the project team are grateful to a number of organizations for their financial support, including: the WJP; Venable LLP (Washington, DC); Gobierno de Cantabria, Cámara Cantabria, Ayuntamiento de Santander, and Universidad Internacional Menéndez Pelayo (Spain); the Universities of Nottingham and Sheffield, and the International Bar Association Foundation, Inc. Nor would any of the substance have been possible without our expert contributors, who gave freely of their time and expertise in support of the rule of law, often in the face of considerable work, time, and personal pressures. We are also very appreciative of many others, too numerous to name here, especially our ever flexible and diligent editorial assistants and small army of largely volunteer student researchers; the Oxford University Press publishing team, for their support of and vision for this project from its early beginnings; for administrative and IT support provided during the course of the project by the Universities of Nottingham and Sheffield; and most certainly not least, our families and friends for their endless patience, understanding, and support as we immersed ourselves in the task at hand.

It is sincerely hoped that the current report, as with the accompanying book, which represents the efforts of many over a three year period, might in some way assist those upon whom our national and international security depends - who are often faced with difficult choices under extreme pressure - to navigate successfully through the counter-terrorist security and rule of law quagmire. As such, readers of this report are strongly encouraged to disseminate it as widely as is possible, not least to governmental and intergovernmental policy-makers and practitioners engaged in counter-terrorist responses. To this end also, it is very much hoped that the necessary funding may become available in the future to translate part or all of this report into other languages to increase its accessibility since its findings and recommendations are of global relevance.

Katja LH Samuel, Nigel D White, and Ana María Salinas de Frías (Nottingham University, January 2012).

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## **ABBREVIATIONS**

<b>ACHPR</b>	African Commission on Human and Peoples' Rights
<b>ACHR</b>	American Convention on Human Rights 1969
<b>ACtHPR</b>	African Court on Human and Peoples' Rights
<b>African Charter</b>	African Charter on Human and Peoples' Rights 1981
<b>AP I</b>	Additional Protocol I 1977 to the Geneva Conventions 1949
<b>AP II</b>	Additional Protocol II 1977 to the Geneva Conventions 1949
<b>AU</b>	African Union
<b>CAT</b>	UN Convention against Torture 1984
<b>CPT</b>	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
<b>CTC</b>	UN Counter-Terrorism Committee
<b>CTED</b>	UN Counter-Terrorism Committee Executive Directorate
<b>CTITF</b>	UN Counter-Terrorism Implementation Task Force
<b>ECHR</b>	European Convention on Human Rights 1950
<b>ECRI</b>	European Commission against Racism and Intolerance
<b>ECtHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>IACHR</b>	Inter-American Commission on Human Rights
<b>IACtHR</b>	Inter-American Court of Human Rights
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Convention on Civil and Political Rights 1966
<b>ILC</b>	International Law Commission
<b>NGO</b>	Non-Governmental Organization
<b>OAS</b>	Organization of American States
<b>OAU</b>	Organization of African Unity
<b>OPCAT</b>	Optional Protocol to UN Convention against Torture 2002
<b>PACE</b>	Parliamentary Assembly of the Council of Europe
<b>POW</b>	Prisoner of War
<b>PSC</b>	Peace and Security Committee of the African Union
<b>RECs</b>	Regional Economic Communities
<b>UDHR</b>	Universal Declaration of Human Rights 1948

<b>UN</b>	United Nations
<b>UN CT Strategy</b>	UN Global Counter-Terrorism Strategy 2006
<b>UNCAT</b>	UN Committee Against Torture
<b>UNGA</b>	UN General Assembly
<b>UNHRC</b>	UN Committee on Human Rights
<b>UNODC</b>	UN Office on Drugs and Crime
<b>UNODC (TPB)</b>	UN Office on Drugs and Crime (Terrorism Prevention Branch)
<b>UNSC</b>	UN Security Council

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## EXECUTIVE SUMMARY

The current report examines the international rule of law framework within which counter-terrorist policy-making and practices should occur, whether at the national governmental or regional/international intergovernmental level. It also makes recommendations as to how the framework may be strengthened both in terms of the interpretation, application, and development of its principles, and through best practices which are not only rule of law based, but may also strengthen inter-state and intergovernmental cooperation.

In terms of identifying the applicable legal framework, the starting position is the UN Global Counter-Terrorism Strategy which was adopted on the basis of consensus by all UN Member States in September 2006. In particular, Pillar IV identifies its four principal sources of underpinning legal principles as being international human rights, international humanitarian, refugee/asylum, and criminal law. Additionally, the international rule of law framework comprises a number of other principles also, especially those of general international law regarding the responsibility of states and international organizations, which include duties to ensure appropriate reparations for any victims of internationally wrongful acts committed by their agents, and to ensure due diligence. Democratic principles are also important due to increased recognition of the interconnectedness of human rights, the rule of law, and democracy, not least within outputs of the UN General Assembly and Security Council on peace and security matters. That said, there is no universal definition of or agreement regarding the concept of democracy and the form that it should take, making it difficult to pinpoint its foundational principles with precision, though the core principle is that of accountable government.

There are, however, a number of weaknesses with this framework in practice, many of which are recurring themes throughout the report. One significant one is the continued absence of a universal definition of terrorism, without which there can be no fully coherent corpus of counter-terrorist law, not least because it allows the existence of many diverse, and often incompatible, national and regional definitions which cannot be (easily) harmonized with one another. In turn this hinders inter-state cooperation, for example on extradition matters under the principle of *aut dedere aut judicare* (extradite or prosecute). That said, as is evident in this report, a number of relatively clear rules exist already, ranging from those governing the use of force against terrorists; to their capture, detention, and treatment; to ultimately the trial of terrorists, and securing justice for victims of terrorist attacks.

Another important source of potential weakness is where governments seek to derogate from their obligations under international human rights law on the basis of the terrorist threat being exceptional and justifying a state of emergency. Of particular concern here is where the resultant measures are disproportionate to the threat, or become the normal rather than exceptional state of affairs within a nation. Problematic too are *lacunae* – which may be normative, interpretative, and/or policy-driven in nature – especially those which are attributable to deliberate policy decisions to interpret particular rules in a restrictive way which afford terrorist suspects the least protection and levels of due process possible, while seeking to limit the accountability of the government concerned towards such individuals including under international law. A further overarching source of weakness considered in

the report is that attributable to the challenges of ‘operationalizing’ the UN Global Counter-Terrorism Strategy and strengthening the implementation of its underpinning core principles in practice. While Security Council Resolution 1373 (2001) has been instrumental in dramatically improving the ratification status of the sectoral anti-terrorism conventions especially, considerable challenges remain regarding the implementation of and compliance in practice with these and other key conventions (especially those of human rights) within domestic jurisdictions.

In terms of the legal paradigm in which counter-terrorist responses should occur, the report strongly argues that the rules which currently make up the international rule of law framework are very clear that a criminal justice response should be the norm (which is the approach of the UN Global Counter-Terrorism Strategy also), and a military approach should be exceptional. More specifically, a rule of law based response requires a carefully calibrated scale of counter-terrorist measures which are a combination of a criminal justice approach based on human rights compliant domestic and international criminal law, with a preventive approach that relies on carefully assembled intelligence enabling law enforcement officers to prevent the commission of crimes as well as to prosecute those planning such crimes on the basis of clearly defined criminal offences. A fully developed criminal justice/preventive paradigm is both legitimate and effective for tackling terrorist threats, thereby reducing the military paradigm to situations of specific armed conflict only, when international humanitarian law is the primary legal regime, with its own internal coherence and clear norms for dealing with means and methods of warfare that employ terrorism. Whatever the applicable paradigm and rules, a recurring theme is that states can only increase their legitimacy and overall effectiveness of their counter-terrorist responses when they not only ensure the highest achievable level of compliance with the applicable obligations and rights, but also afford (suspected) terrorists the benefit of the full protection of law even in cases of doubt as to, for example, their exact legal status under that regime.

An overarching question considered throughout the report is how legitimate counter-terrorist security imperatives may be accommodated *within* rather than balanced *against* the international rule of law framework. While the report fully recognizes the often difficult and pressurized decisions that national governments especially have to take in response to often complex, asymmetric terrorist activities, nevertheless it contends that rule of law based responses are not only necessary but also possible within the existing framework. In particular, some of the applicable principles – especially those of international human rights and humanitarian law – already make provision for certain situations of exceptionality which are relevant to efforts to counter terrorism. Despite this, the relationship between governmental and intergovernmental security imperatives and the rule of law is a source of recurring tension throughout the report, reflected especially within the state and institutional practices considered, which include: forms of detention; treatment in detention; unlawful coercive interrogation; extraordinary rendition; use of lethal force; discrimination; the engagement of private (military) security companies; and the Security Council’s 1267 sanctions regime.

Two closely related issues are how to reduce current levels of impunity, not only for terrorist actors under domestic and international criminal law and mechanisms, but also for states and intergovernmental organizations in their counter-terrorist policies and practices; and to secure adequate levels of justice and reparations for their respective victims. With respect to non-state terrorist actors, the sectoral anti-terrorism conventions criminalize most forms of terrorist acts, and other principles of international criminal law may be drawn upon also (such as crimes against humanity). Judicial means should be based on the established criminal justice paradigm, thereby normally excluding military trials and commissions, and should ensure that due process norms cover both criminal and other measures such as control orders or targeted sanctions. As far as victims of terrorist attacks are concerned, it is evident that much work remains to be done in terms of developing a coherent international legal framework to ensure their access to justice, although there are already many national and international legal principles and best practices which could be drawn upon.

With respect to states' practices, standards and sanctions for governments (and intergovernmental organizations) and their officials in their counter-terrorist responses are derived from international human rights law especially, although each of the other sources of principles outlined at the outset are also evident. Both judicial and non-judicial means of control are important for ensuring that such practices are rule of law based, and that any victims are appropriately compensated. These can take a number of forms. National courts have an important role to play here in terms of checking and reviewing executive actions, both in terms of their constitutional as well as human rights, etc compliance, not least where states seek to derogate or otherwise deviate from their domestic or international obligations, which they attempt to justify in terms of meeting security imperatives. In doing so, the courts have often sought to reduce the scope of any issues which have traditionally been considered to be non-justiciable – such as defence and foreign policy matters – especially due to the increased frequency of multi-lateral operations, in order to ensure greater governmental accountability and narrow any potential impunity gaps. Regional human rights courts, especially the well established European Court of Human Rights (ECtHR) and Inter-American Court of Human Rights (IACtHR), have also played a pivotal role here. While they appreciate the difficult security situations confronting governments, and permit them a certain degree of latitude, for example in determining the grounds for declaring any state of emergency, nevertheless they remain insistent upon rule of law based counter-terrorist responses regardless of the nature of the threat or (suspected) terrorist. More recently, judicial mechanisms have begun to play an important role in ensuring greater rule of law compliance by international organizations also, illustrated by the response of the European Union (EU) Courts to the Security Council's 1267 sanctions regime. Additionally, the non-judicial mechanism of the Office of Ombudsperson has been created here to increase the sanctions regime's legitimacy and its adherence to at least some basic rule of law norms. Both are important for addressing institutional impunity gaps, especially in the absence of formal judicial review mechanisms to independently scrutinize, for example, the Security Council's employment of its significant, binding powers under Chapter VII UN Charter.

It is evident also, however, that judicial mechanisms are not adequate on their own to close potential impunity gaps here. Therefore, non-judicial mechanisms also play a very important

role in terms of ensuring greater accountability of executive action. This may take many different forms, including special rapporteurs; treaty bodies and organs (including the UN Human Rights Committee, UN Committee Against Torture, UN Subcommittee on Prevention of Torture, Inter-American Commission on Human Rights, African Commission on Human and Peoples' Rights, and European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment); and parliamentary oversight. Additionally, civil society has played a pivotal role in terms of exposing issues of rule of law concern, as well as in assisting victims to access justice.

One significant, recurring obstacle to ensuring greater executive accountability, which has arisen with respect to both judicial and non-judicial control mechanisms, has been a doctrine of state secrets, whereby executives often fail or refuse to disclose relevant and necessary information for: terrorists to adequately defend themselves; 'black listed' suspected terrorists to challenge their listing under sanction regimes; failed asylum-seekers to challenge the decisions made against them and their forced expulsion; victims of terrorist attacks to secure justice, not only in terms of compensation but also truth regarding events surrounding any attack(s); and victims of counter-terrorist responses - for example, those who have been tortured in detention or during coercive interrogations, and/or extraordinarily rendered - to seek justice and reparations.

Another key issue considered in the report is how to strengthen inter-state and inter-agency cooperation especially, which is essential to successfully counter many of the current (and most probably also future) terrorist threats which are increasingly transnational in nature. It therefore considers different regional and international challenges and examples of cooperation, from which best practices may be drawn which may be implementable within other parts of the world and/or contexts, albeit in a modified form. For example, best practices have been developed by Eurojust for judicial cooperation with EU Member States and third party states; and by the International Criminal Court (ICC), which has developed mechanisms for the handing over and disclosure of certain security sensitive materials necessary for the prosecution and defence of serious criminal charges, and has developed a mechanism of in-depth analysis charts to assist in the management of vast quantities of facts and evidence required for the trial of any complex serious crimes. Meanwhile, diverse initiatives are taking place on the African continent aimed at strengthening both rule of law based national and regional/continental counter-terrorist policies and practices, and cooperation, although significant challenges remain, especially in terms of the availability of resources and human rights compliance. The work of INTERPOL, which seeks to strengthen cooperation between police forces especially, is also considered, including some of the legal framework and other challenges it has had to overcome when responding to terrorist matters, not least to ensure that these are rule of law led.

A final overarching and recurring theme throughout the report is that whatever the perceived short-term political or operational benefits of any deviation from the international rule of law framework, in the longer term such practices merely taint a government (or an intergovernmental organization) and hinder its effectiveness by undermining its legitimacy and public confidence in it, which may take many years to repair. Furthermore, any

repressive practices may result in violent mobilization by citizens against the state, leading to greater rather than less instability and security threats for a state to deal with. Such scenarios are best avoided through rule of law based policies and practices from the outset.

Therefore, while many positive steps have been made towards strengthening the international rule of law framework, both normatively and in practice, it is evident that much essential work remains to be done. This includes strengthening the UN Global Counter-Terrorism Strategy (as well as other rule of law compliant national and regional counter-terrorist strategies) in practice, not least because an effective strategy is a vital tool for preventing erratic, disproportionate, or even unlawful executive responses under pressure. In tandem, the resilience of both critical infra-structures and society needs to be strengthened in order to minimize the impact of terrorist acts. In particular, states should concentrate not on pushing the boundaries of the law beyond breaking point, sometimes to the extent that they are indistinguishable from the very people they are seeking to outlaw and punish; but rather they should act as the principal subjects of international law that they consistently claim to be and thereby respect the rights and duties they have themselves created by treaty and custom.

# 1. INTRODUCTION

## 1.1. Project Objectives

The project is concerned primarily with identifying, examining, clarifying, contributing to the normative development of, and making recommendations regarding, those legal principles making up the international rule of law framework applicable to national, regional, and multi-national counter-terrorist responses, both conceptually and in practice.

In doing so, it further examines the relationship between these principles (for example, between international human rights and international humanitarian law); their extra-territorial reach; their respective strengths and weaknesses and possible *lacunae*; the function and contribution of different state, institutional, and non-state actors in the development and enforcement of these principles; and consideration of the consequences of adherence and non-adherence to the rule of law in the context of counter-terrorism.

## 1.2. Research Parameters

In terms of its substantive coverage, many topics are examined, ranging from recurring thematic ones - such as non-state and governmental/institutional impunity, accountability, judicial and non-judicial control mechanisms, enforcement, cooperation, state responsibility, and legitimacy; to specific issues and practices – for example, violent mobilization, classification, administration, and treatment of battlefield detainees, interrogation, extraordinary rendition, extra-judicial killings, intelligence gathering, discrimination, *non-refoulement* and diplomatic assurances, private security providers, and effective justice and reparations for victims of both terrorist attacks and unlawful counter-terrorist responses.

## 1.3. Target Audience

While the project's outcomes are expected to be of interest to a diverse audience, its findings and recommendations are aimed especially at governmental and intergovernmental legal and non-legal practitioners and policy-makers engaged in counter-terrorist matters globally. This is reflective of growing trends in terrorist threats being transnational and borderless in character, which require increasingly coherent and collective responses if they are to be countered - whether at the bilateral, sub-regional, regional, or international levels; and inter-state, inter-intergovernmental organizations; and between states and intergovernmental organizations.<sup>1</sup>

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<sup>1</sup> See, eg, United Nations (UN) Report of the High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2004) UN Doc A/59/565 (UN High-Level Panel Report), paras 17, 24, and 272; the most recent biennial review of the UN's Global Counter-Terrorism Strategy in UN General Assembly (UNGA) Res 64/297 (8 September 2010) UN Doc A/RES/64/297 para 4, and its Preamble which states that international cooperative efforts must be in accordance with the international legal principles examined in the current report; and the most recent UNGA resolution on 'Measures to Eliminate International Terrorism', UNGA Res 66/105 (9 Dec 2011) UN Doc A/RES/66/105 Preamble, and para 2.

With this target audience in mind especially, the project seeks to be solution-orientated, including in terms of the recommendations made and the identification of best practices which may be adaptable and transferable to other contexts and jurisdictions.

## **2. KEY CONCEPTS, PRINCIPLES, AND FRAMEWORK**

### **2.1. The International Rule of Law Framework Applicable to Counter-Terrorism**

Despite the significance of the rule of law, there is no universal consensus or definition as to its exact meaning or components. Nevertheless, there are a number of clearly identifiable sources of legal principles which make up the international rule of law framework applicable to counter-terrorism, the primary ones of which are outlined here.

#### *2.1.1. UN Global Counter-Terrorism Strategy 2006*

In determining the applicable international rule of law framework, the correct starting point is believed to be the United Nations (UN) Global Counter-Terrorism Strategy 2006 (UN CT Strategy) and the principles which underpin it. Adopted without a vote by the UN General Assembly in Resolution 60/288,<sup>2</sup> thereby reflecting a baseline of universal consensus and legitimacy, this was the first time that the UN Membership had agreed and adopted a common strategic approach and framework to fight terrorism. Furthermore, the pivotal importance of the rule of law both underpins and is reiterated throughout its text,<sup>3</sup> not least due to its recognition ‘that acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy.....’<sup>4</sup>

The UN CT Strategy’s Plan of Action has four pillars, each reflecting different elements of its overarching objectives: Pillar I: measures to address the conditions conducive to the spread of terrorism; Pillar II: measures to prevent and combat terrorism; Pillar III: measures to build states’ capacity to prevent and combat terrorism and to strengthen the role of the UN system in this regard; and Pillar IV measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism. Although the current focus is primarily on Pillar IV, its inter-connectedness with the underpinning objectives and principles of Pillars I to III is also recognized. For example, with respect to Pillar I the erosion of

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<sup>2</sup> UN General Assembly (UNGA) Res 288/60 (8 September 2006) UN Doc A/RES/288/60 (UN CT Strategy); subsequently reviewed by the UNGA biennially in UNGA Res 62/272 (5 September 2008) UN Doc A/RES/62/272, and UNGA Res 64/297 (8 September 2010) UN Doc A/RES/64/297, both of which have also been adopted on the basis of consensus.

<sup>3</sup> See, eg, UN CT Strategy, Action Plan: Pillar II, para 3 (‘To cooperate fully in the fight against terrorism, *in accordance with our obligations under international law.....*’); and Pillar IV, Preamble (‘Reaffirming that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy...’), and paras 1-5.

<sup>4</sup> UN CT Strategy, Preamble.

fundamental human rights and criminal justice norms through repressive governmental responses to terrorist activities may themselves become root causes of radicalization and eventual violent extremism.<sup>5</sup>

The principal body of applicable legal principles identified in the UN CT Strategy are those of international humanitarian, human rights, refugee/asylum, and criminal law,<sup>6</sup> together with the UN Charter.<sup>7</sup> While not perfect in terms of their universal acceptance, implementation, or application, nevertheless most UN Member States are legally bound to adhere to most of these principles by virtue of being States Parties to the applicable international conventions<sup>8</sup> and protocols and/or related customary international law norms.

### 2.1.2. *WJP Universal Rule of Law Principles*

Additionally, the project endorses the four universal rule of law principles determined by the WJP, namely that: a government and its officials and agents are accountable under the law; the laws are clear, publicized, stable and fair, and protect fundamental rights; the process by which the laws are enacted, administered, and enforced is accessible, fair and efficient; and access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.<sup>9</sup>

### 2.1.3. *Democratic Framework*

The legal principles mentioned above do not operate in isolation. Instead, there is growing international recognition of the interdependent and mutually reinforcing relationship that exists between those universal principles concerned with the protection of the rule of law, promotion of democracy, and respect for human rights, both for the maintenance of international peace and security more generally<sup>10</sup> as well as in the specific context of counter-terrorism.<sup>11</sup> Indeed, a dominant and recurring message of the ‘Arab Spring’ has been that

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<sup>5</sup> UN CT Strategy, Preamble; Action Plan: Pillar I, Preamble, paras 1, and 7.

<sup>6</sup> UN CT Strategy, Action Plan: Preamble; Pillar IV, paras 2-5 Also, UN Security Council (UNSC) Res 1624 (14 September 2005) UN Doc S/RES/1624, Preamble, and para 4; UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 para 3.

<sup>7</sup> See, eg, UN CT Strategy, Preamble.

<sup>8</sup> Where UN Member States are not yet states parties to some of the applicable international treaties, they are urged to do so and to implement their provisions within national law at the earliest opportunity. See, eg, UN CT Strategy, Plan of Action: Pillar IV, para 3; and UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 paras 3(d) and (e).

<sup>9</sup> Available at <<http://www.worldjusticeproject.org/about/>> accessed 28 November 2011. See too the WJP’s Rule of Law Index at <<http://worldjusticeproject.org/rule-of-law-index/>>.

<sup>10</sup> See, eg, Report of the Secretary-General, ‘In Larger Freedom: Towards Development, Security and Human Rights for All’ (2005) UN Doc A/59/2005 (In Larger Freedom Report), paras 127-8; World Summit Outcome, UNGA Res 60/1 (16 September 2005) UN Doc A/RES/60/1 para 119; UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 para 2.

<sup>11</sup> See, eg, UN CT Strategy, Preamble; UNGA Res 66/171 (19 December 2011) UN Doc A/RES/66/171, Preamble. Similarly, see eg Council of Europe’s: Convention on the Prevention of Terrorism 2005 (adopted 16 May 2005, entered into force 1 June 2007), especially the Preamble; and Parliamentary Assembly, Resolution 1507 (2006), adopted 27 June 2006, para 1. See also International Summit on Democracy, Terrorism and



many people around the world, including those who have lived under authoritarian and/or repressive regimes, aspire to live in societies which respect principles of dignity, democracy, freedom, economic opportunity, the rule of law, and human rights.

It is difficult to identify with precision those legal principles which make up this democratic component of the international rule of law framework. Whilst there is general consensus that democracy has now acquired the status of being a universal value and right within the UN system,<sup>12</sup> there is no universal definition or agreement as to its meaning or form. That said, the concept is generally associated with the notion of accountable government, not least in terms of acting as a legal standard or benchmark against which its actions may be measured, and is generally linked to a state's constitutional principles. One would also expect those principles articulated within international conventions – such as freedom of speech, expression, religion, association, and the right to privacy – to be reflected in some form within a democratic framework.<sup>13</sup>

#### 2.1.4. *Other Principles*

A number of other more general principles apply also, for example those governing the direct or indirect responsibility of states<sup>14</sup> and international organizations<sup>15</sup> for internationally wrongful acts or omissions. States are responsible for the wrongful acts or omissions of state organs and agents, and for those of private actors when performing inherently governmental functions, which are performed under the effective control of the state. Organizations are directly responsible for the wrongful acts or omissions of their agents, and of state organs under their effective control. In addition to direct responsibility for wrongful acts or omissions, states and organizations are responsible for any failure to exercise due diligence to prevent violations of international law by private actors.<sup>16</sup> Such principles are an important constraint on states' counter-terrorists strategies, whether they are conducted through state agents or through private contractors.

Other principles include those of legality, necessity, proportionality and non-discrimination.<sup>17</sup>

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Security (8-11 March 2005), Madrid Agenda, 'Confronting Terrorism' <<http://summit.clubmadrid.org/agenda/the-madrid-agenda.html>> accessed 8 December 2011 (Madrid Agenda).

<sup>12</sup> See, eg, In Larger Freedom Report (n 10) paras 128, and 148-9; World Summit Outcome (n 10) paras 119, and 135; UN Press Release 'General Assembly Declares 15 September International Day of Democracy' GA/10655 (8 November 2007).

<sup>13</sup> See, eg, ICCPR: art 17 (privacy); art 18 (freedom of thought, conscience, and religion); art 19 (freedom of expression); and art 22 (freedom of association).

<sup>14</sup> International Law Commission (ILC), 'Responsibility of States for Internationally Wrongful Acts' (2001), Annex to UNGA Res 56/83 (12 December 2001), as corrected by UN Doc A/56/49 (Vol 1)/Corr.4, UN Doc A/RES/56/49 (ILC Articles on State Responsibility 2001).

<sup>15</sup> ILC, 'Draft articles on the responsibility of international organizations', Yearbook of the International Law Commission (2011) vol II, Part Two.

<sup>16</sup> See, eg, *The Corfu Channel Case (United Kingdom v Albania)* [1949] ICJ Rep 4, para 22; *Case of Velasquez Rodriguez v Honduras* (Judgment) IACtHR Series C No 4 (29 July 1988), para 172.

<sup>17</sup> See the International Commission of Jurists, 'Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism' (Berlin Declaration) (adopted 28 August 2004) (Berlin Declaration) Principle 1, <<http://www.icj.org/dwn/database/BerlinDeclaration-06092004.pdf>> accessed 8 December 2011.

## **2.2. Criminal Justice Approaches to Counter-Terrorism**

The conclusion reached in the current project is that criminal justice approaches should be the norm for counter-terrorist responses, with armed conflict approaches remaining exceptional. This is also reflective of the UN CT Strategy, which reiterates: ‘...the United Nations system's important role in strengthening the international legal architecture by promoting the rule of law, respect for human rights, and effective criminal justice systems, which constitute the fundamental basis of our common fight against terrorism.’<sup>18</sup>

Consequently, the substantive content of this report is weighted towards non-forcible criminal justice responses to terrorism. The armed conflict paradigm is only considered to the extent that it meets with and crosses over to or from the criminal justice paradigm; in relation to a possible blurring of some traditional parameters of both paradigms through recent state practices, not least the suggestion of the emergence or existence of a ‘new paradigm’ and claims relating to the exceptionality and uniqueness of current terrorist threats and related responses; and when comparing the different levels of protection and potential impunity afforded by both paradigms in relation to non-state terrorist actors or governmental actors in their counter-terrorist responses.

## **2.3. A Rule of Law Based Response to Terrorism**

A rule of law based response requires that institutions with governing and executive functions at national, regional, and international levels - especially executives, militaries, and police forces when engaged in counter-terrorism - are as much subject to national and relevant international laws as those engaged in terrorist activities. As such, it has a power-restraining effect, in particular against excesses in the exercise of executive power. Indeed, a common denominator detected amongst root causes of terrorism is: no accountable government and no rule of law. However, as is evident later in the report, effective systems of both judicial and non-judicial control and accountability mechanisms to narrow governmental or institutional impunity gaps remain problematic.

In terms of what a rule of law based response means, it does not simply require clear, certain, and applicable rules, though these form an important part. The essence of law, especially criminal law, is to circumscribe what is acceptable and what is unacceptable behaviour. If definitions of offences and the other matters mentioned are unclear then the main function of criminal law especially is lost, and the pursuit of other short-term, executive-led goals may take over. More specifically, a legitimate rule of law based response to terrorism is underpinned by fundamental laws and principles drawn from peremptory norms of international law as well as from foundational principles of custom. These include those principles prohibiting torture, discrimination, *refoulement*, arbitrary detention; and those guaranteeing basic due process, rights to information, and freedom of conscience, expression, and religion. A rule of law that pays no regard to the substance of the law does not guarantee

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<sup>18</sup> UN CT Strategy, Action Plan: Pillar IV, para 5.

a just and sustainable legal order; indeed it guarantees little more than punishment in accordance with the law, often in the absence of its due processes.

Nonetheless, the importance of security to a state or to the international system must not be forgotten. This means that the value of security and its inherent imperatives should be incorporated into the rule of law framework where this is not already the case, particularly public and criminal law, and many parts of international law including the UN Charter. International human rights law already recognizes states of emergency that genuinely threaten the integrity of the state, thereby enabling the legal system of a state to be temporarily adjusted to increase the protection of security and decrease the protection of non-derogable rights. That said, states of emergency should be exceptional - *within* the law, not exceptional *to* the law - and generally avoided, not least because they more often than not lead to the violation of fundamental rights. Indeed the legitimacy of any counter-terrorist effort is increased if governments avoid such declarations even though there may be strong arguments that there is a genuine state of emergency. As the International Commission of Jurists noted in their 'Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism' in 2004:

These [rule of law] principles, standards and obligations define the boundaries of permissible and legitimate state action against terrorism. The odious nature of terrorist acts cannot serve as a basis or pretext for states to disregard their international obligations, in particular in the protection of fundamental human rights.

A pervasive security-oriented discourse promotes the sacrifice of fundamental rights and freedoms in the name of eradicating terrorism. There is no conflict between the duty of states to protect the rights of persons threatened by terrorism and their responsibility to ensure that protecting security does not undermine other rights.<sup>19</sup>

## **2.4. Security Imperatives and their Accommodation within the Rule of Law Framework**

The project's starting premise is that governments have legitimate security imperatives<sup>20</sup> to meet in order to protect both their nationals and their territory, which often require difficult choices to be made including under significant pressure. Consequently, the overarching question of the current project is how legitimate domestic, regional, and multi-national counter-terrorist security imperatives – whether at the governmental or intergovernmental level, individually or collectively - may be accommodated within rather than erode the rule of law. Throughout, there is a recurring theme of tension between security imperatives and

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<sup>19</sup> Berlin Declaration (n 17) 1. Similarly, see UN CT Strategy, Action Plan: Pillar IV, Preamble, that 'effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing'.

<sup>20</sup> The term 'security imperative' is used here to denote the inherent duty upon states especially to effectively protect the lives of their citizens against terrorist threats or actions. On this, see eg Council of Europe's Committee of Ministers, 'Guidelines on Human Rights and the Fight against Terrorism' (2002), adopted 11 July 2002, para I; and *LCB v the United Kingdom* (Application No 14/1997/798/1001) ECtHR Judgment of 9 June 1998, para 36.

resultant practices - lawful, legitimate, or otherwise – and adherence to the international rule of law framework.

The project's overall findings suggest that the current international normative framework, while not as coherent as some might wish especially in the absence of a universal definition of terrorism, is largely adequate to respond to most forms of terrorist threat or activity; where it is not, recommendations are made. Contrary to the misperceptions of some, ultimately compliance with the existing rule of law framework carries with it many benefits, not least in terms of increasing the legitimacy and effectiveness of counter-terrorist responses, and strengthening international cooperative efforts where all interested parties work to the same norms and standards.

## **2.5. Terrorism, Counter-Terrorism, and the Absence of a Fully Coherent International Legal Regime**

Unlike other specific areas of international law, such as international humanitarian law applicable in armed conflict, or international criminal law applicable to grave violations of international law, there is as yet no fully coherent international legal regime governing terrorism and responses to terrorism. This is largely, although not solely, attributable to the continued inability of the international community to reach agreement on a universal definition of terrorism, and therefore to adopt a consistent approach to terrorism and counter-terrorism.

States and other actors have responded by developing parts of a legal regime by, for example, the adoption of a number of significant sectoral treaties addressing most forms of terrorism and based on a criminal justice model requiring State Parties to extradite or prosecute suspected terrorists.<sup>21</sup> By their nature, however, these have been to a certain extent *ad hoc* responses to the changing nature of terrorism, driven by the dominance of specific concerns at particular points in time, whether over hijacking during the 1960s and 1970s, or more recent concerns such as terrorist financing or the potential use of Weapons of Mass Destruction.

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<sup>21</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969); Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977); International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992); Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (adopted 24 February 1988, entered into force 6 August 1989); Convention on the Marking of Plastic Explosives for the Purpose of Detection (adopted 1 March 1991, entered into force 21 June 1998); International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997 by UNGA Res 52/164, entered into force 23 May 2001); International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999 by UNGA Res 54/109, entered into force 10 April 2002); International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005 by UNGA Res 59/290, entered into force 7 July 2007).

While providing a legal framework of sorts for the prosecution and punishment of terrorists, they suffer from certain structural weaknesses, such as lack of supervision and prosecutorial discretion for states holding any suspects, which may lead to competing claims to jurisdiction and ultimately to lack of enforcement. What is clear, however, from the normal response of states to terrorism and terrorist acts in negotiating and adopting treaties on the subject, is that terrorism is a crime, albeit a particularly heinous one that is not simply directed at innocent targets but is also directed at undermining society. Thus any coherent development of international law on terrorism should be based on the international criminal law paradigm, and legitimate counter-terrorism on the basis of the enforcement of such laws. In addition to the criminal law core of counter-terrorism, there is a growing amount of ‘hard’ (ie binding) law emerging from the UN Security Council (for example, Security Council Resolution 1371 (2001)) to accompany the developing body of ‘soft’ (ie non-binding) law emanating from the UN General Assembly and other international organizations.

Nevertheless, what is crucially lacking in the area of terrorism is a foundational treaty, around which all other laws revolve and gain their legitimacy; akin to the Geneva Conventions of 1949<sup>22</sup> in the case of international humanitarian law; and to the Rome Statute of 1998<sup>23</sup> in the case of international criminal law. As both examples demonstrate, it is not necessary to have such a treaty at the outset of a legal regime; indeed that it is quite common for the pivotal treaty to be adopted at a later stage to consolidate and underpin the international legal regime in question. Nevertheless, a multi-lateral, universally acceptable treaty is necessary for a sustainable and legitimate legal regime governing terrorism and counter-terrorism. Therefore, while the Security Council created a temporary stop-gap through its (somewhat belated) definition of terrorism in Resolution 1566 (2004) - building its definition around the elements identified below but linking it to the offences in the sectoral treaties outlined above<sup>24</sup> - it cannot make a claim to universality or legislative legitimacy given that it emanates from an executive organ, albeit one with significant law-making competence. Nor can the recent attempt by the Special Tribunal for Lebanon to declare the existence of a customary international crime of ‘transnational terrorism’ since at least 2005 be regarded as authoritative;<sup>25</sup> such a decision has been robustly criticized and rejected as not being founded in state practice.<sup>26</sup>

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<sup>22</sup> Geneva Conventions I-IV were adopted on 12 August 1949, and entered into force 21 October 1950.

<sup>23</sup> Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force on 1 July 2002) (ICC Statute).

<sup>24</sup> UNSC Res 1566 (8 October 2004) UN Doc S/RES/1373 para 3. The definition added little substantively in that it did not criminalize any conduct which was not already criminal under existing transnational crime treaties. Nor is any ‘special intent’ or motive (political, religious, or ideological purpose) required behind the conduct. Whilst this avoids concerns about the discriminatory targeting of certain religious or political beliefs, the lack of such a motive element dilutes the special character of terrorism as an offence against the political process or other public orientated interests.

<sup>25</sup> Special Tribunal for Lebanon (Appeals Chamber), *Interlocutory Decision on the Applicable Law*, STL-11-01/I (16 February 2011) (Special Tribunal for Lebanon *Interlocutory Decision*), para 85.

<sup>26</sup> See, eg, B Saul, ‘Legislating from A Radical Hague: The UN Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism’ (2011) 24 *Leiden Journal of International Law* 677; K Ambos, ‘Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?’ (2011) 24 *Leiden Journal of International Law* 655; M Gillett and M Schuster, ‘Fast-track Justice: The

Thus the need for a Comprehensive Convention on International Terrorism has not passed; indeed as more *ad hoc* laws are adopted on terrorism and counter-terrorism, the greater the need for such a Convention, to provide unity and legitimacy, as well as overall legality, for a sustainable counter-terrorist strategy. A Comprehensive Convention would also add value through the inclusion of a definition of terrorism which would bring greater precision, certainty, and consistency of approach to the rule of law framework. In addition, it would clarify the basic nature and extent of counter-terrorism, for example by defining the limits of a criminal justice approach; identifying relevant principles applicable from other parts of international law; and by strengthening and supervising (by means of a treaty body) the obligations of State Parties to extradite or prosecute.

Although most aspects of the Convention have now been agreed, a definition remains elusive, in particular attributable to disagreement regarding whether or not persons engaged in armed self-determination struggles should fall within its scope. The likelihood of completing negotiations on, and subsequent adopting, the draft Comprehensive Convention any time soon is not currently promising.<sup>27</sup> That said, although there is no universally agreed definition of terrorism, the main elements of any such definition seem to be relatively clear, namely that they should cover serious criminal acts (the main examples of which are those found in the existing suppression treaties) against civilians with the aim of intimidating a population or part of it, or compelling a national government or international organization from doing or abstaining from some act; irrespective of any political, ideological, or religious motive behind it.<sup>28</sup> It is also important to ensure that any definition of terrorism developed for criminal justice purposes does not confuse the existing regime applicable to situations of armed conflict or other situations when international humanitarian law applies, since this regime already has clear provisions dealing with terrorist means and methods of warfare. (See further section 4.1).

There is no shortage of international and national norms that seek to restrain terrorist and counter-terrorist activities. There are, however, a number of weaknesses. More generally, the existence of international rules is one thing; their actual adoption, application, and enforcement within domestic and some regional jurisdictions may be another, as is evident throughout this report. There are many important specific weaknesses also. One is that international human rights law, probably the most important regime in terms of counter-terrorism, is limited jurisdictionally, with continuing debates about its applicability beyond the territory of the Contracting State.<sup>29</sup> International humanitarian law, on the other hand, does not have that restriction, but is confined in its application to armed conflicts, and besides which has its own well developed prohibitions on the use of terror during wartime.

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Special Tribunal for Lebanon Defines Terrorism' (2011) Journal of International Criminal Justice (Advance Access published on 18 August 2011).

<sup>27</sup> See, eg, UNGA, 'Measures to eliminate international terrorism: Report of the Sixth Committee', UN Doc A/66/478 (15 November 2011), paras 23-6.

<sup>28</sup> See Special Tribunal for Lebanon *Interlocutory Decision* (n 25) para 85; similarly, UNGA Res 49/60 (9 December 1994) UN Doc A/RES/49/60 para 3.

<sup>29</sup> Most recently, the ECtHR examined these issues in the case of *Al-Skeini and others v United Kingdom* (Application No 55721/07) ECtHR Judgment of 7 July 2011; and *Al-Jedda v United Kingdom* (Application No 27021/08) ECtHR Judgment of 7 July 2011.

International criminal law would appear to be the natural home for the development of a legal regime for tackling terrorism, but despite the fact that the debates leading to the Rome Statute were motivated by, and included, plenty of discussion about terrorist crimes, ultimately problems of lack of definition, and the lack of universality of the sectoral treaties meant that only core customary crimes (aggression, genocide, crimes against humanity, and war crimes) were included. Though major acts of terrorism may well fall within at least some of these core crimes (see section 4.2), the ICC is unlikely to be central to the fight against terrorism, at least in so far as it is not one of its core crimes. Of course, it is possible for future Review Conferences of the ICC to develop a new crime based on a universally accepted definition of terrorism in the future, which currently remains elusive.

## **2.6. The Legal Relationship between Conflicting Norms**

One important issue - which impacts upon the cohesiveness of the international tapestry of rule of law norms and their enforcement – is uncertainty concerning the exact nature of the normative relationship existing between national, regional, and international/UN outputs, in particular where these are inconsistent and incompatible with each other. Such conflicts are an inevitable characteristic of a system of international law which is influenced by many and diverse national and institutional law-making activities in the absence of a central legislator or executive; and which lacks a centralized adjudicator, such as a court with general and compulsory jurisdiction, to reconcile competing or incompatible norms.

The matter is further complicated by the fact that there are only a few principles of international law for determining the normative relationship between two different legal orders; one of the most important of which is that a state cannot invoke provisions of its domestic law as a justification for failure to perform its obligations under a treaty to which it is a party.<sup>30</sup> In the case of the Security Council, Member States accept and agree to carry out its decisions when adopted in accordance with the purposes and principles of the UN Charter, which includes respect for human rights.<sup>31</sup>

Limited forms of hierarchy exist within international law in the shape of norms of *jus cogens* (otherwise known as ‘peremptory norms’) and obligations arising under the UN Charter, when they conflict with obligations arising under any other treaty. More specifically, the exact meaning, scope, and effect of Article 103 UN Charter in the event of any conflicting norms between UN and regional or national norms have come into question in the counter-terrorist context, in particular if and when obligations arising under the UN Charter prevail over the other treaty obligations and with what consequences. In terms of its meaning, there appears to be general agreement that Article 103 extends to obligations: which are concerned directly with Articles 1 (purposes) and 2 (principles) UN Charter; which result from a binding decision of a UN organ, for example of the Security Council under Article 25 UN Charter; or which arise ‘under any other international agreement’, although the exact meaning of this is

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<sup>30</sup> Art 27 Vienna Convention on the Law of Treaties (adopted on 23 May 1969, entered into force 27 January 1980).

<sup>31</sup> Arts 1, 24(2), and 25 UN Charter.

unclear. Beyond that, however, the reach of this provision is to a large extent dependent upon who is interpreting the provision, in particular whether a restrictive or broader interpretative approach is adopted. Furthermore, the exact consequences of any incompatibility as a result of Article 103 are unclear, with the exception of any norms conflicting with *jus cogens* status which will be invalid.

In the counter-terrorist context, these issues initially came to the fore with respect to the Security Council's Resolution 1267 sanctions regime against Taliban and al Qaeda terrorists and organizations, which is examined in detail below (sections 7.5 and 8.3). One of the primary rule of law tensions raised by this regime has been that despite the inadequacy of the Security Council's conformity with relevant human rights standards - reflected within its listing and delisting procedures - this does not reduce the scope or applicability of existing human rights obligations at the domestic or regional levels. Instead, even when responding to laws promulgated by the Security Council, Member States must be careful to respect other fundamental norms and constitutional rights. This is especially true of norms of *jus cogens* which as general principles of law are binding upon all states and international organizations, with the consequence that any incompatible norms will be invalid or terminated. The ECtHR has made it clear that obligations arising under a Security Council resolution cannot be unilaterally interpreted by states to override their obligations under human rights treaties. The Court did leave open the possibility that the Security Council could, by means of an express and clear provision, override states' obligations under human rights treaties when necessary for imperative reasons of peace and security.<sup>32</sup> Such use of exceptional powers by the Security Council, however, should be used sparingly so as not to undermine the human rights provisions that underpin legitimate counter-terrorist responses.<sup>33</sup>

### **3. GOVERNMENTAL AND INTERGOVERNMENTAL INSTITUTIONS**

#### **3.1. Governmental**

States, who remain the dominant actors within international law, are directly bound by the rule of law principles examined in this report, whether by virtue of being States Parties to the relevant treaties and/or being bound under customary international law. This makes their role in the promotion and enforcement of rule of law norms – whether national, regional, or international ones - critical, especially in the absence of any international court or tribunal with universal and explicit competence to prosecute terrorist crimes or to bring states to

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<sup>32</sup> *Al-Jedda v United Kingdom* (n 29) para 105.

<sup>33</sup> On these conflict of norm issues, see eg J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press, Cambridge 2003), especially 12-13, 16, 148, 324, and 338; R Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 *International and Comparative Law Quarterly* 583, 585, and 591; and B Simma (ed), *The Charter of the United Nations* (Oxford University Press, Oxford 1995) 1122.



account for non-compliance with rule of law obligations including in pursuit of their counter-terrorist security imperatives. Consequently, as part of the criminal justice paradigm upon which the UN CT Strategy is founded, states are required to develop and maintain effective and rule of law based national criminal justice systems which comply with well established human rights principles and fundamental freedoms.<sup>34</sup>

In practice, however, as Counter-Terrorism Committee Executive Directorate (CTED) has discovered in its efforts pursuant to Security Council Regulation 1373, ‘ensur[ing] that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice’<sup>35</sup> can pose significant challenges to states’ criminal justice systems. Often these have required states’ investigative, prosecutorial, and judicial authorities to develop new mechanisms, not least to accommodate the case-management and technical complexities associated with many terrorism cases. These have ranged from developing the necessary forensic evidence gathering skills sets; to comprehending the many diverse and often difficult to detect methods of transferring funds designated for terrorist purposes; to ensuring the integrity of the chain of custody of different and sometimes novel forms of evidence, especially where this is electronic in form (not least due to the fast evolving nature of such technology); to methods of uncovering and subsequently using such evidence as the basis of a prosecution or defence case in a legally admissible manner.<sup>36</sup>

### **3.2. Intergovernmental**

Significantly, although the treaties and customary law norms which comprise the international rule of law framework apply directly to states only, intergovernmental organizations – both at the regional and international levels - have important functions to play in terms of implementing the objectives of *inter alia* the UN CT Strategy. This includes the establishment of effective mechanisms to ensure the protection of fundamental rights, and the development and harmonization of coherent anti-terrorism norms.

As with states, they may encounter tensions between security imperatives and adherence to rule of law norms in their institutional practices, yet are increasingly impacted by trends towards increased institutional responsibility and expectations of rule of law compliance by international organizations, not least for reasons of legitimacy and the closing of impunity gaps whether at the non-state, state, or institutional level. This is illustrated by the creation of the Ombudsperson to the Security Council’s 1267 sanctions regime (see section 8.3).

### **3.3. United Nations**

As is reflected within the UN CT Strategy, the UN retains a pivotal institutional role in strengthening the international legal architecture for countering terrorism, not least through

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<sup>34</sup> See, eg, UN CT Strategy, Action Plan: Pillar IV, para 4.

<sup>35</sup> UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 para 2(e).

<sup>36</sup> See separate submission of David Scharia.

promotion of the rule of law.<sup>37</sup> Indeed, it retains a central responsibility to ensure that counter-terrorism is both effective in tackling terrorism (a burden largely placed on the Security Council) and just (a concern for the General Assembly); and has a number of institutional mechanisms to assist this process. Each will be considered in turn.

Despite the international recognition and affirmation of the Strategy, however, it has yet to achieve its full potential in practice, not least in terms of being underpinned by the requisite levels of national and regional political will and knowledge of its content in order to translate its core objectives from rhetoric and theory into practice.<sup>38</sup> Despite the fact that it was adopted and has been reaffirmed subsequently by consensus resolutions, one institutional weakness of any UN General Assembly resolution remains that it is not formally binding or enforceable in contrast to those of the Security Council (for example, UN Security Council Resolution 1373 which was adopted under Chapter VII UN Charter).

### 3.3.1. *UN General Assembly and Security Council*<sup>39</sup>

Both the UN General Assembly and the Security Council have different yet complementary roles and approaches in relation to the development and implementation of the international legal framework. Despite these, there have been some recent signs of synergy, between the executive and security-driven hard law produced by the Security Council, and the general, human rights, focused norms produced by the General Assembly,<sup>40</sup> towards a more coherent body of UN law. This is important for ensuring greater legitimacy of counter-terrorist responses; and for placing the UN, as the most legitimate representative of the international community, at their centre. Such consolidation is evident within the adoption of the UN CT Strategy, although this remains a long way from being truly embedded within Member States' responses as previously noted. Certainly, not least under Article 24(2) UN Charter,<sup>41</sup> the Security Council should concern itself with human rights matters; whereas, under Articles 10, 11(1), and 14 UN Charter, the General Assembly has competence on matters of peace and security, especially those that raise human rights concerns or constitute denials of the right of self-determination. Indeed, with respect to the manner and circumstances of the creation of the Special Tribunal for Lebanon,<sup>42</sup> it has been suggested that there has been a paradigm shift

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<sup>37</sup> UN CT Strategy, Action Plan: Pillar IV, para 5.

<sup>38</sup> See further, eg, J Cockayne, A Millar, and J Ipe, 'An Opportunity for Renewal: Revitalizing the United Nations counterterrorism program' (Center on Global Counterterrorism Cooperation, Washington, DC, September 2010) i-ii, <[http://www.globalct.org/resources\\_publications.php](http://www.globalct.org/resources_publications.php)> accessed 8 December 2011.

<sup>39</sup> See ND White, 'The United Nations and Counter-Terrorism: Multilateral and Executive Law-Making', Chapter 3. Note, all chapter references given in the report, refer to AM Salinas de Friás, KLH Samuel, and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford 2012).

<sup>40</sup> See, eg, the UNGA annual resolutions on the 'protection of human rights and fundamental freedoms while countering terrorism': UNGA Res 66/171 (19 December 2011) UN Doc A/RES/66/171; UNGA Res 65/221 (21 December 2010) UN Doc A/RES/65/221; UNGA Res 64/168 (22 January 2010) UN Doc A/RES/64/168.

<sup>41</sup> Furthermore, in *Conditions of Admission of a State to the United Nations (Article 4 of the Charter)* [1948] ICJ Rep 64, the International Court of Justice confirmed that although the Security Council (and it follows, also the General Assembly) is an organ with a political nature, that its political character could not exempt it from observance of the UN Charter's (rule of law) treaty provisions in the exercise of its powers.

<sup>42</sup> UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757.

whereby the Security Council is being increasingly informed by international criminal justice objectives and norms<sup>43</sup> though its focus remains peace and security.

**3.3.1.1. Evolution of Approaches** During the Cold War period, terrorism was generally responded to by the UN and the wider international community by a consensual, multi-lateral criminal justice approach of counter-terrorist law-making and law enforcement, which established important building blocks for the post-Cold War period. Indeed, during this era a military approach to tackling terrorism was not generally recognized by either the UN or wider international community.

In contrast, during the post-Cold War era, the transnational criminal justice approach of the 1960s and 1970s has on occasion been supplemented by or even replaced with a collective security, occasionally military, approach which has been characterized by much broader and often more controversial legislative, military, and penal responses. Acts of terrorism are seen not just as issues for national and international criminal justice, but as threats to the peace for the Security Council to deal with, and possibly for states to respond to using their right of self-defence. Certainly, with respect to the latter, notable features of this era have included concerted efforts by some to reform the right of self-defence; and the vision of a continuing ‘War on Terror’<sup>44</sup> with an open-ended right of defence against terrorism.

Any notion of a global war, whether against the phenomenon of terror or against particular non-state actors, is potentially legally problematic. On the one hand it may simply be seen as a non-technical or rhetorical term used by political leaders in the same vein as ‘war on drugs’ or ‘war on poverty’. However, because terrorism involves armed violence, and therefore is closer to war in a literal sense, some may be tempted to view it as having a deeper, legal meaning, namely referring back to the pre-UN Charter legal order in which it would not be necessary to analyse each terrorist attack and the response to it in terms of its legitimacy as an exercise of self-defence. One of the principal concerns regarding any reference to a continuing war in the current context is that whilst this may serve as a useful rhetorical tool, it may also be used as a legal justification for pursuing broader policies which may by-pass otherwise applicable rule of law norms and standards. In turn, any such invocation risks undermining the principles of the UN Charter and the objectives behind those rules.

It terms of evaluating the UN’s response to this term, it has not accommodated such a concept within its approaches to counter-terrorism. Although during the post-9/11 era the Security Council has in effect determined that all acts of international terrorism are threats to international peace and security,<sup>45</sup> it has mainly used its non-forcible Chapter VII powers in response to terrorism, and has not yet authorized military action. Consequently, it remains accurate to state that there is no global state of war, rather legally speaking a time of peace,

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<sup>43</sup> F Megret, ‘A Special Tribunal for Lebanon: the UN Security Council and the emancipation of international criminal justice’ 21 (2008) *Leiden Journal of International Law* 485, 499.

<sup>44</sup> Since the initial introduction of this term by the US Government following 9/11, it has since been modified to a US led war against al Qaeda and its terrorist affiliates who support efforts to attack the US, its allies, and partners. See, eg, ‘Barack Obama declares the ‘War on Terror’ is over’, *The Telegraph* (27 May 2010).

<sup>45</sup> UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368.

though a peace that is ruptured by terrorism and by other acts of international violence as well as by localized armed conflicts.

**3.3.1.2. Rule of Law Promotion** Despite the different functions and approaches of the General Assembly and Security Council, their own promotion of the rule of law – both in rhetoric and practice – remains central to the effectiveness and legitimacy of not only their actions, but also to the wider international rule of law framework.

Particularly problematic here has been the Security Council's mixed practices in terms of its own adherence to core rule of law principles. While on the one hand it reaffirms the importance of the rule of law, including within its resolutions;<sup>46</sup> on the other, some of its approaches to terrorism security imperatives have reflected poor adherence to fundamental human rights norms, as mentioned already with respect to its targeted sanctions regime. Another area of difficulty has been the legislative responses required by Member States under Security Council Resolution 1373. While the Resolution undoubtedly strengthened the international legal framework, in rule of law terms it was also problematic due to the absence of an accompanying working definition of terrorism at the time. Although one was given in Security Council Resolution 1566,<sup>47</sup> this was some 3 years later by which time many states had already passed domestic anti-terrorism legislation in accordance with their own national definitions. Consequently, although states did not protest at the time, in the longer term incoherent anti-terrorist laws may lead to disparities in compliance and even perceptions of illegitimacy, with certain states using those laws for draconian repression, while others refuse to comply because such laws fail to match rule of law standards, including human rights obligations.

With respect to the General Assembly, it has often failed to condemn or even comment on rule of law violations within its areas of competence (and arguably also responsibility), focussing instead primarily on condemning terrorist atrocities. Claiming that measures are necessary to counter-terrorism should not be accepted as a reason for escaping censure if those actions violate human rights or other applicable principles of international law. For example, targeted killings, though lawful in certain limited situations during armed conflict, generally violate international human rights laws when undertaken outside of that context, and therefore should be censured by the General Assembly. Without that collective condemnation of illegality, the basic functioning of the rule of law cannot be said to exist in international relations.

### **Recommendations:**

- Current trends towards increased synergy between the General Assembly and the Security Council require clarity on the applicability of the rules governing the use of force in the UN Charter. In particular, states should only resort to force in extreme

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<sup>46</sup> UNSC Res 1456 (20 January 2003) UN Doc S/RES/1456 para 6; UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624 para 4.

<sup>47</sup> UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566 para 3.

cases where there is strong evidence of an imminent terrorist attack being launched from another country. This understanding of the law should be endorsed by the General Assembly in the form of a declaration on the right of self-defence against non-state actors; and individual actions that come within accepted parameters should receive endorsement from either the Security Council or the General Assembly. The General Assembly could also take such an opportunity to affirm that while the *jus ad bellum* accommodates military action against terrorists in exceptional circumstances, the military paradigm should be used cautiously and sparingly, otherwise the conflict will expand, and a continuing and ever-escalating state of hostilities will ensue.

- The Security Council should be informed and persuaded to authorize military action only if the threat becomes imminent and the target state is unable to defend itself or otherwise seeks UN help. For less pressing threats of terrorist military action then, the Security Council and regional bodies could impose measures short of the use of force, for example targeted sanctions that comply with basic human rights, such as due process against individuals and groups on the basis of a threat to international peace and security. The measures should be calibrated depending on the seriousness of the threat, from requiring states to arrest and try individuals themselves; to requiring them to hand over suspects to a state with jurisdiction over the offences under relevant UN treaties; to imposing sanctions on states and individuals. Overall, this would represent a welcome return to the situation of the Security Council dealing with individual instances of serious cases of terrorism, rather than taking a more blanket legislative approach, which is a disproportionate response based predominantly on the security imperative, potentially allowing for little or no human rights protection.
- It is recommended that there should be recognition that in cases of international terrorism that constitute threats to international peace, the Security Council has a crucial role to play. Security Council activities as regards terrorism should not be seen as by-passing or overriding the criminal justice approach. The 1267 Committee's listing of individuals and entities should be a prelude to their trial for involvement in terrorism and should be in accordance with human rights obligations. Listing should not be seen as an alternative to trial and criminal punishment, but as an interim step. If a listed person has not been sent for trial at national level within a reasonable period of time, he or she should be delisted.
- In cases falling below the threshold for military/collective security action, states should rely on a mixture of cooperation and lawful coercive techniques (which clearly would not include unlawful rendition flights, the torture, inhumane or degrading treatment of suspects, their prolonged arbitrary detention, or acts in violation of the principle of *non-refoulement*) to ensure that suspected terrorists are brought to trial, working within existing bilateral, regional, and multi-lateral cooperation regimes.
- The criminal justice paradigm should be strengthened by the UN and its agencies consolidating the raft of treaties, by agreeing a definition of terrorism and by accommodating the Security Council within the treaty regime, as has been done within the Rome Statute creating the International Criminal Court.

- A consolidated treaty should not only define terrorism; it should strengthen the methods of cooperation, especially the ‘prosecute or extradite’ formula to ensure strong prosecution or more efficient extradition. Supervision of this obligation should be given to a treaty committee.
- The soft law of the General Assembly could be developed much further, not least with respect to specific forms of cooperation: extradition, legal assistance, execution of foreign penal sentences, recognition of foreign penal judgments, transfer of criminal proceedings, freezing and seizing of assets deriving from criminal conduct, intelligence and law enforcement information gathering and sharing, and the creation and recognition of regional/sub-regional judicial spaces.
- It is important that the UN acts in cooperation with regional organizations to increase the coherence as well as reach of the agreed counter-terrorist strategy and its outworking.

### 3.3.2. *Institutional Mechanisms for Implementing the UN CT Strategy*<sup>48</sup>

In addition to the law-making role of the General Assembly and Security Council, there are a number of UN institutional mechanisms in place aimed at strengthening the implementation of counter-terrorist rule of law norms, including those underpinning the UN CT Strategy, not least through the coordination and development of good practices, and capacity-building initiatives.

One such mechanism is the UN Counter-Terrorism Implementation Task Force (CTITF), which was created in 2005 to enhance the coordination and coherence of counter-terrorist efforts within the UN system. This now includes the implementation of the UN CT Strategy, although the primary responsibility for this rests with individual Member States. CTITF coordinates a number of Working Groups, two of which focus on issues of direct rule of law concern.<sup>49</sup> One of its primary challenges remains achieving the requisite levels of political will and action to more extensively embed the UN CT Strategy within domestic anti-terrorism practices.

Another is the UN Office on Drugs and Crime (Terrorism Prevention Branch) (UNODC (TPB)) which plays a central role, especially in the provision of technical assistance to Member States upon request, including on the ratification and implementation of international legal instruments against terrorism, and other measures aimed at strengthening the capacity of national criminal justice systems.<sup>50</sup> Much of this assistance is delivered through its Global Project on Strengthening the Legal Regime against Terrorism, which has

<sup>48</sup> See especially N El Khoury, ‘Implementing Human Rights and Rule of Law Aspects of the UN Global Counter-Terrorism Strategy: The UNODC/TPB Experience’, Chapter 37; separate submission of EJ Flynn.

<sup>49</sup> Working Group for the Protection of Human Rights while Countering Terrorism; and Working Group for Supporting and Highlighting Victims of Terrorism. See further <<http://www.un.org/en/terrorism/ctitf/workinggroups.shtml>> accessed 8 December 2011.

<sup>50</sup> Since 2002, UNODC/TPB’s mandate here has been reiterated in and developed by various UNGA resolutions including, most recently, in ‘Measures to Eliminate International Terrorism’, UNGA Res 66/105 (9 December 2010) UN Doc A/RES/66/105 para 20.

global, sub-regional, and national components. One significant impediment to TPB's work, however, is the absence in many countries of a national coordination centre or unit which coordinates the national counter-terrorist efforts of its officials, without which it is more difficult to sustain constructive dialogue and momentum with all the relevant parties. There can be a direct correlation between effective internal communication lines and both the subsequent performance of national authorities in countering terrorism, as well as the effectiveness of any technical assistance delivery to it.

The other key mechanism is the CTC<sup>51</sup> and CTED,<sup>52</sup> one of whose primary mandates is the effective implementation of Security Council Resolution 1373 by monitoring and assisting Member States to meet their related legislative obligations. Although the very nature of this work inherently touches upon a broad array of human rights and rule of law issues – both in terms of particular issues as well as overarching principles of, for example, legality and double criminality - an important restraint on their work to date has been the absence of a specific mandate to assess rule of law compliance by Member States in any detail, primarily because the CTC is not formally designated as a human rights body.

Some indirect inquiry into rule of law frameworks has been possible under the wording of Security Council Resolution 1373;<sup>53</sup> the authorization given to CTED by the CTC to ensure the provision of rule of law based technical assistance to Member States;<sup>54</sup> and when following the CTC's human rights 'policy guidance'<sup>55</sup> which directs CTED to provide advice to the CTC on a number of matters, which include international human rights, refugee, and humanitarian law, in connection with the identification and implementation of effective measures to implement Resolution 1373. Nevertheless, the absence of a direct mandate to examine these issues, combined with the continued focus of the CTC being weighted more towards legislative and administrative aspects of the counter-terrorist framework than rule of law ones, undoubtedly impedes CTED in the work and enquiry that it may undertake on rule of law issues.

However, the CTC's and CTED's focus on rule of law issues is changing following the adoption of Security Council Resolution 1963,<sup>56</sup> which appears to signify the beginning of a convergence between the international counter-terrorist framework and the broader global effort to promote development, rule of law, and human rights such that counter-terrorist responses may no longer be considered in isolation. This may require some adjustments in the way that international mechanisms, not least the Security Council, address the counter-terrorism challenge in the years ahead. Ultimately, the loosening or removal of prior

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<sup>51</sup> Established under UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 para 6.

<sup>52</sup> Established under UNSC Res 1535 (26 March 2004) UN Doc S/RES/1535 to assist the work of the CTC.

<sup>53</sup> Eg, judicial procedures. Under UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 para 2(e), states are to ensure 'that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts *is brought to justice...*', which requires standards of impartiality, independence, etc.

<sup>54</sup> See, eg, UNSC CTC, 'Technical Assistance', <<http://www.un.org/en/sc/ctc/capacity.html>> accessed 16 January 2012.

<sup>55</sup> See website of the CTC, <<http://www.un.org/en/sc/ctc/rights.html>> accessed 8 December 2011.

<sup>56</sup> UNSC Res 1963 (20 December 2010) UN Doc S/RES/1963. In particular, the Resolution recognizes that 'development, peace and security, and human rights are interlinked and mutually reinforcing....' (Preamble). See too para 10.

constraints on the work of CTED under the provisions of Resolution 1963 can only assist in current *inter alia* UN efforts to strengthen the implementation of and adherence to international rule of law norms, not least with respect to the establishment of effective oversight and accountability mechanisms, which in turn promote greater public confidence in security institutions.

### ***Recommendations:***

The efforts of these UN mechanisms to strengthen rule of law adherence in counter-terrorist responses, especially though more effective national implementation of the UN CT Strategy, would be assisted through the following recommendations:

### ***States***

- Enhancement of the domestic ratification processes of outstanding instruments against terrorism.
- Further incorporation into national laws, and subsequently enforcement, of those human rights standards arising from international instruments which are of specific relevance to the fight against terrorism.
- Full replication of all terrorist offences contained within international anti-terrorism instruments within national legislation.
- Reform and simplification of double (dual) criminality requirements in domestic laws and treaties relevant to terrorist offences.
- Continually striving towards and promoting common grounds among countries to facilitate international cooperation.
- Ensuring the expeditious apprehension, and subsequent prosecution or extradition, of alleged perpetrators of terrorist acts in accordance with the relevant provisions of national and international law, in particular international human rights, refugee, and humanitarian law.
- Designation and establishment of a competent national authority (focal point) to coordinate and thereby strengthen international cooperative efforts on criminal matters, where one does not currently exist.
- Designation and establishment of national coordination centres or units to oversee and coordinate the efforts of different agencies and entities dealing with counter-terrorism at the domestic level.



### *International Community*

- Sustainment of international efforts to reach agreement on the draft UN Comprehensive Convention on International Terrorism, in particular to obtain consensus on a universally accepted definition of terrorism.
- Provision to those countries which do not currently have the necessary capacity to deal with complex terrorist crimes with the necessary logistical means and substantive expertise.
- Ensuring regular, ongoing training workshops and seminars on specialized types of terrorism to enable both counter-terrorist policy-makers and practitioners to keep abreast of recent developments and therefore respond to them more effectively.

### *CTED*

- Provision by the CTC of a specific mandate for CTED to make detailed assessments of rule of law compliance by Member States.
- Development and reliance by CTED on a standardized set of indicators to achieve consistency in assessments.
- Strengthened relationships with assistance-providers to ensure follow-up in addressing identified weaknesses.

### **3.4. Democratic Framework<sup>57</sup>**

In addition to the importance of upholding and protecting democratic principles and practices, the importance of functioning democratic institutions in countering terrorism is widely recognized, including by the UN General Assembly.<sup>58</sup> Closely related to this is the recognition amongst many states and intergovernmental organizations that an effective democratic framework makes a state more resilient in resisting internal terrorist campaigns. As stated in the Madrid Agenda 2005: ‘Only freedom and democracy can ultimately defeat terrorism. No other system of government can claim more legitimacy, and through no other system can political grievances be addressed more effectively.’<sup>59</sup> Furthermore, it is widely recognized that democratic principles, together with their accompanying rights, are often themselves specific terrorist objectives.<sup>60</sup>

As is a recurring theme throughout this report, however, not only terrorists but also governments may violate the rule of law through their counter-terrorist responses. Often this is attributable, at least in part, to the weakness of its internal institutions and compliance

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<sup>57</sup> See CM Cerna, ‘The Role and Legal Framework of the Inter-American Commission on Human Rights in Securing Justice for Victims’, Chapter 30.

<sup>58</sup> See, eg, UNGA Res 60/158 (16 December 2005) UN Doc A/RES/60/158 para 7.

<sup>59</sup> Madrid Agenda (n 11) ‘Citizens and Democracy’.

<sup>60</sup> See, eg, UN High-Level Panel Report 2004 (n 1) para 145; Council of Europe’s Committee of Ministers, ‘Guidelines on Human Rights and the Fight against Terrorism’ (2002), Preamble (para a); and Madrid Agenda (n 11) ‘The Madrid Principles’.

mechanisms,<sup>61</sup> including its democratic framework. One of the most effective ways that a functioning democracy may at least limit erosions of the rule of law is through parliamentary oversight (examined in more detail in section 8.1).<sup>62</sup> Similarly, as has been the experience of many Member States of the Organization of American States (OAS), democratic rights may become more vulnerable to erosion or abuse during times of polarization or political crisis, which include situations of insurgent, terrorist, or guerrilla violence. Regional organizations and mechanisms have an important role to play here, especially in terms of ensuring that these rights are more effectively protected against any arbitrary interference by their Member States.

It is recognized, however, that countering terrorism within a democratic framework may come at a cost; nevertheless it is believed to be essential to effective security responses in both the short and longer term. As Chief Justice Aharon Barak, Supreme Court of Israel, famously stated: ‘At times democracy fights with one hand tied behind its back. Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of its security stance.’<sup>63</sup> That said, the courts have recognized that some compromise between the requirements for defending democratic society and individual rights is inherent within *inter alia* human rights treaties.<sup>64</sup>

### ***Recommendations***

- Democratic rights must be more effectively protected against arbitrary interference by the state, especially during times of polarization or political crisis, not least when responding to terrorist threats.
- Any direct or indirect governmental interference or coercion, intended to restrict the enjoyment of these rights on *inter alia* politically motivated rather than genuine security grounds – for example against human rights defenders or political opponents – should be prohibited by law.
- States should be required, including by any regional organization to which they belong, to incorporate within their national laws those regional and international human rights provisions which uphold and protect democratic rights and freedoms principles. In particular, such national legislation should clearly provide for appropriate sanctions for the perpetrators of rule of law violations. These should include the availability of both

<sup>61</sup> In Larger Freedom Report (n 10) para 133.

<sup>62</sup> See, eg, Council of Europe’s Parliamentary Assembly, Recommendation 1713 (2005), on ‘democratic oversight of the security sector in member states’, para 7: ‘Democratic supervision makes use of a series of specific tools intended to ensure the political accountability and transparency of the security sector. These instruments include constitutional principles, legal rules and institutional and logistical provisions, as well as more general activities aimed at fostering good relations between the various parts of the security sector on the one hand, and the political powers (the executive, legislative and judiciary) on a representatives of civil society (NGOs, the media, political parties, etc) on the other.’

<sup>63</sup> HCJ 5100/94, *The Public Committee against Torture in Israel v The State of Israel* 53(4) PD 817, 845. Similarly, see *Klass and others v Germany* (Application No 5029/71) ECtHR Judgment 6 September 1978, para 49; *Orhan v Turkey* (Application No 25656/94) ECtHR Judgment 6 November 2002, para 336.

<sup>64</sup> See, eg, *Klass and others v Germany* (n 63) para 5; and *Brogan and others v United Kingdom* (Application Nos 11209/84, 11234/84, 11266/84, and 11386/85) ECtHR Judgment 29 November 1999, para 48.

criminal sanctions, and of reparations for the victims of such violations, especially by the state where its officials are implicated. Such measures would further assist in reducing current levels of governmental impunity, including in a counter-terrorist context.

### **3.5. Policy-Maker<sup>65</sup>**

Policy-makers clearly lie at the heart of executive decision-making and, as such, determine the extent to which counter-terrorist initiatives are or are not rule of law based. For all the reasons detailed and repeated throughout this report – not least legality, legitimacy, and effectiveness – a number of conclusions were reached. These may be summarized in the following terms: the rule of law does not permit, nor is it expedient, to fight terror with terror; any injustice caused by terrorists, must be countered with justice.

One significant finding is that it is essential for policy-makers to avoid succumbing to any deviations from established norms, not least because such temptations are often induced by terrorists themselves. For example, the use and any acceptance of the idea of a ‘War against Terror’ risks affording terrorists and their causes legitimacy through giving them associated labels - such as ‘fighters’ or ‘soldiers’ - in furtherance of their ideological agendas. In turn, as has been seen in relation to the classification and subsequent treatment of al Qaeda and Taliban battlefield detainees, it may usher in unwelcome confusion and blur previously understood demarcations as to the applicable legal paradigm and its accompanying rules.

Another is that the implementation and accompanying justifications of exceptional legal measures which deviate from constitutional normality may similarly further a fundamental objective of terrorism, namely the substantial alteration of the normal functioning of the democratic system, not least through the erosion of norms and values upon which it is premised. Closely related to this is concern regarding the adoption of any measures and provisions incompatible with the rule of law which extend beyond the immediate emergency created by a terrorist attack. It is of the greatest importance to limit those occasions on which a government reacts to particular security imperatives through the adoption of legal, judicial, and/or administrative measures which lie outside of a state’s usual responses and the rule of law framework.

Additionally, rule of law based responses are often (indeed, should always be) a prerequisite to cooperation, whether bilateral, (sub)-regional, or multi-national in nature. The transnational character of many current terrorist threats is such that it is no longer appropriate to adopt solely domestic approaches, based on traditional concepts of terrorism contained within national criminal justice systems, to what has become a multi-national problem that requires a coherent multi-national approach. Linked to this is the importance of developing a common understanding, language, and approach as to how the notion of rule of law based responses is interpreted, as this may lead to different outcomes.

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<sup>65</sup> See F Perpiñá-Robert, ‘Counter-Terrorism Policy-Making from the Perspective of a Diplomat’, Chapter 12.

Finally, to be truly effective, it is important that rule of law based responses occur in parallel with addressing any underpinning root causes, as is reflected within Pillar I of the Action Plan to the UN CT Strategy.

***Recommendations:***

- The term ‘war’, or any similar term, against any phenomenon of terrorism or particular terrorist actor should not be used, in particular to avoid affording terrorists and terrorist causes any legitimacy; and to prevent any confusion relating to or blurring of the criminal justice and armed conflict paradigms and their respective rules. This does not, however, prevent recognition of the existence of specific armed conflicts with terrorist actors, such as in Afghanistan, when the threshold of the existence of an armed conflict is crossed as understood under international humanitarian law.
- All possible lawful and legitimate responses to particular terrorist threats should be exhausted before resorting to any exceptional legal, judicial, and/or administrative measures, which by their nature threaten the rule of law principles upon which a democracy is founded. Where such recourse is taken, great care must be taken to guard against the erosion of a nation’s core values, and to return to normal responses at the earliest possible moment.
- Every effort should be made to promote and embed rule of law norms within a state’s policies and practices - executive, legislature, and judiciary – during non-exceptional times if they are to be enduring and sustain rule of law based responses during exceptional circumstances.
- When developing counter-terrorist policies, it is important that the focus of governmental machinery shifts from short-term tactical measures to long-term policy designs in the pursuit of a global vision for security. Respect for human rights and fundamental freedoms, which underpin democratic governance, must be central to such an endeavour.
- Care too must be taken to respect core economic, social, and cultural rights, given that counter-terrorist measures can sometimes result in the targeting (in extreme cases – the demonizing) of a minority group or culture.
- Due to the more prominent role of diplomacy in international counter-terrorist efforts – for example, in negotiating the release of foreign nationals being detained by another state; or in seeking and potentially overseeing the implementation of diplomatic assurances given in relation to non-nationals being returned to their countries of origin where there is a significant risk of ill treatment – it is of great importance that diplomats become increasingly conversant with fundamental rule of law norms, which has traditionally been the preserve of lawyers.

### 3.6. Legal Adviser<sup>66</sup>

Due to the central decision-making role of policy-makers, both at the governmental and intergovernmental levels, it is essential that lawyers are an integral part of decision-making processes in order to ensure that counter-terrorist policies and resultant practices are rule of law based. Of course, it should go without saying that any legal advice given is accurate, adheres to the constraints of law, and does not allow the analysis to be unduly influenced by policy factors. Though such an approach will not necessarily ensure that all executive decisions are made within the law, it will reduce the potential for rule of law violations, and thereby put less pressure on mechanisms of accountability - judicial or otherwise - which come into play only after the law has been breached. Four key functions of governmental and intergovernmental legal advisers are considered here.

#### 3.6.1. *Governmental*

The first is the role of the legal adviser in the national legislative process or in the process of establishing international norms, in particular monitoring that contemplated legislation or norm-setting is in conformity with international standards in the field of human rights and humanitarian law. Unless the legal adviser is deeply involved in the legislative process, there is a clear risk that rules may be adopted that do not meet the constitutional and international legal standards that the state is obliged to observe.

- The policy-maker should see to it that appropriate routines are in place to ensure that the legislative process is properly managed.

Secondly, the legal adviser should be engaged with the administrative process, in particular assisting in formulating decisions by the executive (the government) or different organs of the international organization. A prominent feature here is that decisions are made that affect individuals in concrete cases. The decision-maker can be a lawyer, or another official, or a body of officials, most prominently ministers forming a cabinet.

- In such situations it is crucial that the legal adviser is consulted before decisions are made. This applies in particular when the decisions may have serious consequences for individual persons or entities. An important element is to assess whether there is sufficient capacity to perform these functions and, in case there is a need for capacity-building, to seek assistance as appropriate.

A third role is where the legal adviser represents his or her country in international negotiations or assists committees and conferences in the process of negotiating international treaties.

- The legal adviser should be involved in formulating the instructions that are given to those who represent their country in international negotiations. Loyalty to this instruction and good judgement are vital.

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<sup>66</sup> See H Corell, 'The Role of the Lawyer in Shaping Responses to the Security Imperative', Chapter 11.

Fourthly, the legal adviser has a role in relation to the policy-maker. Decision-making must be based on a sound legal analysis and advice. In this context the quality of the personal relationship between the legal adviser and the policy-maker comes to the forefront.

- The policy-maker should be aware that he or she is best served by a legal adviser who scrupulously observes the moral and ethical elements of the profession. The legal adviser should realize the pressure under which the policy-maker works and therefore make sure that advice is provided in a critical and constructive manner. It is therefore important that the legal adviser is closely involved in the process as early as possible, and that he or she has direct access to the policy-maker.

### 3.6.2. *Intergovernmental*

With respect to the first role, namely involvement within the national legislative process or in the process of establishing international norms, in situations where an international organization adopts norms in a manner similar to the process at the national level, the same standards must be applied at the international level.

- Even if the international organization may not be formally bound by international agreements in the field of human rights and humanitarian law, the standards prescribed in these agreements must nevertheless be upheld. This applies in particular if the norms relate to civil rights and obligations of individuals.

For the second role of involvement by the legal adviser in the administrative process, what was said about the process at the national level is by and large applicable also at the international level.

In relation to the third role of the legal adviser representing his or her country in international negotiations or assisting committees and conferences in the process of negotiating international treaties:

- International legal advisers should raise questions in the negotiation process if they discover that contemplated provisions risk violating international legal standards, in particular in the fields of human rights and international humanitarian law. If the international legal adviser is asked to engage in the drafting process, such standards must be upheld as a matter of principle.

Finally, as far as the role of the legal adviser in relation to the policy-maker is concerned, at the international level this may be a complex and delicate matter depending on the way in which the institution is organized and the customs that have developed. However, with respect to the executive head of the organization, the relationship is very much the same as, for example, the relationship between the head of government and his or her legal adviser at the national level.

- The legal adviser should be involved in the process as early as possible, should be present when important policy issues are discussed, and must have direct access to the executive head of the organization.

## 4. LEGAL PRINCIPLES AND FRAMEWORK

### 4.1. International Humanitarian Law<sup>67</sup>

International humanitarian law governs situations of international and non-international armed conflict. One limb of international humanitarian law governs (prohibits) acts of violence against civilians and civilian objects in armed conflict; while the other limb allows, or at least does not prohibit, attacks against military objectives, including enemy personnel. These acts constitute the very essence of armed conflict and, as such, should never be legally defined as ‘terrorist’ under a different body of international law (namely, international treaties governing acts of terrorism). To do so would imply that they are prohibited acts which must be subject to criminalization under that other international legal framework. This would stand at odds with the dichotomous regulation of acts of violence which is at the core of international humanitarian law. In particular, those persons lawfully engaged in armed conflict, as defined by international humanitarian law, enjoy combatants’ immunity from prosecution by the detaining state for lawful acts of war. It would thus be contrary to the very logic of combatant/prisoner of war (POW) status if a person lawfully taking a direct part in hostilities were to be legally classified as a ‘terrorist’ as that would allow prosecution by the opponent for conduct specifically authorized under international humanitarian law. Needless to say, the right to take a direct part in hostilities is restricted to ‘lawful’ combatants who may not resort to such unlawful acts as perfidy in order to kill, injure or capture an adversary, perfidy being a war crime.

Furthermore, under international humanitarian law all persons who are not combatants are designated as civilians. They may not be the object of attack ‘unless and for such time as they take a direct part in hostilities’.<sup>68</sup> Contrary to certain claims, direct participation by civilians in hostilities - colloquially referred to as ‘unlawful’ or ‘unprivileged’ combatancy or belligerency - is not a war crime as such (unless carried out perfidiously), because it is an inevitable fact of armed conflict. It is, however, sanctioned in a variety of ways by both international and domestic law. Given the comprehensiveness of such sanctioning of civilian participation in hostilities, it is difficult to see what purpose is served by designating as ‘terrorist’ acts of violence committed by civilians in armed conflict.

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<sup>67</sup> See J Pejic, ‘Armed Conflict and Terrorism: There is a (Big) Difference’, Chapter 7; and NS Rodley, ‘Detention as a Response to Terrorism’, Chapter 18.

<sup>68</sup> Art 51(3) Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) (AP I). It is, however, acknowledged that there is much ongoing debate and disagreement regarding the exact definition and scope of this provision, not least with respect to non-state terrorist actors such as al Qaeda. See further, eg, ICRC, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ (ICRC, Geneva, May 2009); and R Geiß and M Siegrist, ‘Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?’ (2011) 93 *International Review of the Red Cross* 11.

All the substantive rules on the conduct of hostilities prohibiting attacks against civilians or civilian objects apply equally to international and non-international armed conflicts. There is, however, a crucial legal difference between the two types of conflicts. Under international humanitarian law, there is no ‘combatant’ or ‘POW’ status in non-international armed conflict. Instead, states’ domestic law prohibits and penalizes violence perpetrated by private persons or groups, including all acts of violence that would be committed in the course of an armed conflict. Consequently, the interplay between international humanitarian law and domestic law leads to a situation in which members of non-state armed groups are likely to face stiff sentences under domestic law even for acts of violence that are not prohibited by international humanitarian law (for example, attacks against military objectives). This inherent contradiction between the two legal frameworks for international and non-international armed conflict is part of the reason (there are many other reasons, not least disregard of international humanitarian law altogether) why non-state armed groups often disregard international humanitarian law norms, including those prohibiting attacks against civilians and civilian objects, namely they have little or no incentive to do so. Therefore, it was suggested that adding any further layer of incrimination – namely designating as ‘terrorist’ those acts committed in armed conflict that are not prohibited under international humanitarian law – would reduce the likelihood of obtaining respect for its rules even further.

More generally, despite some claims to the contrary, there is a prevailing consensus, including amongst the current project’s contributors, that there is no armed conflict of global reach taking place at present. That said, some elements of international efforts to counter the terrorist activities of non-state actors since 9/11 have constituted situations of armed conflict. What is occurring is a multi-faceted fight against terrorism in which a range of measures are being employed to prevent or put a stop to acts of terrorist violence. At one end of the spectrum are peaceful or non-violent means, such as negotiations, diplomacy, criminal investigations and prosecution, financial and other sanctions, and so on. At the other end it is only when acts of violence and the responses thereto meet the threshold of armed conflict that a situation may be classified as an armed conflict triggering the application of international humanitarian law. In other words, each situation of violence should be examined on its own merits to determine how it should be legally classified, even when it is rhetorically referred to as part of a global ‘war’. Any blurring of armed conflict and terrorism may carry with it significant (often unintended and unhelpful) legal, political, and/or practical<sup>69</sup> consequences.

One other important matter here concerns the exact nature of the relationship between international human rights law and international humanitarian law. While there is an abundance of universal and regional human rights norms fully applicable in normal peacetime circumstances and also a host of quite detailed rules of humanitarian law applicable in international, and to some extent also non-international, armed conflicts, the normative framework becomes especially fragile in situations of conflict and disturbances falling short of the threshold of the application of international humanitarian law instruments. Furthermore, with respect to post-9/11 counter-terrorist discourse, a struggle is taking place

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<sup>69</sup> See, eg, *Holder v Humanitarian Law Project*, 130 S Ct 2705 (2010), <<http://www.supremecourt.gov/opinions/09pdf/08-1498.pdf>> accessed 8 December 2011.



between a law and order paradigm governed mainly by international human rights law, and an armed conflict paradigm governed mainly by international humanitarian law, in which a ‘mixed’ paradigm is emerging whereby international human rights law notions are read into international humanitarian law.

***Recommendations:***

- International actors (states, international organizations, non-governmental organizations (NGOs), the media, and others) should not conflate terrorism and war, and should make every effort to gain a better understanding of the legal, political, and practical consequences of designating as ‘terrorist’ acts of violence committed in armed conflict. The term ‘terrorism’ should, as a matter of international law, be reserved for acts of violence committed in time of peace or for the few acts designated specifically as terrorist under international humanitarian law. The same approach should be taken in domestic legislation.
- States negotiating the draft Comprehensive Convention on International Terrorism should make every effort to craft an international humanitarian law savings clause that would exclude from the Convention's scope the activities of the parties to an armed conflict, both international and non-international.
- States should ensure that domestic anti-terrorism legislation and other measures are drafted so as to exclude the activities of neutral, independent, and impartial humanitarian organizations from their scope. Donor funding clauses, whether drafted by states or international organizations, should likewise allow the unimpeded work of neutral, independent, and impartial humanitarian organizations.

4.1.1. *Classification, Administration, and Treatment of Battlefield Detainees*<sup>70</sup>

There has been much recent debate and related controversies concerning the classification of battlefield detainees, which in turn impacts upon the manner in which such persons should be administered and the minimum levels of treatment and rights that they are entitled to under international law. In particular, the contemporary prevalence of asymmetric (and frequently urban) warfare, in which it is increasingly hard to distinguish combatants or fighters from civilians, has led some to consider that certain provisions of the Geneva Conventions 1949, designed as they were for warfare more than six decades ago, are obsolete.

Even as the methods of determining the correct status of detained persons have become ever more difficult, it is suggested that states lose nothing by applying the highest possible standards in the treatment of detainees. For at least one and a half centuries, the ‘gold standard’ in this respect has been the status and treatment of POWs. Governments today have refused to consider detained ‘terrorists’ as POWs, often motivated by the political imperative of affording these detainees (and by extension, their cause) a legitimacy which they do not

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<sup>70</sup> See D Turns, ‘Classification, Administration, and Treatment of Battlefield Detainees’, Chapter 17.

deserve; equally, they fear the legal consequences of giving detainees POW status, not least that they might then be held to all the detailed technical requirements of Geneva Convention III. Such approaches have resulted in rule of law ‘black holes’, not least because those captured during military counter-terrorist operations are denied the legitimacy and protections of an armed conflict paradigm.

The current situation is that military counter-terrorist operations are a reality; that ‘terrorists’ are likely to be captured in such operations for some time to come; and that uncertainty about their exact legal status is likely to persist for the foreseeable future, not least due to the subjectivity of the concept of ‘terrorism’ and being a ‘terrorist’. Meanwhile, key issues remain what mechanisms should be used to determine the status of such detainees, and how they should be classified.

As far as the system for determining the classification of battlefield detainees is concerned, international humanitarian law has a mechanism for dealing with persons of uncertain status who are detained during military operations, at least if the armed conflict is of an international character: their status should be judicially determined by a tribunal (the so-called ‘Article 5 tribunal’), pending which determination they must be treated as if they were POWs, and following which they can be treated accordingly. Such tribunals should conform, as a minimum, to the basic protections contained in Common Article 3 of the Geneva Conventions 1949 and the ‘fundamental guarantees’ of Article 75 of Additional Protocol I 1977 (which are considered principles of customary international law). In situations of non-international armed conflict, there is no comparable mechanism for determining the status of those detained. Nevertheless, such persons should be treated humanely in accordance with Common Article 3 and (if applicable) Additional Protocol II 1977.<sup>71</sup>

Regardless of the inherent complexities which may exist, states are encouraged to apply the highest possible standards of international humanitarian law - supplemented, where necessary, by human rights law – to the classification and treatment of such detainees. If their status is indeed unclear upon capture, they should be treated *as if they are POWs* – which is not the same thing as *actually being given POW status* – until a proper determination of their status has been made. Such determinations must be made by a court which affords the detainees the fullest possible substantive rights and procedural protections under international humanitarian and human rights law. Certainly, such an approach, which applies the highest standards, will avoid some of the perils of getting it wrong in the glare of 24-hour news coverage which is increasingly damaging to the perceived legitimacy of an operation and therefore to its subsequent success.

### ***Recommendations***

- In conflicts of an international character, Article 5 tribunals should conform, as a minimum, to the basic protections contained in Common Article 3 of the Geneva

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<sup>71</sup> Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) (AP II).

Conventions 1949, and the ‘fundamental guarantees’ of Article 75 of Additional Protocol I 1977 (which are considered principles of customary international law).

- In conflicts of a non-international character, detained persons should be treated humanely in accordance with Common Article 3 and (if applicable) Additional Protocol II 1977.
- Where the status of particular detainees is unclear upon capture, states are encouraged to treat them *as if they are POWs* until a proper determination of their status has been made.
- It is essential that operating instructions are issued by national governments which clearly detail what constitutes acceptable and unacceptable treatment of any person being detained, whether civilians or POWs.<sup>72</sup>

A further challenge remains how to review - both procedurally and substantively - the status of detainees after the initial determination. This has also been and continues to be a matter of much controversy, especially due to the rule of law inadequacies of some determination procedures, and has been subject to judicial scrutiny also.<sup>73</sup>

### ***Basic Requirements of Due Process***

- Where an administrative board is convened for the purpose of reviewing the status of detainees, it must independent and impartial including in terms of any decision to release the detainee being final (ie it cannot be overruled by the convening authority, who may be a military commander). The board should have a number of options open to it when making its recommendations, which may include: release; release to the host state (ie the country where the detainee is being physically held) or a third state (subject to the principle of *non-refoulement*); gradual reintegration into the community; prosecution eg by the host state; or, in certain limited circumstances, administrative internment (as a measure of last resort).
- The criteria, or at least a part thereof, for detention may be based on a threat to the detaining force, established by either a belligerent act or direct support to hostilities in the aid of belligerent forces. If they do not meet such criteria, they must be released. Any evidential standard upon the detainee should be the lower one of ‘balance of probabilities’ (or ‘preponderance of the evidence’) and not the higher criminal standard of ‘beyond a reasonable doubt’.

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<sup>72</sup> See, eg, the Report of the Baha Mousa Public Inquiry, published on 8 September 2011 - <<http://www.bahamousainquiry.org/report/index.htm>> accessed 2 December 2011, which made 73 recommendations, including on such matters as the handling of civilian detainees, and tactical questioning and interrogation training. This resulted in the subsequent prompt amendment and reissue of UK military doctrine and guidance - UK Ministry of Defence, 'Joint Doctrine Publication - Captured Persons (CPERS)' (October 2011) JDP 1-10 (2nd edn).

<sup>73</sup> See, eg, *Hamdi v Rumsfeld*, 542 U.S. 507 (2004).

- Periodic reviews must occur with adequate frequency (at a suggested minimum of every six months). If the individual is no longer a continuing threat to the detaining power, he must be released.
- The detainee must be informed, in a language he understands, of the reasons for detention. He should receive an unclassified summary of the facts; an explanation of the review board's procedures; a notice of when the hearing will be held; adequate time to prepare; and a notice of his personal representative's appointment.
- The detainee must be given a chance to respond, orally or in writing, and present witnesses on his behalf if they are reasonably available (eg in person, or through teleconferencing technology).
- A personal representative is provided to the detainee, to assist him in preparing the case to be presented to the review board. The necessary resources should be made available for adequate preparation of the case, for example through the creation of some form of 'detainee assistance centre' which may provide a place for the personal representative to work, meet with the detainee several times before the board is held, and obtain the support of paralegal, investigative, administrative, etc personnel.
- Such a system should be regarded as an interim rather than permanent mechanism while the host state (which will generally be a conflict or post-conflict state and therefore have a weak or dysfunctional criminal justice system), designed to provide for a transition to host nation criminal proceedings at the earliest opportunity.

#### **4.2. Domestic and International Criminal Law<sup>74</sup>**

The criminal law has assumed a central role in global counter-terrorist efforts since 9/11, reflected in inter-related developments in international, regional, and national legal systems which have witnessed modifications to existing and the introduction of new terrorist offences and related criminal procedures. This is reflective of the fact that the criminal justice approach to terrorism should be the norm and the military approach the exception. Indeed, the existence of strong and effective criminal law controls on terrorism may forestall the perceived need by national authorities to resort to military force or other exceptional emergency measures.

Reliance on the criminal law as a tool of counter-terrorism is not new, rather has long been used in many countries to prosecute terrorist acts. However, the purpose of such law controls on terrorism depends to an extent on the manner in which a particular domestic legal order frames the problem. One approach is that terrorism is treated as an ordinary crime rather than one requiring special treatment, even if it is regarded as forming a special threat. Consequently, it is prosecuted under existing offences such as murder, assault, damage to property, and arson. Until recently, this has been the more common approach because many

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<sup>74</sup> See especially B Saul, 'Criminality and Terrorism', Chapter 6; TH Jillani, 'Impunity and the Emerging Patterns of International Justice', Chapter 9; R Rastan and O Bekou, 'Terrorism and Counter-Terrorist Responses: The Role of International Criminal Jurisdictions', Chapter 32; and El Khoury (n 48).

countries did not have specific anti-terrorism laws until they were required to do so in response to the legislative requirements of Security Council Resolution 1373. In other jurisdictions, acts of terrorism sometimes fall within the scope of conventional national security or public order offences, such as treason, rebellion, sedition, and treachery, or by resort to offences under emergency laws in exceptional cases. Where terrorism is treated as a distinct category of criminal harm, this is often underpinned by a desire to stigmatize such acts by separating them out from the framework of ordinary crimes.

The prohibition of conduct as criminal is ordinarily a matter falling within the reserved domain of domestic jurisdiction. In the development of international criminal law proper, conduct may, however, be internationally criminalized where it is 'considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction' of the local state,<sup>75</sup> for example, due to its transboundary effects, because it poses a threat to 'the peace, security and well-being of the world',<sup>76</sup> or because it 'shocks the conscience' of humanity.<sup>77</sup>

Undoubtedly, many national anti-terrorism frameworks were strengthened considerably by the requirements of Security Council 1373 to ratify and implement international anti-terrorism conventions. However, the resultant legislative rush also created a number of difficulties of rule of law concern. These included legislative overreaction; inconsistent national legislative instruments with the potential to impede rather than assist international cooperation in the absence of a harmonized international approach; and the stretching of traditional criminal law concepts and the integrity of related criminal processes, often beyond their breaking point especially in the absence of necessary reform of criminal justices processes.

In addition, even though domestic criminal laws are on the frontline of counter-terrorism and there is no universal definition of terrorism, nevertheless when criminalizing terrorist acts states must still observe fundamental human rights principles, especially that of legality (*nullum crimen, nulla poena sine lege*). The principle of legality requires that any acts described by the law as criminal offences must be strictly defined, without doubt or ambiguity, and may not be applied retroactively. Therefore, legal definitions that are vague, nebulous, or unspecific, or that make it possible to criminalize acts that are legitimate and/or permitted in the eyes of international law, are contrary to this rudimentary rule of law principle. Furthermore, although criminal law is capable of being adapted to new situations, including in a counter-terrorist context, great care must be taken that public policy and political imperatives do not put so much strain upon it that the very rule of law benefits of criminal law are eroded or even lost.

In terms of the more detailed substantive content of domestic anti-terrorism laws, these should reflect the basic elements of those offences covered by the international treaties

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<sup>75</sup> *Hostages case* (1953) 15 Ann Dig 632, 636 (US Military Tribunal at Nuremberg).

<sup>76</sup> Preamble ICC Statute.

<sup>77</sup> *Attorney General of the Government of Israel v Eichmann* (1961) 36 ILR 5 (District Court of Jerusalem), para 12.

against terrorism.<sup>78</sup> These can be grouped into five categories: offences linked to the financing of terrorism; offences based on the status of the victim; offences linked to civil aviation; offences linked to ships and fixed platforms; and offences linked to dangerous materials. The international treaties against terrorism cover most of the foreseeable forms of terrorist activities. Furthermore, the extended modes of criminal liability (whether described as inchoate, ancillary, or preparatory offences) under domestic law are also available to respond to terrorism, allowing the criminal law to deal with terrorist attempts, conspiracies, aiding and abetting of terrorism, and so forth. In the absence of a universal definition of terrorism, such treaties have typically required States Parties to criminalize certain conduct; to establish extra-territorial jurisdiction over it; and to cooperate by prosecuting or extraditing suspected offenders.

In addition to the substantive content of criminal justice systems, it is essential that states ensure that their existing criminal procedures are adequate for the prosecution of terrorism cases, because these constitute one of the main safeguards of the rule of law and offer legal protection to the rights of any alleged offenders. As terrorism is a crime, terrorist offenders should be dealt with as criminals, and hence be subject to the normal rules and procedures of due process that apply to other criminal offences. An additional source of strain, however, has been the modification of not only existing criminal law and criminal procedure, but also the proliferation of non-criminal means of responding to terrorism, such as certain questionable methods of surveillance, administrative or preventive detention, summary deportation under immigration law, civil ‘control orders’, and the unwarranted use of military force. Some development of criminal justice responses, which are not static, are both to be expected and may be necessary to accommodate novel situations and challenges, and the use of certain non-criminal measures, such as the use of force, are not per se unlawful. Nevertheless, their modification or proliferation may raise concerns, especially where they arguably go beyond what is strictly necessary (for example, on grounds of ‘exceptionality’) and/or they result in the circumvention of procedural (hard won) protections of what would ordinarily entail a criminal law response to terrorism, and have the potential to interfere with its integrity. Any parallel systems of shadow justice - such as protracted administrative detention or civil control orders - is likely to have punitive, criminal law-like consequences while seeking to avoid the procedural protections and intensive scrutiny which the criminal law guarantees suspects. Instead, it is essential that all terrorism related proceedings directly or indirectly linked to issues of criminality meet the requisite levels of due process, including the minimum standards of a fair criminal trial guaranteed under international human rights law in the case of criminal prosecutions. To avoid double punishment, alternatives to criminal justice (such as control orders) should not be imposed upon a person in respect of the same conduct for which a person has already been convicted.

Where for any reason it is not possible or appropriate to prosecute suspected terrorists within a domestic jurisdiction, it should for the most part be possible to indirectly incorporate terrorist offences under other existing international criminal offences where these are not

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<sup>78</sup> See list of international conventions (n 21).

directly sanctioned (which is generally the case currently<sup>79</sup>). In particular, the international crimes of genocide, war crimes, and especially crimes against humanity,<sup>80</sup> may encompass the most serious terrorist acts. That said, each of these crimes has a high threshold to cross in terms of establishing the necessary legal elements. As such they do not represent full substitutes for a universal definition of terrorism and related offences. Nevertheless, as is evident in the recent jurisprudence of international courts and tribunals – especially that of the *ad hoc* tribunals, Special Court for Sierra Leone, and the International Criminal Court - there is a developing body of case law which supports such approaches, influenced by more general trends towards closing existing impunity gaps for non-state (terrorist) actors.

Capturing such conduct under the rubric of international criminal law where this is possible carries with it other benefits also not least in the absence of a universal definition of terrorism, such as the utilization of an existing legal framework without recourse to defining a separate international crime. International criminal law, moreover, extends to state and non-state actors equally, thereby providing a well developed rule of law framework to address both alleged terrorist acts as well as violations committed by state actors in response to them. Placing such conduct within an international jurisdiction may also trigger obligations of relevant states to provide international cooperation and judicial assistance. This may arise from a Security Council resolution adopted under Chapter VII UN Charter imposing such obligations on all UN Member States, or through treaty obligations arising from acceptance of international jurisdiction by particular states.

### ***Recommendations:***

- Legal definitions of terrorism, whether for the purpose of establishing offences or triggering investigative powers, must be crafted with sufficient precision to satisfy the legality principle inherent in the freedom from retrospective criminal punishment. The relatively narrow definition reflected in Security Council Resolution 1566 is a ‘best practice’ starting point, including in the drafting (begun in 2000) of the UN’s Draft Comprehensive Convention. Consideration should also be given to adding a further ‘motive’ element which recognizes the special character and gravity of terrorism as conduct inspired by political, ideological, or religious objectives (as in certain common law jurisdictions such as Britain, Australia, Canada, South Africa, and New Zealand), while being mindful of the risks of unlawful discrimination in the application of the law in practice.
- Reaching agreement on principled *exceptions* to criminal law definitions of terrorism is also vital at the international and national levels. Over breadth in criminal law responses to terrorism is partly due to the failure of certain laws (as in Australia) to exclude conduct that is lawful under international humanitarian law, whether committed by state or non-state actors. The result may be the criminalization of what

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<sup>79</sup> The only international or internationalized court that currently includes the crime of terrorism as a separate offence *per se* is the Special Tribunal for Lebanon.

<sup>80</sup> See, eg, arts 6-8 ICC Statute.

would otherwise constitute lawful hostilities under international law, including, for instance, acts of violent rebellion against oppressive governments, even when such acts target only military objectives and are proportionate by minimizing civilian casualties. Such an approach problematically implicates the domestic criminal law of one state in the repression of legitimate political action in another state, in addition to where the law also strips away the traditional protection of the political offence exception under national extradition law. Such laws interfere not only in the domestic jurisdiction of a foreign state, but also in the exercise of self-determination (including by civil violence) by the foreign population.

- It is important for the UN Draft Comprehensive Convention to specify that it should prevail as *lex specialis* to conduct which may also fall within the scope of regional anti-terrorism treaties. Given that a number of regional treaties apply vague and over broad definitions of terrorism, preferentially applying the UN Draft Comprehensive Convention may help to constrain potential rights abuses flowing from the indiscriminate application of regional conventions, as well as to reinforce truly universal normative standards against terrorism over idiosyncratic regional ones. The relationship with existing international sectoral anti-terrorism treaties is less problematic, given that those treaties are already relatively narrow in scope by their focus on particular physical manifestations of terrorist activity. Prosecution either as a sectoral offence or as terrorism may be equally productive in its own way. Nonetheless, there may still be virtue in giving priority to the UN Draft Comprehensive Convention so as to better pin-point the nature of the social harm – terrorism is terrorism precisely because of the additional ‘terrorist’ elements which aggravate the crime.
- Inchoate, ancillary, or preparatory offences that are connected to any criminal definition of terrorism should be carefully crafted to ensure that conduct is only criminalized where it has a sufficiently proximate or causal connection to actual or eventual commission of terrorism, including by ensuring that the fault elements of offences are sufficiently restrictive. Further, as offending conduct becomes more remote from actual commission of terrorist violence, criminal penalties should be commensurately and proportionately reduced.
- These principles are also apposite to the formulation of group based or status offences (such as those concerning membership, association with, or ‘material support’ for a terrorist organization) as well as speech-related offences (such as incitement, advocacy, or glorification of terrorism), so as to ensure that freedoms of association and expression are not unjustifiably infringed. In the case of group based offences, the designation of an organization as ‘terrorist’ should always involve either a judicial determination of the status of the organization, or at least an opportunity to effectively challenge any executive designation before a court which guarantees a procedurally fair hearing (including adequate disclosure of security evidence).
- All terrorism prosecutions must comply within the minimum standards of a fair criminal trial under international human rights, taking into account any necessary modifications to regular procedure which recognized as acceptable by that law in



security cases. Civilian trials are ordinarily preferable to military ones; and the accused must always be entitled to receive the minimum disclosure of evidence necessary to maintain equality of arms in the proceeding and thus to guarantee a fair trial.

- Transnational criminal cooperation pursuant to multi-lateral or bilateral arrangements must comply with minimum international human rights standards, including concerning the conditions of detention and the availability of judicial review of detention. The recent Beijing Convention 2010 expressly guarantees ‘fair treatment’ in accordance with human rights law in relation to cooperation on suppressing unlawful acts against civil aviation.<sup>81</sup> Self-evidently, irregular rendition or summary deportation must not be used by states to circumvent the procedural protections guaranteed by extradition processes.
- To avoid double punishment, alternatives or supplements to criminal justice (such as control orders) should not be imposed upon a person in respect of the same conduct for which a person has already been convicted and discharged their criminal and moral responsibility through serving a sentence. Where a person has been previously convicted of a terrorism offence, a control order can only be justified where there is evidence that the affected person poses a continuing risk of terrorism, following a procedurally fair hearing (including a sufficiently protective standard of proof and adequate disclosure of evidence to the person).
- In the absence of a comprehensive agreed definition on the crime of terrorism as an international crime, it may be beneficial to use the existing framework of international criminal justice institutions to address terrorist acts. In particular, the existing framework is able to capture both the acts of state and non-state actors, and the conduct of both physical perpetrators as well as their civilian or military commanders, who may be held responsible for their respective acts and their omissions.
- At the national level, states should consider to what extent terrorism and counter-terrorist responses to them may be amenable to judicial scrutiny under the existing framework of international humanitarian law or under national offences derived from the domestic incorporation of other international offences such as crimes against humanity, for example under the rubric of implementing legislation for the ICC Statute.
- At the international level, consideration should be given to how the prohibition of terrorist acts can be: (i) directly incorporated under the applicable law of international criminal jurisdictions, as war crimes and crimes against humanity or as a stand-alone offence; and (ii) where such conduct and governmental responses to them can be subsumed indirectly under the existing framework of international criminal law.
- The jurisdiction of the ICC should be expanded to specifically include terrorism-related offences, for example the trial of those accused of serious cross-border terrorism who have not been brought to justice within a domestic jurisdiction.

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<sup>81</sup> Art 11 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (adopted in Beijing, 10 September 2010, not yet in force).

- The concept of universal jurisdiction for international crimes should be further developed to reduce impunity gaps for serious rule of law violations in the context of terrorism and counter-terrorism.
- The State Parties to the ICC Statute should adjust their national legislation to fully implement the Statute's requirements; and judiciaries should create precedents to enforce its rules and principles.

### **4.3. International Human Rights Law**

The scope of international human rights law principles is far reaching, not least in terms of specifying fundamental rights and duties which interact with and influence the interpretation and application of the other core legal principles considered here. As such, human rights norms lie at the heart of much counter-terrorist discourse. There can be a perception by some that human rights norms impede their responses to legitimate security imperatives, leading to a belief that the more human rights are restricted, the higher the level of citizens' security will be. Certainly, many core human rights and freedoms repeatedly have come under strain or have been violated in the context of counter-terrorism, some significant examples of which are examined in section 6 below in relation to particular states practices. As has been noted previously, however, effective counter-terrorist measures require upholding the rule of law, with the objectives of both security and rule of law based responses being complementary and mutually reinforcing rather than in conflict with each other.

There is a plethora of treaty and customary international law principles at the national, regional, and international levels. Especially influential amongst them have been regional human rights treaties (the European Convention on Human Rights (ECHR), the American Convention on Human Rights 1969 (ACHR),<sup>82</sup> and the African Charter on Human and Peoples' Rights 1981 (African Charter)<sup>83</sup>) and the International Covenant on Civil and Political Rights 1966 (ICCPR)<sup>84</sup> in the development and articulation of those norms, which have often codified related customary norms; and their associated courts, commissions, and treaty bodies (including the ECtHR, IACtHR, Inter-American Commission on Human Rights (IACHR), African Commission on Human and Peoples' Rights (ACHPR), African Court of Human and Peoples' Rights (ACtHPR), UN Human Rights Committee (UNHRC), UN Committee Against Torture (UNCAT), and monitoring bodies like the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)) which have interpreted and applied them (see further section on judicial and non-judicial control).

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<sup>82</sup> Adopted 22 November 1969, entered into force 18 July 1978.

<sup>83</sup> Adopted 27 June 1981, entered into force 21 October 1986.

<sup>84</sup> Adopted 16 December 1966, entered into force 23 March 1976.

#### 4.3.1. *Emergency Powers and Non-Derogable Norms*<sup>85</sup>

The body of human rights norms is not inflexible; rather it has in-built mechanisms to accommodate exceptional circumstances, including where particular terrorist threats or activities are so serious that they may be considered to constitute a ‘public emergency’ which ‘threatens the life of the nation’.<sup>86</sup> Where particular criteria are met, a state may be entitled to derogate from certain human rights guarantees, whether by a temporary reduction in or suspension of their related rights and obligations, for as long as the exigencies of the situation require this. The overarching objective of these mechanisms is to assist a state’s authorities and law enforcement agencies in reinstating law and order where there is a danger or threat to public order which generates serious instability or agitation in domestic security and social peace. Due to the gravity of any suspension of normal rights, these exceptional measures should be used sparingly and only for the minimum period of time absolutely necessary. Such powers are contained within not only national constitutions, but also those regional and international instruments referred to already. Significantly, there is general consensus that the existence of a terrorist threat on its own does not *per se* justify the invocation of emergency powers.

Some common deviations from fundamental human rights guarantees (whether or not adopted under formal declarations of emergency) since 9/11 especially, have included: extended periods of pre-charge or pre-trial detention; limited access to legal representation; suspension or limitation of *habeas corpus*; the use of military courts or commissions; restrictions on disclosure of and access to classified evidence; increased reliance on coerced confessions; the lowering of evidentiary standards; the use of anonymous witnesses; and limitations on appeal rights. While there may be a need to adjust procedures in terrorism cases, many of these practices have raised significant rule of law concerns. For example, while the lowering of some standards can in limited circumstances be both lawful and legitimate, in practice they often introduce special criminal procedures which undermine basic human rights protections, including the ordinary due process guarantees of a criminal trial, or permit excessive and disproportionate criminal sanctions.

Despite the inbuilt normative safeguards, one of the most significant threats to the integrity of the human rights component of the international rule of law framework has been the misuse of emergency powers: whether through inappropriate declarations of emergencies and the accompanying suspension of fundamental rights and freedoms by executives, and/or the

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<sup>85</sup> See especially C Landa, ‘Executive Power and the Use of the State of Emergency’, Chapter 8; also E Myjer, ‘Human Rights and the Fight against Terrorism: Some Comments on the Case Law of the European Court of Human Rights’, Chapter 28; and S García Ramírez, ‘The Inter-American Court of Human Rights’ Perspective on Terrorism’, Chapter 29.

<sup>86</sup> See, eg, art 4(1) ICCPR. The IACtHR has interpreted ‘exceptional situations’ for the purpose of invoking art 27 ACHR relatively narrowly to mean ‘in time of war, public danger, or other emergency that threatens the independence or security of a State Party’ (*Case of Durand and Ugarte* (Judgment on the merits) IACtHR Series C No 68 (16 August 2000) para 99). Although the ECtHR has not specified particular situations which may fall within the art 15(2) ECHR exception, it has established a three part test for establishing when such a declaration with its accompanying suspensions may be justified: there must exist an exceptional situation of crisis or emergency; which affects the whole population; and which constitutes a threat to the organized life of the community (*Lawless v Ireland (No 3)* (Application No 332/57) ECtHR Judgment 1 July 1961 para 28). Interestingly, there is no provision for such derogation in the African Charter.

unjustified prolonging of emergency powers, in what the International Commission of Jurists has termed ‘the normalization’ of exceptional responses.<sup>87</sup>

Importantly, not all human rights may be derogated from. There are two categories which cannot be: those which are specifically stated as being non-derogable within human rights instruments; and those which are not explicitly listed within these categories, but have become non-derogable through related jurisprudence. With respect to the former category, typically such prohibitions include the prohibition of any suspensions to the right of juridical personality; right to life; prohibition against torture *et al*; right to humane treatment; freedom from slavery; prohibition against *ex post facto* laws; and freedom of conscience and religion. As far as the second category is concerned, many of these have become non-derogable because they are necessary for the protection of the first category of rights, for example because they guarantee fundamental due process (eg Article 14 ICCPR right to a fair trial) or prohibit any form of discrimination in the exercise of emergency powers (eg Article 4(1) ICCPR). Additionally, states may not in any circumstances rely upon the existence of exceptional circumstances to justify any violation of international humanitarian law or peremptory norms of international law.

The courts have a key role to play here, in particular in avoiding legal excesses from becoming a justification for potential arbitrariness on the part of the state’s law enforcement agencies in their fight against terrorism; which in turn may create unacceptable impunity shields for state officials who do not respect fundamental human rights guarantees. (See further section 7.2).

### ***Recommendations:***

- Human rights must not only be enshrined within national legal orders, but must also serve as a bridge between respecting authority and defending freedom. These are essential characteristics of any fight against terrorism if it is to be effective without losing legitimacy. However, such legitimacy is only possible where effective and appropriate judicial control is maintained over those laws and other measures adopted by authorities in an emergency situation, especially where these result in the violation of human rights in any particular case. Consequently, this critical judicial function should be safeguarded at all times, contrary to some past and present practices.
- It is essential and possible, even during exceptional circumstances, to respect the basic principle of division between the responsibilities of public authorities, namely, between the executive, legislature, and judiciary. This not only maintains the checks and balances between the powers that make up the state apparatus, but also ensures that the principle of independence is not undermined in the performance of their respective constitutional functions as this is an indivisible element of public confidence in the legitimate exercise of governmental powers.

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<sup>87</sup> Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, ‘Assessing Damage: Urging Action’, Executive Summary (Geneva, 2009) 6, <<http://ejp.icj.org/IMG/ExecSumm.pdf>> accessed 9 December 2011.

- Where it is necessary to restrict human rights, not least in the context of counter-terrorist responses, it is most important to apply the principle of proportionality, including where any allegations of human right violations are made, because this is essential to determining the reasonableness or legitimacy of any particular restrictive measure taken by the authorities.

#### 4.4. Asylum and Refugee Law<sup>88</sup>

Increasingly, asylum and refugee norms have become an integral part of the counter-terrorist rule of law framework, even though it was not originally envisaged or intended that they be used to respond to terrorist threats and actions in this way; indeed, such associations impact negatively on the vulnerable people that asylum and refugee law is intended to protect. These norms have become prominent in counter-terrorist discourse for three principal reasons. Firstly, their cornerstone principle of *non-refoulement* (explained in section 4.4.1) has restrained governments from taking certain counter-terrorist measures, perhaps most controversially the physical removal of unwanted (suspected) terrorists from their physical territory. Another is that asylum and refugee law has become an unwilling preventative instrument of governments to deny asylum to and expel from its territory those they determine to be ‘terrorists’. Although such measures may indeed prevent some unwelcome (potential) terrorists from entering a state, it is also likely that genuine asylum-seekers - who may be subjected to persecution, ill treatment, or other forms of serious harm if returned to their countries of origin, and to whom states owe the duty of protection under international law - are being wrongly denied asylum under the same policy approaches. Finally, a significant rule of law concern here has been the frequent absence of due process, including the ability of an asylum-seeker to properly challenge a government’s decision to expel him or her (see further section 7.3).

Protection for refugees and asylum-seekers under international law, including under the Convention relating to the Status of Refugees 1951<sup>89</sup> (Refugee Convention), is not absolute. In particular, Article 33(2) Refugee Convention, which is designed to protect the national security interests of the country of refuge, explicitly allows states to expel refugees deemed to be a threat to the community or national security of their host country. It must, however, be applied in a proportionate manner. This means that there must be a causal link between the refugee and the danger posed; it must be demonstrated that the danger is sufficiently serious and likely to be realized; that the removal is a proportionate response to the perceived danger; that removal will alleviate or even eliminate the danger; and such mechanism is used as a last resort where no other possibilities of alleviating the danger exist.

In addition, claimants may be excluded from refugee protection under Article 1F, under which the Refugee Convention does not apply where there are serious reasons for considering

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<sup>88</sup> See AM Salinas de Frías, ‘States’ Obligations under International Refugee Law and Counter-Terrorism Responses’, Chapter 5; and C Wouters, ‘Reconciling National Security and *Non-Refoulement*: Exceptions, Exclusion, and Diplomatic Assurances’, Chapter 22.

<sup>89</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) (Refugee Convention).

that a person may have committed crimes against peace, war crimes, crimes against humanity, serious non-political crimes, or acts contrary to the principles and purposes of the United Nations. The rationale behind Article 1F Refugee Convention is to exclude those whose acts are so grave that they are undeserving of international protection as refugees. In particular, terrorist acts may fall within the meaning of Article 1F(b) Refugee Convention where they constitute serious non-political crimes, and were committed outside of the country of refuge and prior to the person's admission to the host country. However, this poses a number of difficult questions, not least in the absence of a universal definition of terrorism, for example at what point the seriousness threshold has been crossed. Furthermore, in the current political climate, defined by a fear of terrorism and international crime, states demonstrate a reluctance to accept and apply the political offence exception, including under extradition treaties.

One difficulty in interpreting and applying these provisions is that the drafters of the Refugee Convention did not indicate how to deal with those who are excluded from refugee protection. Another is that states tend to apply the exclusion clause to 'terrorists' on a collective basis, by relying on lists of proscribed terrorists and terrorists organizations such as those of the UN and EU, rather than making individual assessments. From a rule of law perspective, these approaches are concerning, especially because they normally deny basic levels of due process and are very difficult to challenge successfully including in a court of law. In any event, the removal of suspected terrorists under these provisions by denying them refugee protection does not ultimately serve international security interests; it merely protects the national security interests of the removing state, and passes the problem to the receiving state.

Exclusion from refugee protection cannot be viewed separately from a criminal law context. Fighting the impunity of criminals, including terrorist non-state actors, and prosecuting those who are excluded from refugee protection is implied by the exclusion clauses. They refer to very serious crimes as defined in international instruments and national laws, and for which the perpetrator can be extradited and prosecuted. Only when prosecution is initiated may state security interests be served, and protection from *refoulement* ensured. That said, prosecuting excludable persons is easier said than done and should not take place in the country of origin as there may be a risk of ill treatment and an unfair trial. Developments in international criminal law - such as the establishment of the concept of universal jurisdiction, and the creation of international criminal tribunals and the International Criminal Court - increase the possibility of prosecuting excludable persons outside of their country of origin. This is notwithstanding the many legal and practical difficulties regarding issues of jurisdiction and evidence gathering that exists.

### ***Recommendations:***

- That national authorities, as well as international organizations, collaborate - in legal and practical terms - to ensure the prosecution of excludable persons while maintaining their right to be protected from *refoulement*.

- Reconciling national security interests with the right to be protected from *refoulement* is best served when different fields of law are combined. Combining refugee law with criminal law, extradition law, and human rights law can achieve effective reconciliation by excluding those who have committed terrorist acts from refugee protection; protecting national security interests by prosecuting individuals under a clear legal framework; and protecting their basic human rights by obtaining assurances that guarantee no unlawful punishment will be sought or executed.

#### 4.4.1. *Non-Refoulement*<sup>90</sup>

In most cases, despite the provisions of Articles 1F and 33(2) Refugee Convention, the excludable person cannot be removed from the host state's territory because he or she is protected from *refoulement* under international human rights law. The principle of *non-refoulement* provides individuals with protection against removal from the host state (whether by extradition, deportation, expulsion, or return) to a country where their lives or freedoms are threatened. As such, it represents the cornerstone of international asylum and refugee law. In addition to being specified in Article 33 Refugee Convention, the guarantees of *non-refoulement* are reflected in and have been developed under various regional and international human rights instruments. Although most of the instruments do not contain express provisions prohibiting *refoulement* - Article 3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) is an exception - jurisprudence interpreting the ICCPR, ECHR, and ACHR has developed prohibition of *refoulement* norms under the general prohibition of torture and other forms of cruel, inhuman, or degrading treatment or punishment.

The prohibitions against *refoulement* are absolute. Consequently, even in times of public emergency or armed conflict a state cannot derogate from these prohibitions. This absolute character has been acknowledged – including as a norm of customary international law with potentially *jus cogens* status - because it is underpinned by the non-derogable prohibition against torture.<sup>91</sup> Therefore, as the ECtHR stated robustly in the case of *Chahal v United Kingdom*<sup>92</sup> and has repeated subsequently,<sup>93</sup> states may not prioritize or balance national security interests over or against the individual right to be protected from *refoulement* if the risk of torture or ill treatment after removal exists. When such a risk exists, no one can be removed by a state because he has committed serious criminal offences, or because he poses a threat to the national security of the state or its people.

<sup>90</sup> See especially AM Salinas de Frías (n 88).

<sup>91</sup> See, eg, *Prosecutor v Anto Furundzija* (Judgment) IT-95-17/1-T-10 (10 December 1998) paras 144-54; *Al-Adsani v United Kingdom* (Application No 35763/99) (2002) 34 EHRR 11, paras 60-1.

<sup>92</sup> *Chahal v United Kingdom* (Application No 22414/93) 23 EHRR 413, para 80.

<sup>93</sup> See, eg, *N v Finland* (Application No 38885/02) (2006) 43 EHRR 12, para 159; *Saadi v Italy* (Application No 37201/06) ECtHR Judgment of 28 February 2008, para 138.

### **Recommendations:**

- When adopting domestic norms regulating the entry by nationals of another state, states must distinguish between immigrants and persons in need of protection. States should, as far as is possible, regulate refugee and immigration through different legal instruments taking into due account the fact that refugee law is primarily a humanitarian instrument designed to regulate the exceptional situation of forced migration.
- Domestic rules regulating refugees must be respectful of the *non-refoulement* principle as a consolidated customary norm of international law. *Non-refoulement* must form the bedrock of any such domestic legislation.
- According to duties arising under the *non-refoulement* principle, states should refrain from the removal, whatever the means (deportation, expulsion, extradition, return), of any person in need of and entitled to protection under Article 1 Refugee Convention 1951, regardless of their particular status regarding the Convention. They should also refrain from adopting or participating in any system designed to prevent asylum-seekers from reaching their territory in order to make an asylum request, a practice which may also amount to *refoulement*.
- States belonging to either the Inter-American or the European system of protection of human rights must abide by the *non-refoulement* principle in their counter-terrorist responses as a matter of *jus cogens* and, therefore, must respect this *erga omnes* obligation at all costs. No balance is allowed to be struck between national security and any risk of torture or ill treatment or punishment.
- As far as the protection of human rights at a universal level is concerned, states should honour obligations identified and declared by those monitoring bodies with which they participate. In particular, they should respect the *non-refoulement* principle as a matter of *erga omnes* obligation, at least where there is the case of risk of torture, ill treatment or punishment, enforced disappearance, and extra-judicial execution.
- States are strongly called upon to ratify human rights treaties enshrining the *non-refoulement* principle where they have not already done so.

#### 4.4.2. *Diplomatic Assurances*<sup>94</sup>

Faced with security concerns, yet restrained by the principle of *non-refoulement* in their responses, host states have looked for alternative approaches for removing unwanted persons from their territory. These have been developed in a political and legal climate that acknowledges the need to find ways to hold persons who have committed serious crimes especially criminally accountable for their actions and to alleviate the danger to a states' national security. One way in which states currently seek to meet their international legal obligations of *non-refoulement*, while overcoming its obstacles for removing a person falling

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<sup>94</sup> See Wouters (n 88).



within its scope, has been through the use of diplomatic assurances. Under this practice, returning states wanting to remove aliens from their territory seek diplomatic assurances from the receiving state guaranteeing his or her safety. More specifically, the returning state seeks to reduce the risk of any form of ill treatment to negligible proportions by making and implementing formal agreements (which should be transparent) between persons or institutions that have the legal authority to provide the assurances and the power to implement them. Nevertheless, the overarching tension relating to any reliance upon diplomatic assurances cannot be overcome easily, namely that where there is a need for such assurances in the asylum context, there is an acknowledged risk of ill treatment or serious harm.

The effectiveness of diplomatic assurances to reduce the risk of subjection to ill treatment or serious harm depends on the ability of the receiving state to reduce the risk to a negligible level and effectively guarantee the person's safety. While the use of diplomatic assurances is not expressly prohibited, including under international human rights and refugee law treaties, various supervisory bodies to human rights instruments – in particular, the UNHRC, UNCAT, and the ECtHR – have expressed serious reluctance to accept diplomatic assurances in asylum cases.<sup>95</sup> Indeed, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment is of the opinion that requesting and obtaining assurances as a precondition for the transfer of people should be ruled out altogether.<sup>96</sup>

There are a number of reasons for such concerns. First, such assurances are often sought, made, and implemented outside of a clear and formal legal framework, leaving their exact status, binding character, and effectiveness uncertain. Closely related to this is the fact that such assurances are based on good faith rather than law, which is especially concerning in this context. Another is that a receiving state may not be capable of controlling its agents and therefore guaranteeing that a risk of proscribed ill treatment is reduced to a negligible level. Indeed, this is likely in a weak state where the very risk of ill treatment has been identified in the first place, with such countries often suffering from poor human rights records not least systematic practices of torture or the perpetration of other grave human rights violations by state officials especially. Furthermore, instead of negating the risk, requesting assurances by

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<sup>95</sup> See, eg, the following UNHRC's Concluding Observations: Sweden: (24 April 2003) UN Doc CCPR/CO/74/SWE para 12; New Zealand: (7 August 2002) UN Doc CCPR/CO/75/NZL para 11; United States of America: (18 December 2006) UN Doc CCPR/C/USA/CO/3/Rev.1 para 16; United Kingdom of Great Britain and Northern Ireland: (30 July 2008) UN Doc CCPR/C/GBR/CO/6 para 12; and France: (31 July 2008) UN Doc CCPR/C/FRA/CO/4 para 20. Also, the following UNCAT Concluding Observations: Russian Federation: (6 February 2007) UN Doc CAT/C/RUS/CO/4 para 16; United States of America: (25 July 2006) UN Doc CAT/C/USA/CO/2 para 21; Canada: (7 July 2005) UN Doc CAT/C/CR/34/CAN para 5(e); Switzerland: (21 June 2005) UN Doc CAT/C/CR/34.CHE para 5(j). In terms of ECtHR jurisprudence, the following are illustrative: *Chahal v United Kingdom* (n 92); *Saadi v Italy* (n 93); *Ismoilov and others v Russia* (Application No 2947/06) ECtHR Judgment 24 April 2008, para 127; *Kabulov v Ukraine* (Application No 41015/04) ECtHR Judgment 19 November 2009, paras 113-14.

<sup>96</sup> See, eg, Reports of the UN Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment to the UN General Assembly' of: (23 August 2004) UN Doc A/59/324 para 30 (van Boven); and (30 August 2005) UN Doc A/60/316 para 46 (Nowak). See too M Nowak, 'Report of the Special Rapporteur on the question of torture' (23 December 2005) E/CN.4/2006/6 para 32: 'diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and refoulement'.

identifying the individual concerned to his or her country of origin may well increase it. It certainly raises issues of privacy and confidentiality. A final principal concern noted here is that any decision to rely upon diplomatic assurances normally by-passes the individual concerned, who plays no role in requesting, assessing, accepting, or refusing such assurances; nor does the individual generally have any say as to whether he or she wishes to return voluntarily and subject himself or herself to the associated risks of ill treatment, rather than for example face the prospect of indefinite administrative detention.

Nevertheless, there is recognition of the significant challenges posed by this security imperative versus rule of law tension to governments and the need for some degree of pragmatism while not sacrificing fundamental, *jus cogens*, protections. Therefore, while the practice is not encouraged, and the need for great caution by any state seeking to rely on diplomatic assurances cannot be over emphasized, it may be possible to bring this practice within the rule of law framework – or at least make them less objectionable - subject to meeting rigorous criteria.

One requirement is to ensure the effectiveness of diplomatic assurances by reducing the risk of any ill treatment or serious harm to a negligible level which effectively guarantees the person's safety. In order to do so, such assurances must be unequivocal, leaving absolutely no doubt that any ill treatment or serious harm will occur. Furthermore, it is essential that the returning state is able to hold the receiving state to account for its undertakings, which means that the former state must be able to closely monitor the fate of the returned person and to take preventative or remedial action if ill treatment occurs. Without such mechanisms, protection from *refoulement* could be rendered meaningless if states were able to avoid their international obligations on the basis of paper only guarantees regarding a person's safety. However, such a requirement will be very difficult, if not impossible, for most states to meet, both in theory and in practice. Consequently, there may be merit in exploring whether an independent, international oversight mechanism could be established, perhaps one that is UN sponsored, although such a mechanism would be likely to face many of the *inter alia* practical and cooperation difficulties experienced by human rights treaty bodies, special rapporteurs, etc. Another suggested condition is that diplomatic assurances should only be used in cases where refugees have been formally recognized as such in order to bring them clearly within the scope of the Refugee Convention and its protections. Only when the exceptions to such protection under Article 33(2) Refugee Convention are invoked should diplomatic assurances to guarantee the refugee's safety be applied.

Ultimately, any uncertainty as to whether and how diplomatic assurances may be rule of law compliant will to a large extent depend upon current and future interpretations and the development of the relevant body of norms, especially by the courts. In the meantime, it is recommended that diplomatic assurances are only pursued by returning states where the following six (political) questions may all be answered in the affirmative:

### ***Recommendations:***

- Can the state that provides the assurances be trusted? Merely relying on a state's international legal obligations is not enough. Diplomatic assurances can only be meaningful when they provide more guarantees than already implied by the existing international legal obligations of the receiving state. In particular assurances that are provided outside a legal framework rely on the trustworthiness of the state and its government. This is a political rather than a legal question.
- Is the state that provides the assurances capable of effectively guaranteeing the person's safety? A state that is confronted with endemic practices of torture and lacks effective control over (parts of) its people and territory cannot arguably effectively guarantee safety. It is a question of a state's human rights and security or control record rather than its legal obligations.
- Are the given assurances aimed at guaranteeing the person's safety? Assurances must be directed at the person and his unsafe situation. General assurances or assurances aimed at protecting, for example, the person's property rather than his or her physical security will not suffice.
- Are the assurances sufficient to guarantee safety? A mere promise will not suffice. Assurances must be given in a formal legal context creating clear obligations and reducing the risk of subjection to irreparable harm to negligible proportions.
- Is it possible to effectively conduct post-return monitoring of the implementation of the assurances? Adequate implementation of the given assurances is required and effective monitoring of compliance essential. This should include free, full, and immediate access to the person concerned. The possible creation of an independent, international monitoring body should also be considered here in order to overcome at least some of the challenges for a sending state in monitoring the implementation of a bi-lateral agreement with a receiving state.
- Is redress possible in the event of non-compliance with the assurances? The individual, as well as the state seeking assurances, must have the legal opportunity to seek redress in case of non-compliance in order to seek reparation or compensation.

#### ***4.4.3. Release of Detainees or Other Persons to Third Party States***<sup>97</sup>

A different scenario, with its own unique challenges, is where the state holding a detainee plans to transfer a person to a third party receiving state which has agreed to receive that person due to the risk of *non-refoulement* if returned to his or her country of origin, as has happened in relation to a number of former detainees held at Guantánamo Bay.

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<sup>97</sup> See Council of the EU, 'Outcome of Proceedings' 10523/2/09 REV 2 (4 June 2009): 'Conclusions of the Council and of the representatives of the Governments of the Member States on the closure of the Guantanamo Bay Detention Centre'.

In particular, while decisions as to whether or not to accept such former detainees and the determination of their legal status fall within the sole responsibility and competence of the receiving state, they may raise issues of internal national security for other states also, who may need to be part of the consultation process prior to any transfer. This is illustrated by the position of EU Member States and Schengen associated countries and the guidance issued by the Council of the EU following the announcement by the US government in 2009 to close Guantánamo Bay. A significant issue here is the general rule that any third country nationals legally residing within one Member State or Schengen associated country has the right to move freely within the territories of the other aforementioned states, where certain conditions set by the provisions of Schengen *acquis* are met. Consequently, as a result of the abolition of controls at internal borders within the Schengen area, a decision to accept a former detainee by one Member State could impact upon *inter alia* the public order and/or internal security of the other Member States and Schengen associated countries.

Consequently, it was agreed that any of these states will only act as receiving states if certain other criteria are met, in particular that: the person concerned is ‘cleared for release’ by the sending state (in this case the US); there are compelling reasons why that person cannot be returned to their home country of origin (*non-refoulement*); and the person wants to be transferred to the Member State or Schengen associated country concerned. Every effort should also be made by the receiving state to integrate such persons into their society, in a manner respecting their human rights and fundamental freedoms. Additionally, a mechanism<sup>98</sup> was agreed to ensure appropriate consultation and thorough information-sharing (including confidential, intelligence, and other information such as the envisaged legal status and residence details of such persons) before and after decisions to receive former detainees occur in order to give all interested states the opportunity to share relevant information and to take appropriate measures in accordance with the Schengen *acquis* and national law. This process must also be rule of law based, for example respecting and protecting any personal data contained in such information exchanges in a manner consistent with the national laws of the Member States and Schengen associated countries involved, together with relevant EU and Council of Europe legislation; as well as more generally respecting human rights and fundamental freedoms guarantees.

Although some aspects of this case study are unique to that context, not least with respect to the free movement of persons, nevertheless some of its underpinning principles and practices may be of wider relevance, hence a number of related recommendations are made here.

### ***Recommendations:***

- Before any potential receiving state finally agrees to and receives a person who has posed some form of security threat to the sending state (even if ‘cleared for release’) it should check whether this may impact upon the internal security of another state (eg a neighbouring state and/or one where a bilateral arrangement for the movement of

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<sup>98</sup> This includes utilizing existing information-sharing mechanisms (such as existing legal frameworks on inter-state intelligence sharing, SIRENE, Europol, etc).

persons may exist), and ensure appropriate levels of consultation both before and after the transfer.

- The mechanism and approaches identified here may be of wider potential application beyond detainees currently being held under some system of administrative detention. In particular, they may be adaptable to situations of asylum-seeker expulsions as an alternative to diplomatic assurances where there is a willing third party receiving state.
- Any mechanism developed here must adhere fully to the rule of law, especially in terms of being consistent with the prohibition against refoulement and safeguarding basic human rights and fundamental freedoms.

#### 4.5. *Lacunae within the Existing Framework*<sup>99</sup>

In addition to the tensions operating within and between the four key sets of principles just considered, one overarching source of potential challenge to the integrity and cohesiveness of the international rule of law framework applicable to counter-terrorism is its *lacunae*. These may be normative, interpretative, and/or policy created in nature.

With respect to normative *lacunae*, at least most aspects of terrorist activities are believed to be prohibited by and their effects provided for under international law, whether by dedicated anti-terrorism or more generally applicable conventions, instruments, or other legal principles. However, due to the historically piecemeal manner in which international criminal law especially has developed, some normative gaps still persist. One remains the absence of a universal definition of terrorism itself, from which other normative challenges derive, not least in terms of poorly drafted or incompatible domestic anti-terrorism legislation which is not easily harmonized into a homogenous and seamless universal criminal justice framework. That said, the achievement of any universal definition will not of itself resolve all outstanding normative challenges here. This is illustrated by the absence of an agreed international framework of principles governing access to justice by and reparations for victims of terrorist offences, for which there is no normative explanation in terms of any obvious drafting obstacles to be overcome, or shortage of national examples of best practices and developed mechanisms which may be drawn upon.

Other *lacunae*, at least in terms of their effect, are attributable to the interpretative approaches adopted by the courts when interpreting and applying particular principles. This is especially true when the judiciary are unduly deferential to the executive and its security imperatives, in particular where they allow the argued needs of national security and its responses to be balanced *against* rule of law protections, rather than insisting that they be accommodated *within* the scope of the existing framework and its inbuilt flexibility to accommodate exceptionality. Indeed, as some recent case law - for example, regarding the scope of the *non-refoulement* principle - has demonstrated, there is the danger that such deference may not

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<sup>99</sup> See especially KLH Samuel, 'The Rule of Law Framework and its Lacunae: Normative, Interpretative, and/or Policy Created?', Chapter 2.

only introduce unhelpful ambiguity, but even suggest the possibility of derogations in practice from absolute principles.

Another source of potential *lacunae* is attributable to the diversity and inconsistency of national, regional, and international judicial and non-judicial interpretations regarding the extra-territorial reach of human rights provisions, in particular whether and how a State Party may have extra-territorial obligations for any human rights violations committed by its officials under the concept of ‘effective control’.<sup>100</sup> The more restrictive the approach, the more likely it is that *lacunae* will result in terms of impunity for certain state actions, thereby denying victims of these human rights violations of any right to redress and reparation.

The third principal source of *lacunae* identified are those which may be policy created in the sense that there is no normative or interpretative reason or requirement for their existence; rather they are generally the product of deliberate executive policy choices as to how particular principles are interpreted and applied. This has been especially evident in relation to the paradigms in which governments have sought to justify particular counter-terrorist responses, especially where they have chosen the one which offers them the greatest latitude (military over criminal justice), or where there have been attempts to argue the existence of some new paradigm which effectively creates impunity gaps for governments coupled with less protection for terrorists. There have been related tensions regarding the application and interpretation of particular principles also. This is illustrated by the classification and treatment of battlefield detainees, in relation to whom governments have tended to make deliberate policy choices that afford the least rather than highest level of rights and/or due process possible.

### ***Recommendations:***

- Where normative gaps remain within the international rule of law framework, especially those which are not dependent upon the securing of a universal definition of terrorism, every effort should be made to close them, whether through the amendment of existing or the introduction of new instruments. An example concerns the development and subsequent adoption of an international legal framework that ensures appropriate justice and reparations for victims of terrorist attacks.
- Greater clarity and guidance are required from the courts to assist governments on the crossing point from what may be permissible to what is impermissible conduct in pursuit of security imperatives: for example, when any reliance upon information which is the suspected product of torture or other ill treatment - whether for administrative or judicial purposes - crosses the line from what may be reasonable to what is unlawful.
- With respect to the diversity and inconsistency of interpretative approaches to the extra-territorial reach of human rights instruments and the concept of ‘effective control’, one possibility is to seek to harmonize current approaches through the introduction of what has been described as a ‘tripartite typology: jurisdiction resulting from territorial-based

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<sup>100</sup> See, eg, *Al-Skeini and others v United Kingdom* (n 29); and *Al-Jedda v United Kingdom* (n 29).

legal competence; jurisdiction resulting from non-territorial-based legal competence; and jurisdiction resulting from a purely factual relationship between state and individual.<sup>101</sup> Such an approach would draw together the most common interpretative approaches with the benefit that which of the three possible tests is applied would be influenced by the realities and circumstances of each case on an individual basis. It would also avoid the significant (and perhaps insurmountable) hurdles that would accompany any attempt to harmonize existing, inconsistent jurisprudence, although the latter would be desirable in the longer term.

- Executives are strongly encouraged to be more transparent regarding their security objectives and related policies and practices, and accountable for them. Contrary to some common misperceptions, the provision of increased procedural and substantive safeguards, including public scrutiny and debates, would ultimately strengthen rather than undermine such policies and practices, not least in terms of increased legitimacy and public confidence. In turn, these may permit governments to adopt more potentially controversial counter-terrorist measures on a formal basis, subject to appropriate safeguards, which would be illegitimate if pursued on an informal, less accountable, *ad hoc* approach.
- Even when pursuing legitimate security imperatives, executives must take great care that their adopted counter-terrorist policies and practices do not over-stretch or even corrupt otherwise well functioning systems of criminal justice, including through arguments regarding the existence of *lacunae*.

## 5. MILITARY AND CRIMINAL JUSTICE/PREVENTIVE PARADIGMS AND THEIR PRIMARY ACTORS

### 5.1. Criminal Law Enforcement and Exceptional Military Responses<sup>102</sup>

The post-Cold War era has witnessed new trends by terrorists on the one hand, particularly their increasing ruthlessness; and governments and international organizations on the other, in the form of executive-led security/military approaches that challenge international legal paradigms. While this executive-led action has not completely replaced consensual, multi-lateral instruments that take a criminal justice/human rights approach, it is posing a number of challenges to the rule of law, especially due to the expansion of more coercive responses, existing alongside consensual ones, which have been accelerated by the events of the 9/11 terrorist attacks. A particularly concerning feature of such responses, from a rule of law

<sup>101</sup> H King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 Human Rights Law Review 521, 537-8, 542-55.

<sup>102</sup> See especially, K Weston, 'Counter-Terrorism Policing and the Rule of Law: The Best of Friends', Chapter 13; G Staberock, 'Intelligence and Counter-Terrorism: Towards a Human Rights and Accountability Framework?' Chapter 14; and TR Mockaitis, C Tucker Jr, and A Invictus, 'The Military and the Role of Law in Counter-Terrorism', Chapter 15.

perspective, is that some governments have engaged all elements of their national power - legal, economic, diplomatic, financial, military, intelligence, information, etc – in an attempt to neutralize the threat posed by non-state terrorist actors especially. Whilst this is not per se problematic, the primary concern here is when this results in not only a disproportionate response, but more fundamentally one that subverts essential checks and balances within democratic states.

As was stated at the outset, the natural location of terrorism and counter-terrorism is within international criminal law and an international criminal justice approach, which means that suspected terrorists must normally be arrested and charged with criminal offences (under national and, if applicable, international law). Given that transnational and international terrorism can amount to threats to international peace and security, in addition to domestic responses it is possible that law enforcement measures may occur within a collective security context also, including that of UN, NATO, or the African Union (AU). Law enforcement officers can, of course, use force if their lives are in danger, but this is clearly distinct from soldiers using weapons against an enemy where it is perfectly lawful to use lethal force in situations of armed conflict. Unless the act of terrorism and the counter-terrorist response escalates to a situation of armed conflict, military force should not be used. It must be recognized though that certain acts of terrorism have the necessary scale and effect to justify action in self-defence thereby potentially leading to a situation of armed conflict in which the military approach is justified and international humanitarian law applies. The same argument applies when there is an imminent terrorist attack, subject to the requirements of the right of self-defence.<sup>103</sup>

After the excessive responses witnessed during the post-9/11 era, there is a pressing need to rebalance the relationship between military approaches to counter-terrorism and criminal justice/preventive approaches. This necessitates re-establishing an understanding of the relationship between international human rights law (which regulates the criminal justice response) and international humanitarian law (which primarily regulates the military response). Maintaining the parameters within and between the two paradigms is especially important due to the visible, ongoing struggle taking place in post-9/11 counter-terrorist discourse between them, not least in relation to the emergence of a 'new' paradigm. Any blurring between the lines may facilitate greater levels of impunity than is currently the case, especially in relation to states and their responses.

More specifically, a rule of law approach must be based on the military option being exceptional in relation to specific armed conflicts, and being invoked only when the requirements of self-defence are met or when authority is granted by the UN Security Council. The primary role of the military of outside states in such operations should be to provide support and training to states facing terrorist threats so that they can defend themselves, such

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<sup>103</sup> See International Court of Justice's judgments in: *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 at 22-127; *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161 at 175-99; and *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168 at 213-23.



as through sustained nation-building efforts in the wake of any conflict which has destroyed or seriously degraded a state's internal structures including those of law enforcement.

With respect to the criminal justice paradigm, intelligence gathering is important in developing a preventive element to it, so that the threat of terrorism is fully addressed. A fully developed criminal justice/preventive approach would further minimize the need for a military approach. However, while intelligence plays a vital role in enabling governments to develop security policies, it is not the function of the intelligence services to enforce them. The maintenance of such boundaries in terms of differing roles limits overlap and confusion with law enforcement and criminal justice organs entrusted with the enforcement of national security laws and policies in counter-terrorism. Consequently, intelligence agencies should not perform the functions of law enforcement personnel and, in particular, should have no powers to detain or arrest people. To the extent that they are given any coercive powers, intelligence agents must comply with the same standards as, for example, the police, most particularly by ensuring detainees prompt access to a lawyer and the courts. Furthermore, it is important to establish clear parameters specifying at what point intelligence obtained by the security services should require police involvement not least in order that it becomes admissible evidence against a suspect; and the related roles and powers of each agency including when they are cooperation together on a case. In maintaining these clear boundaries, it is also crucially important to develop effective mechanisms for inter-agency cooperation, both at the national and international levels; indeed, a clear division of functions necessitates this if counter-terrorist responses are to be truly coherent and effective.

The differing yet mutually reinforcing roles require both the independence and interdependence of the police, intelligence agencies, and the prosecutor. In turn, this should provide the necessary checks and balances that support the rule of law principles applicable to a specific case, for example, the provision of independent scrutiny of the grounds for arrest and weight of evidence against those suspected of terrorist related crimes. Without such checks and balances, there are opportunities for unwarranted detention and malicious prosecution, leading to an infringement of human rights and a serious miscarriage of justice. It is essential that law enforcement officers work within the rule of law. They must not use violence, oppression, or threats to gain admissions from suspects, but present them with overwhelming evidence, gained from forensic examination, and seek their explanation. Such practices are never legally, legitimately, or morally defensible, even by law enforcement officers responding to challenging terrorist threats. It is only through these means that terrorists will be 'safely' convicted and their sentences confirmed should they subsequently appeal against conviction.

The need for clear lines of accountability of police, military, and intelligence communities within their states, and consequently in international law, is a strong argument for discouraging the contracting out of a number of governmental functions exercised in the course of counter-terrorism, such as combat, arrest, detention, interrogation, and intelligence gathering. If such functions are outsourced then, as the state remains directly responsible for the actions of private providers in carrying out these functions, clear lines of accountability, over and above those found in the contract, are required. Contracting with private providers

for any counter-terrorist functions or operation requires the state to ensure that those private providers do not violate the rights of individuals under human rights or international humanitarian law during the course of a counter-terrorist operation. (See further section 6.7). In addition to establishing clear lines of accountability, it is also crucial from a rule of law perspective to ensure that any systems of accountability are effective, adequate, and unhindered, not least to strengthen public confidence that fundamental values, as well as legal and ethical standards, are not being abused under the guise of security imperatives. (See eg section 8.1 on parliamentary oversight).

Ultimately, terrorism is and will remain a significant international security problem for the foreseeable future. It cannot be eliminated, but terrorism can be reduced and contained. Like organized crime, the challenge is not to eradicate the threat, but to reduce it to a level with which society can abide. It is beyond any dispute that the state has both the fundamental right and duty to protect itself and its people from terrorist threats. Therefore, effectively responding to the asymmetric nature of such threats, which is inherent within terrorism, will require the adoption of a new comprehensive approach that will utilize all elements of national power, though in a proportionate, lawful, and legitimate way. It will also require strict adherence to the rule of law by all agencies and organs of government involved, not least to promote high levels of public confidence.

## **5.2. Specific Recommendations**

Some further observations and recommendations are made with respect to each of the primary actors.

### *5.2.1. General*

- Every effort should be made at the national, regional, and multi-national level to rebalance the relationship between military and criminal justice/preventive counter-terrorist approaches, in particular by re-establishing an understanding of the relationship between international human rights law and international humanitarian law in order to maintain the necessary parameters within and between the two paradigms.
- Every effort should be taken to ensure that military approaches are exceptional, being invoked only when the requirements of self-defence are met or when clear and explicit UN Security Council authorization is present. Where this is not the case, state policies and practices should be reviewed and amended as a matter of pressing rule of law concern.
- In order to maintain the boundaries between law enforcement and criminal justice organs, it is essential that any practices which risk blurring them cease with immediate effect. Of pressing concern here, intelligence agencies should not perform the functions of law enforcement personnel, which include having no powers to detain or arrest people.

- Every effort should be made and necessary corrective action taken to establish clear parameters and guidelines specifying at what point intelligence obtained by the security services should require police involvement, and clarifying the related roles and powers of each agency especially in situations of inter-agency cooperation.
- Existing relationships and structures between the police, intelligence agencies, military, prosecuting authorities, and judiciary should be reviewed, to ensure their independence and impartiality including from each other and that clear lines of accountability are in place.
- It is crucial to any rule of based counter-terrorist efforts that effective accountability mechanisms are in place, including through credible and robust oversight mechanisms and accountability structures.
- Every state engaging private contractors should ensure that clear, adequate, and effective regulatory mechanisms are in place to meet their obligations under international law, including the principle of due diligence, whereby a state has a duty to protect individuals within its jurisdiction from human rights violations by private actors. This requires not only clear provisions in procurement contracts, but also systems of state regulation such as licensing, reporting, and monitoring of performance by private contractors

#### 5.2.2. *Police*<sup>104</sup>

- All counter-terrorist policing should be underpinned by a code of practice which at the very least builds upon and reinforces existing instruments, such as the ‘Code of Conduct for Law Enforcement Officers’ published by INTERPOL.<sup>105</sup> While such instruments are useful in that they articulate foundational principles for ethical policing of general relevance, they do not specifically address particular challenges which may arise in a counter-terrorist context. Consequently, it is strongly recommended that a specific code of practice for law enforcement and intelligence officers engaged in countering terrorism is developed. The following is proposed as an initial attempt to develop such a draft code of practice.

#### **Draft Code of Practice for Law Enforcement Officers engaged in Counter-Terrorism**

1. The fundamental principle for all law enforcement officers is that they must maintain a high standard of professional behaviour when interviewing, or otherwise dealing with, individuals involved in, or suspected of, terrorism.

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<sup>104</sup> See Weston (n 102).

<sup>105</sup> ‘INTERPOL Code of conduct for law enforcement officers’, Declaration of intent adopted at the 48<sup>th</sup> INTERPOL General Assembly (Seoul, 1999) (which was developed as part of an anti-corruption initiative). See too, eg, ‘The United Nations Code of Conduct for Law Enforcement Officials’, adopted by UNGA Res 34/169 (17 December 1979) UN Doc A/RES 34/169; and ‘The European Code of Police Ethics’, adopted by the Council of Europe Committee of Ministers, REC(2001) 10E (19 September 2001).

2. In all of their law enforcement activities, officers must work within fundamental rule of law principles (especially those of human rights and criminal law). Consequently, the security imperative must never be allowed to defeat the rule of law. There is a danger that if the state overreacts to the threat from terrorism by imposing draconian, unlawful, or illegitimate measures on its citizens, the state will lose its legitimacy and effectiveness to govern, thereby increasing support for the terrorists it is seeking to counter.
3. It is never legally, legitimately, or morally defensible for law enforcement officers to utilize violence, oppression, or threats to gain admissions or confessions from suspects. Instead, it is essential to present such suspects with evidence of their involvement in any alleged terrorist crime(s), supported by forensic or other expert evidence where available, and seek their explanation.
4. The primary purpose of effective counter-terrorist law is to provide additional powers to law enforcement officers to investigate, interdict, and prevent acts of terrorism before they pose a threat to public safety. Such legislation, which is generally more onerous and restrictive in nature, should be confined to terrorist related investigations and never applied to ordinary domestic criminal investigations.
5. The relationship between law enforcement organizations and national intelligence agencies should be complementary, based on trust, mutual understanding, and supported by effective and efficient cooperation and collaboration, when and where necessary. It is essential that all of their policy and operational decision-making processes are clearly informed and influenced by applicable rule of law principles, thereby reflecting a strong commitment to the indivisible nature of the rule of law.
6. It is essential that senior law enforcement officers understand the need to develop a close working partnership with their counterparts in the domestic intelligence service, supported to this end by the necessary specially trained and dedicated personnel with access to specialist equipment.
7. All law enforcement officers must have a basic awareness of the nature of the threat from terrorism. They must be clear of their specific role and responsibility in the detection, deterrence, and disruption of terrorist activity. They must work with the communities they police to counter the threat from terrorism.
8. Although the outcome of terrorist crime is predominantly murder and damage to property, as far as is reasonably possible, every effort should be made to develop and employ specially trained and dedicated law enforcement officers to investigate such offences; due to their specific inherent challenges and complexities not generally encountered in the investigation of ordinary criminal offences. Ideally, there should exist a permanent cadre of experienced counter-terrorist investigators, or detectives, who undergo specialist, on-going training and participate in exercises, that includes other domestic/international counter-terrorist agencies.
9. Senior law enforcement officers engaged in countering terrorism must be well trained in counter-terrorist strategy and tactics; understand the complex nature of the threat and the

consequences of their actions, or inaction; and be very familiar with rule of law principles which may be reflected instinctively within their responses.

### 5.2.3. *Intelligence Services*<sup>106</sup>

- *Comprehensive Review and Stocktaking:* As has been done in the past when confronted with allegations of intelligence related abuses, states should establish an independent and comprehensive review of the legal framework governing their intelligence services, and of the mandate and capacity of existing oversight structures to ensure appropriate levels of democratic and legal accountability. The Good Practice Study<sup>107</sup> should serve as one of the baselines of such a review.
- *Guidelines and Standards for Intelligence Accountability:* The absence of human rights guidelines and soft law standards for intelligence and intelligence personnel at the regional and/or universal level should be addressed. The existence of both would not only assist in filling the current normative vacuum, but they would also facilitate the appropriation of international human rights law by intelligence agents and oversight mechanisms not least as part of their identity and institutional culture. The compilation of good practices presented by the UN Special Rapporteur in 2010 in The Good Practices Study could serve either as the basis for regional/universal soft law standards, or could be endorsed or even adopted by the UN Human Rights Council and/or the General Assembly.
- *Human Rights Training and Policy Dialogues:* The worlds of intelligence, oversight, and human rights remain largely separate, and discussions like this one are typically conducted in separation from each other. Efforts should be intensified to bridge these gaps, including through human rights trainings for intelligence personnel; the conduct of policy dialogues (under Chatham House rules) on the integration of human rights in counter-terrorism; further studies of human rights and intelligence; as well as the facilitation of closer contact between human rights lawyers, national human rights institutions, and the oversight community. Such activities should cover the full cycle of intelligence powers and systematically include legal and political accountability.
- *Separation of Intelligence Gathering and Law Enforcement:* Intelligence accountability will always remain a delicate issue and one in which any powers afforded need to be kept in equilibrium with the abilities of the oversight structures and the legal system to detect wrong doing and rectify human rights violations. If not, rule of law compliance and effective oversight will remain illusionary. It is recommended that very careful consideration be given and reviews conducted regarding any powers beyond the conventional role of intelligence collection, generation, and sharing that enable public

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<sup>106</sup> See Staberock (n 102).

<sup>107</sup> UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, 'Compilation of Good Practices on Legal and Institutional Framework and Measures that Ensure Respect for Human Rights by Intelligence Agencies While Countering Terrorism, Including Their Oversight' (5 May 2010) UN Doc A/HRC/14/46 (UN Special Rapporteur Compilation of Good Practices Report') 14.

authorities to implement security policies. Clear separations of intelligence and law enforcement tasks have to be maintained, notably in relation to arrest, detention, and interrogations. Steps have to be taken in particular to avoid intelligence agencies duplicating or displacing law enforcement and criminal justice institutions, not least their safeguards, in the fight against terrorism.

- *Upgrading Oversight Structures:* There is a need to close the accountability gap through upgrading the oversight structures. This requires setting in motion the creation of basic oversight structures in countries that have so far not established transparent legal frameworks over their intelligence agencies, nor any (effective) internal or external oversight mechanisms, not least parliamentary. Certainly, the present transition process in the Middle East and North Africa should be used to overhaul existing security apparatus and to ensure (greater) democratic accountability over the security services in the future. This would also greatly enhance the effectiveness of inter-state intelligence cooperation. Oversight and independent control has to extend to all agencies exercising intelligence functions, including military intelligence. It is vitally important that oversight bodies have a specific rule of law and human rights mandate, can access human rights expertise as needed, and that they are adequately resourced to do the task they are entrusted to perform.
- *Rule of Law Compliant Intelligence Cooperation:* Intelligence cooperation remains a critical and sensitive area in which international legal standards are likely to be further clarified in parallel with evolving international case law. In order to prevent the recurrence of human rights violations through intelligence cooperation, steps should be taken to reform the applicable regulatory framework as well as the remit of the oversight structures to explicitly include intelligence cooperation. The mandate of oversight over intelligence agreements and information shared with third countries should be made explicit. Avenues may be explored to establish ways of ‘networking accountability’.
- *No Tolerance for Torture and Other Crimes under International Law:* There is today a critical deficit of legal accountability in practice for acts of torture or other serious human rights violations. Pursuing such cases is not an option, but a legal obligation. Prosecuting authorities should be strengthened and supported through mutual legal assistance and extradition schemes, and their independence safeguarded. A sea change is required that recognizes criminal acts committed by state officials as not deserving special protection or lenience but heightened attention.
- *State Secrecy and Impediments to Accountability:* States should ensure that national security doctrines and invocations, such as state secrecy, are not used in ways that preclude the right to remedy and reparation. It is possible to accommodate legitimate state secrets privileges and other national security considerations while allowing those responsible for serious human rights violations to be held to account. Access to information laws, journalist source protection, and whistleblower protections should complement an effective accountability framework.

- *Primacy of the Criminal Justice Response*: It remains vital to strengthen the capacities of criminal justice systems to address terrorist violence and to bring those responsible to justice. It is the criminal justice response that de-masks terrorist violence as murder, and that prevents terrorists from hiding behind any ideology. It is in this regard vital to ensure that alternative intelligence based preventive mechanisms are not becoming *de facto* parallel tracks of justice with reduced thresholds, not least regarding the evidentiary standard of proof applied. To this end, intelligence based preventive mechanisms need to comply with international human rights law, including its requirements of necessity, proportionality, and non-discrimination, and have to offer fundamental fairness in relation to the underlying intelligence information. Over time, intelligence has to be transformed into admissible evidence or any measures, such as detention, have to cease. In order to protect against the seepage of special powers, and of secret evidence becoming the norm, any preventive mechanisms need to be subject to independent review.
- *International Accountability*: Intelligence accountability is also an international issue, especially because various regional and universal reports have exposed human rights concerns in this domain. Yet, there has so far been no official response by the UN's principal human rights body, the UN Human Rights Council, to the study of four independent mandate holders on secret detention. It is important that the Human Rights Council starts acting on this report by reaffirming the law, endorsing the report, and following up on the recommendations it entails.

#### 5.2.4. *Military*<sup>108</sup>

- Effective military responses to current asymmetric terrorist threats require a holistic approach, which may be achievable by combining national counter-terrorist and counter-insurgency doctrines with other elements of national power - especially diplomatic, informational, military, and economic. That said, care must be taken not to confuse or blur the boundaries between counter-terrorist and counter-insurgency doctrines, which may impact negatively upon the effectiveness of their related strategies.
- Many states currently do not have an adequate, cohesive, and comprehensive national counter-terrorist strategy, including for countering asymmetric terrorist threats. Such a strategy will in some cases require states and their allies to re-conceptualize the nature of the conflict; to reconsider the right force structure to deal with today's threats; and to develop a legal framework for combating terrorism, which includes nation-building as a legitimate task.
- A crucial, but often neglected, aspect of any successful nation-building strategy must be the establishment (or re-establishment) of a functioning legal system, with the ultimate objective of restoring a basic level of security to the local population through some

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<sup>108</sup> See Mockaitis, Tucker Jr, and Invictus (n 102); and separate submission by Kevin Riordan.

semblance of peace, order, and rule of law. At a minimum, a functioning legal system requires courts, judges, prosecutors, and defence lawyers, as well as competent and disciplined police. All of these must adhere to international professional and human rights standards while simultaneously respecting local customs and culture (a balance which is not easily achieved).

- When the military forces of one state (or a coalition of states) become involved in the counter-terrorist operations of another state, they should adopt an indirect approach wherever possible whereby they provide support and training to the state facing terrorist threats so that the latter may adequately defend itself. Such an indirect approach carries a number of benefits, not least in terms of establishing or maintaining legitimacy for the threatened state which is not possible where another state is visibly in control, such as during occupation following a more direct approach of military intervention. Furthermore, it would make the state less vulnerable to terrorist organizations; and would enhance the security of the international system as a whole.
- Established international law norms, which have always been restrictive on the use of pre-emptive force - insisting that a threat must be ‘instant, overwhelming, and leaving no choice of means, and no moment of deliberation’<sup>109</sup> – should be strictly adhered to, rebalancing national security policies and military doctrines where necessary to reflect this.
- The rule of law is a fundamental aspect of good governance that must be regarded as essential by all parts of society, including the military and security organizations. This requires ‘mainstreaming’ the concept and its underpinning principles whereby respect for the rule of law is not merely an ‘add-on’ consideration to be applied in operations when time or resources allow. Rather it must form an inherent and instinctive part of all operational decision-making from the outset and continue through all aspects of planning and execution of an operation; and to all aspects of preparation for operations, including training and education.
- Rule of law ‘mainstreaming’ is relevant at all levels of command or leadership and should also occur throughout the full spectrum of operations to which military forces or security organizations might be committed, including: Government response to civil unrest, rioting, and internal disturbances; peace-support operations; occupation of foreign territory; counter-terrorist operations; counter piracy, counter narcotics, and complex crime fighting; internal armed conflict and counter insurgency; and international armed conflict.

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<sup>109</sup> *The Caroline Case* (n 103).



## 6. RECENT STATE PRACTICES

### 6.1. Detention<sup>110</sup>

As recent state practices have demonstrated, when societies or their governments confront perceived threats to their security, a typical reaction is to seek to eliminate such threat by removing those thought to represent it, including through the deprivation of their liberty, which may take a number of forms.

One form of detention which has been especially controversial, in the context of both criminal justice and military approaches, is what is termed here as ‘administrative internment’. This involves the deprivation of liberty for purposes similar to those the criminal law is aimed at achieving (other than punishment), but without a judicial process that presumes innocence and only convicts people on the basis of evidence ‘beyond reasonable doubt’. In other words, the aim is to remove the perceived threat and/or to obtain information without the discipline of a criminal trial process, using means that, while not intended to be a sanction, to those detained and their families appear to be indistinguishable from the typical criminal sanction. The related propensity for error is correspondingly higher, as vividly evidenced by information now available about many of those detained at Guantánamo Bay.

The position is further complicated when a state seeks to use administrative internment while at the same time trying to engage in (a form of) criminal justice process, once again illustrated by legal complexities relating to Guantánamo Bay. As a result, not only has the administrative internment been challenged - domestically and internationally – but so have the special criminal justice processes, most notably the use of special military commissions. The adoption of such procedures has been necessitated by a number of factors, not least by the very fact of (prolonged) administrative internment, sometimes exacerbated by other abusive treatment attendant on the detention/interrogation process, as well as by the claimed need to maintain certain sources confidential. Such factors, however, call into question the possibility of a credible fair trial under national, as well as international, standards.

In determining the legitimacy and parameters of different forms of detention, including administrative internment, the applicable law will depend upon whether it occurs during peacetime or a state of armed conflict. If the former, then it will usually be governed by international human rights law, in particular those principles which govern arbitrary detention, and the liberty and security of a person. In terms of the permissibility of administrative internment, the current position under Article 9 ICCPR is as follows: the position is not entirely clear in the absence of a formal derogation under Article 4 ICCPR; but where this derogation is made, such a system has not been authoritatively held to violate this principle where the derogation is valid and it remains proportionate. Where any such system of internment is used, it is essential that adequate mechanisms are in place to prevent its abuse and to avoid mistakes, which should conform closely to most aspects of Article 14 ICCPR requirements on fair trial and related due process.

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<sup>110</sup> See especially Rodley (n 67).

In the case of an armed conflict, the applicable law governing any detention is international humanitarian law, in particular its regimes governing POWs and civilians under Geneva Conventions III and IV respectively. The latter is likely to be the most relevant for persons engaged in transnational terrorist activities: although it does not technically apply outside of a situation of international armed conflict, important analogies may be drawn and principles identified which may be evidence of more widely applicable customary international law norms.

In both instances, whether in peacetime or time of armed conflict, the principal form of safeguarding against abuses remains ensuring their proportionality through periodic reviews of those detained: the longer the period of detention, the higher the burden of proof regarding the need for continued detention. This is especially important in the context of transnational terrorism where any administrative internment may be indefinite and protracted, especially due to uncertainty as to when the source of the perceived threat has been sufficiently countered to require the release of those detained. In any event, where serious psychological damage is plausibly being caused by the detention, there may be a requirement to find an alternative, including release.

The other form of detention which has generated much controversy and rule of law concern during recent international counter-terrorist responses has been secret detention, especially in relation to the practice of extraordinary rendition (see further section 6.4). This form of detention shares many of the characteristics of arbitrary detention, internment without the envisaged safeguards of international human rights or humanitarian law, or even an enforced disappearance, and could be considered to be an extreme form of *incommunicado* detention. Furthermore, such a practice most probably violates a number of other core human rights, including the right to liberty and security of person; the right to be treated with humanity and respect for one's human dignity; and the prohibition of torture or cruel, inhuman or degrading treatment (as regards the detained person and his or her family). Denying the person concerned of his rights and associated protections under international law, this form of detention can never be justifiable or lawful, even when a state of emergency is declared.

### ***Recommendations:***

- In internal armed conflict, counter-terrorist activities, particularly detention, should be compliant with international human rights law, except as necessitated temporarily by battlefield conditions.
- In transnational armed conflict, counter-terrorist activities, particularly detention, should conform to international human rights law as the situation stabilizes and actual conflict is absent, that is, when there is effective control by the state party to the conflict.
- Indefinite administrative detention should be regarded as impermissible.
- Where a person is detained administratively for a protracted period, evidence elicited by virtue of the fact, processes, or conditions of detention should not be admissible.

There should be a cut-off point beyond which no criminal prosecution can be considered safe.

- Administrative internment should only be used as an absolute last resort, both as a system and in any individual case, when criminal prosecution is excluded for reasons not attributable to the prior detention and no alternative means of monitoring or control would suffice (principle of proportionality). It should be controlled by strict procedures of independent, regular (not more than six months) review, with resort to a court, on both the legality and well-foundedness of the detention. A decision to continue detention should be based on evidence that at least reaches the standard of a balance of probabilities, with the presumption being against detention after the first review.
- Secret detention is absolutely prohibited.

## 6.2. Treatment in Detention<sup>111</sup>

Closely related to the fact of detention, whatever its form, is the treatment of detained persons. One of the core governing principles here is that every state must respect the absolute prohibition against torture and other cruel, inhuman, or degrading treatment or punishment,<sup>112</sup> in respect of all persons coming under its control, which includes those persons held in detention on its authority or with its acquiescence. It is suggested that the term ‘cruel, inhuman or degrading treatment or punishment’ should be interpreted here in a manner which extends the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

The obligations of the state towards persons deprived of liberty on its authority do not vary depending upon the nature of the behaviour of such persons. Indeed, it is precisely in relation to persons who may present risks to national security that the state must be scrupulous in applying its domestic law and international legal obligations. If it fails to do so, the state deprives itself of a powerful argument: the distinction between its position, based on legality, and that of those persons, such as terrorists, who resort to illegal action to obtain their goals. Therefore, it is crucial that the same criminal law safeguards are applied *mutatis mutandis* to all categories of suspected persons including those accused of terrorist offences. Despite such legal obligations and the benefits of adhering to them, the mistreatment of detainees, including in the context of counter-terrorism, is all too common. Consequently, there remains a pressing need to strengthen existing legal safeguards for detained persons, not only to ensure that they are afforded the requisite level of due process and basic protections, but also in terms of mechanisms to reduce current levels of impunity where detainees are mistreated.

This necessitates the reinforcement of international law norms and standards across regions of the world, coupled with increased public debate at the international and national level

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<sup>111</sup> See S Casale, ‘Treatment in Detention’, Chapter 19.

<sup>112</sup> See, eg, art 3 CAT; art 7 ICCPR.

about the requirement for every state (which aspires to be governed by the rule of law) to adhere to the provisions of the law, if greater compliance is to be achieved in practice. This is especially so with respect to the (mis)treatment of those persons deemed to pose the highest security threat. However, the reiteration of these norms will not suffice on their own. Rather they need to be accompanied by more concerted efforts to combat impunity, which is central to sustaining the prohibition against torture.<sup>113</sup> This includes among law enforcement officers and security agents, where a change of culture will often be required coupled with protective measures for whistle-blowers. A central feature of any approach to combating impunity is also the effective investigation of possible torture or other ill treatment, with criminal sanctions where appropriate.<sup>114</sup>

### ***Recommendations:***

- Nobody deprived of liberty should be subjected to torture or other cruel, inhuman or degrading treatment or punishment.
- The legal safeguards applying to persons held under the criminal law should apply *mutatis mutandis* to persons held in connection with terrorism. The presumption should be in favour of retention of the legal safeguards and norms in respect of all persons detained, with any exception being proportionate to the risk posed in the individual case. The decision as to the exceptional nature of the case should be based on independent assessment by senior personnel not involved in the investigation *per se*.
- No person should be held in *incommunicado* detention.
- All persons in initial detention should be able to exercise their rights, from the outset of custody, to notify someone of their custody; to have access to a lawyer; and to have access to a doctor. They should also be provided with clear information about their rights in a language that they can understand.
- All detention facilities of the state should be listed in official records and should be the subject of confidential scrutiny by independent monitoring mechanisms at the national and international, regional, or universal level. There should be no unlisted places of detention.
- The standards for registering the deprivation of liberty of every person held by agents of law enforcement, border control, or security forces should be scrupulously observed, even when the person is held in connection with offences related to terrorism. Whereas there may be cogent reasons not to inform the detainee or his/her lawyer of the identity of the officers concerned, for the protection of these officers, these matters must nonetheless be recorded so that appropriate oversight and accountability is maintained.

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<sup>113</sup> On the elements of a systematic approach to combating impunity, see further eg CPT 14<sup>th</sup> General Report (CPT/Inf (2004)) 28 paras 25-42.

<sup>114</sup> As required under, eg, arts 4, 6-7 CAT.

- The objective of all questioning should be to obtain accurate and reliable information in order to discover the truth. All officers involved in interviewing and interrogating should be trained to elicit information in conformity with human rights precepts.
- All questioning of persons in detention should be recorded by a continuous electronic system.
- If, exceptionally, it is necessary to prolong the investigative phase, this should not imply retaining the person in the custody of the investigating authorities. From the preventive perspective, it is important that the person moves to custody which is designed for longer stay and where the staff is focused on the custodial function.
- It is essential that all persons in initial detention are promptly brought in person before a judge.
- A systematic approach to combating impunity requires independent mechanisms for thorough, comprehensive, prompt, and expeditious investigation of alleged ill treatment, and for impartial judicial examination of the evidence and determination of appropriate penalties.
- In particular, it is essential that states: investigate and prosecute all instances of detainee mistreatment, especially where this has resulted in death; investigate superiors and not merely those who committed the actual acts of torture, in order to include those in command who design and promote any regime of detainee abuse; and ensure that all investigations are fully resourced as well as insulated from political interference.
- A further component of a fully fledged system for combating impunity is the existence of an independent mechanism for monitoring places of detention.

### **6.3. Unlawful Coercive Interrogation<sup>115</sup>**

As briefly mentioned with respect to treatment in detention, one of the most significant rule of law violations which has occurred in the context of detention, whatever its form – pre or post charge in the course of criminal justice proceedings, administrative internment, secret detention, etc – has been attributable to the utilization of unlawful coercive techniques, normally for evidence or intelligence gathering purposes. This has happened despite the existence of well established prohibitions against such practices under both international human rights and humanitarian law, in addition to existing national standards and regulations. In particular, the requirements of human rights law – especially the prohibition against torture and other forms of ill treatment, including under CAT<sup>116</sup> and Article 7 ICCPR - remain the baseline for assessing the legality of any interrogations, even during times of armed conflict.<sup>117</sup>

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<sup>115</sup> See R Pregent, 'Torture, Interrogation, Counter-Terrorism, and the Rule of Law', Chapter 20.

<sup>116</sup> See definition of torture in art 1 CAT.

<sup>117</sup> See especially Common art 3 to the Geneva Conventions 1949; art 17 Geneva Convention III; art 7 Geneva Convention IV; art 75 AP I; and art 4 AP II.

One particular rule of law complexity is that while CAT defines and clearly establishes an absolute bar to torture without exception or derogation, it does not define the phrase ‘other cruel, inhuman or degrading treatment’. This has resulted in states, human rights courts, and non-governmental organizations seeking to categorize various measures of conduct and suffering in an effort to determine when this threshold is crossed. Physical coercion is in some ways the easiest subject for a state to deal with; it has been universally condemned and is prohibited by all. The legal prohibition will not, however, by itself eliminate the practice. Practical steps must be taken to enforce the prohibition by both holding accountable those who violate the law, and barring the use of such evidence in court.

The greater challenge, particularly in the context of counter-terrorism given the expanded authorities of the police and the asymmetric threat terrorism represents, is how a state can ensure that confessions are in fact voluntary. A key tension here is that each state applies its own criminal law and criminal procedural code to terrorism investigations. Beyond the fundamental prohibition against torture and specified forms of ill treatment, there is no single, uniform, human rights based standard for the interrogations of terrorism suspects to ensure statements are voluntarily given, in part attributable to cultural differences. Therefore, while there is wide agreement that confessions must be ‘voluntary’ in nature, there is no consensus across diverse legal traditions as to its exact criteria, making it difficult to state a general principle that applies to the criminal law regime of every nation. Nevertheless, it is widely accepted across common law, civil law, and Islamic law traditions that confessions to crimes must be voluntary and not be the result of coercion, reflecting the global advancement of human rights law. Similarly, there is a broad prohibition against coercion under the law of armed conflict.

Another fundamental standard is that coercion is never permitted during any interrogation, regardless of its context (law of war or criminal law), geographical location, or characteristics of the individual concerned. This standard applies equally to civilian and military interrogators. In any event, the most reliable form of evidence remains that which is given voluntarily, which is the commonly held belief of the professional interrogator community. Indeed, not only is coercive interrogation self-defeating, but voluntary evidence is also the most useful in terms of its admissibility in criminal proceedings because any evidence tainted by the suspect’s mistreatment is likely to be excluded. Furthermore, in terms of the overall effectiveness of both domestic and multi-national counter-terrorist efforts, these may be undermined by any suggestion of unlawful coercive practices, which is not easily corrected even through a subsequent return to the rule of law. Much work remains to be done here, not least in terms of unqualified rejections of coercive techniques; the achievement of greater transparency to ensure greater accountability; and in further embedding lawful practices within the law enforcement and military community.

### ***Recommendations:***

- All States must explicitly reject any form of coercion in their counter-terrorist legal regimes. This must be without qualification or exception. This includes coercive

interrogation methods by the state or its proxy, as well as the use of any evidence obtained as a result of coercion.

- States must embrace transparency to the greatest extent possible. Although every counter-terrorist program is based to some degree upon intelligence that cannot be publicly disclosed, the state must be open about the terrorist threat it faces, and the steps it intends to take to counter that threat. Without transparency the state's actions will lack legitimacy. This is an ongoing, rather than static, process.
- Human rights organizations must recognize that a primary function of states is to protect their citizens, including through responding effectively to legitimate security imperatives. Therefore, not every temporary derogation or declaration of a state of emergency is necessarily an assault upon fundamental human rights.
- In addition to rejecting coercive interrogation as a matter of principle, states must take affirmative steps to ensure that this principle is incorporated into its law enforcement and military cultures. It must be built into institutional doctrine, repeatedly trained at every level, and periodically inspected by oversight authorities.
- All states and non-governmental organizations involved in assisting other nations in developing, modernizing, or professionalizing their law enforcement and military forces must ensure that the prohibition against coercive interrogation is an essential part of that effort.

#### **6.4. Extraordinary Rendition<sup>118</sup>**

One state practice which has raised especial concern is that of extraordinary rendition, namely the state-sponsored abduction of a person in one country, with or without the cooperation of the government of that country, and the extra-judicial transfer of that person to another country for detention and interrogation outside the normal legal system. Such a practice violates many human rights (including those just discussed in sections 5.1 to 5.3), not only due to its specific objectives of *inter alia* torture, secret and arbitrary detention, but also due to the procedural arbitrariness that accompanies the rendition.

Equally objectionable, not least in rule of law terms, have been their deliberately covert nature and methods, designed by the highest levels of government, under misconceived security imperative justifications, to avoid detection or resultant accountability. The extreme abuses involved in the deliberate adoption of a programme of extraordinary rendition have arisen from the increasingly central and multi-faceted role of intelligence agencies during recent counter-terrorist responses, making the need for more accountable intelligence gathering operations and practices obvious. In particular, due to the spectrum of serious violations involved, extraordinary rendition may give rise to state and/or individual civil or criminal responsibility under international human rights, humanitarian, criminal, and/or refugee and asylum law.

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<sup>118</sup> See especially H Duffy and SA Kostas, 'Extraordinary Rendition': A Challenge for the Rule of Law', Chapter 21.

Nevertheless, despite recognition of the extreme nature and related unlawfulness of extraordinary rendition, the fact of their (continued) occurrence, and the legal right of its victims to redress and reparation, it has been extremely difficult to bring the perpetrators to account and to secure justice for the victims of extraordinary rendition. (See Section 7.7).

## **6.5. Use of Lethal Force**<sup>119</sup>

Another state practice which is especially controversial is the use of lethal force against (suspected) terrorists, on which related debates were reignited following the killing of Osama bin Laden on 1 May 2011. A core challenge here for governments is how to neutralize what may be a very real threat to the lives of their own citizens and territory, especially where the persons concerned are in the territory of another country that is either unwilling to constrain their activities, or incapable of doing so. In particular, the question arises as to when, if ever, it is lawful to use (premeditated) lethal force, either using military personnel or remote-controlled drones, against suspected terrorists who are not at the time carrying out an attack or imminently about to do so, so that such acts do not constitute unlawful extra-judicial killings. This question needs to be addressed on two levels: in relation to the suspected terrorist, whether the use of force necessarily involves violation of his or her right to life, thus making the act unlawful in international law; and if the suspected terrorist is in the territory of another state (the host state), whether the use of lethal force violates the obligation to respect the territorial integrity of states. The territorial integrity of the host state is not violated when express or implied consent is given by the host state to use force, but can also be overcome if terrorist acts are attributable to the host state. In addition, there is support for the use of lethal force in circumstances when a host state is unwilling or incapable of preventing terrorist attacks being launched from its territory against targets in other states.

The issue as to whether or not the use of lethal force is lawful will depend significantly upon its context, in particular the applicable legal regime. Under a law enforcement, criminal justice regime, the governing law is international human rights. While there remains some doubt about the application of specific human rights conventions to extra-territorial action taken by states parties, the growing tendency would seem to be that states may not do things abroad that would be unlawful at home.<sup>120</sup> Furthermore, even if a state would not be liable for violations of its treaty obligations when it targeted a person who was not in its territory, that targeting could involve violation of the customary law rule against arbitrary deprivation of life.

If the assumption here is that a state is bound by its international human rights obligations to respect the lives of individuals wherever they may be, the same norm that applies to use of lethal force in its own territory will apply to use of lethal force abroad. For example, under the ICCPR (and customary international law) the state is prohibited from arbitrary deprivation of life; and under the ECHR the state is prohibited from intentionally taking the life of a person, unless use of lethal force is absolutely necessary in defence of persons

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<sup>119</sup> See D Kretzmer, 'Use of Lethal Force against Suspected Terrorists', Chapter 24.

<sup>120</sup> See, eg *Issa and others v Turkey* (Application No 31821/96) (2004) 41 EHRR 567.



against unlawful violence. Those norms apply whether agents of the state are acting in the territory of the state or abroad. This does not mean, however, that the fact that the suspected terrorist is outside the formal jurisdiction of the state and not subject to its normal law enforcement procedures may not influence the way the norm is interpreted in the concrete circumstances. The terms 'arbitrary deprivation of life' and 'absolutely necessary' are indeterminate and need to be interpreted in concrete circumstances.

The conventional view is that pre-meditated use of lethal force can never be non-arbitrary or absolutely necessary. The hidden assumption here is that outside the hostilities of an armed conflict, unless the threat to life of others is imminent, there will always be other means to frustrate the threat that have to be considered and preferred to use of lethal force. Clearly, such an approach has serious implications for states that are faced with terrorist acts carried out by a group which operates out of another country. Yet, unless there is an ongoing armed conflict between the state and the armed group, the state may not be able to take action its authorities regard as being necessary to prevent attacks taking place in the future. Consequently, it is unsurprising that states facing such a threat seek to justify their actions within an armed conflict paradigm.

The legal position under an armed conflict regime may be summarized in the following terms (see further section 4.1). Resort to the armed conflict regime to justify use of lethal force against suspected terrorists does not lie in the discretion of the state. Rather application of this regime is dependent on the existence of an ongoing armed conflict and the vulnerability to attack of the suspected terrorists either as privileged or *de facto* combatants, members of armed groups who fulfil a continuous combat function in a non-international armed conflict, or civilians who at the time are taking a direct part in hostilities. An armed conflict can only exist with a defined and organized entity – either a state or an organized armed group. There cannot be an armed conflict with 'terror' or 'terrorists'.

While an international armed conflict exists whenever there is resort to use of armed force in the relations between states, a non-international armed conflict between a state and an organized armed group exists only if the scope and level of violence and the degree of organization justify regarding the situation as one of armed conflict rather than criminal activity, riots, or violent disturbances. The border between these situations is indeterminate making it difficult in borderline cases to reach a conclusive decision of whether the regime is one of armed conflict or law enforcement. It is possible that there may be two conflicts, one international and the other non-international, taking place in the same territory at the same time. The status of the members of organized armed groups will depend on whether they are participating in the international or non-international armed conflict. Even when a person belongs to a category of persons who may be targeted in an armed conflict, lethal force should not be used unless there is a military necessity to do so. The principle of proportionality regarding expected harm to civilians must be respected also.

A significant issue, as yet not fully resolved, remains ensuring adequate levels of accountability for any decision to use lethal force under either regime, not least because the state authorities concerned often act clandestinely and deny their occurrence. In the absence of true accountability, there is no way of examining whether any decision to use lethal force

had been based on a reasonable assessment that, in the absence of any other available measures, was absolutely necessary. Although there may be an argument to be made about some relaxation of the demand that lethal force only be used to thwart an imminent attack in order to open up the way for a system of accountability,<sup>121</sup> the dangers to the rule of law of allowing executives to make decisions that lethal force should be used against specific individuals is too great to allow deviation from the accepted norms. Maintaining the rule of law, even at a cost, is an essential part of the struggle of democratic states against terror.

### ***Recommendations:***

- Rather than trying to fit all situations of terror and counter-terror actions into the armed conflict framework, even when this seems highly contrived, attempts must be made to strengthen law enforcement mechanisms for effective action against suspected terrorists. This obviously requires furthering international cooperation in law enforcement. Unfortunately, the political dimensions of terror; the persistent view of some states that terror may at times be justified; and the active or passive support given by certain states to organizations which regularly employ terror, make such cooperation difficult in the very cases in which it is most needed. Notwithstanding these difficulties, such attempts must continue.
- To ensure that any use of lethal force is lawful, it is essential that effective measures be introduced or, where they already exist, strengthened to ensure greater transparency of and accountability for such operations. Only then might they be regarded as legitimate and within the rule of law, which are central to any democratic system of government. Any intentional use of force outside the framework of an armed conflict must be regarded as a highly exceptional action that must meet the demands of absolute necessity to protect the rights of others against unlawful violence. In order to ensure that such use of force was both exceptional and absolutely necessary an investigation by an outside body must be carried out in each case.

## **6.6. Discrimination<sup>122</sup>**

The right to equality and non-discrimination gives concrete expression to the basic idea on which the whole international human rights system is founded: that all human beings, regardless of their status or membership of a particular group, are entitled to a set of rights. Since it underlies all other human rights, equality is often described not only as a ‘right’, but also as a ‘principle’. The foundational significance of equality is reflected in the fact that it is proclaimed at the outset of the Universal Declaration of Human Rights 1948 (UDHR):<sup>123</sup> ‘All human beings are born free and equal in dignity and rights’. Furthermore, general regional and international human rights instruments guarantee the right to equality and non-

<sup>121</sup> See, eg, HCJ 769/02, *The Public Committee against Torture in Israel (PCATI) v Government of Israel*, Judgment of the Supreme Court of Israel.

<sup>122</sup> See D Moeckli, ‘Anti-Terrorism Laws, Terrorist Profiling, and the Right to Non-Discrimination’, Chapter 23.

<sup>123</sup> Art 1 Universal Declaration of Human Rights (adopted 10 December 1948 by UNGA Res 217 A(III)).

discrimination (including the ICCPR, ECHR, ACHR, and African Charter).<sup>124</sup> In rule of law terms, the principle of equality and non-discrimination is an essential aspect of any conception of the rule of law, especially because it acts as a crucial inhibition on state power by forcing those in power to articulate their claims in terms of rules that are equally applicable to the powerful and the powerless.

It is now widely acknowledged that, at the very least, the right to non-discrimination on the grounds of race, sex, and religion binds all states, irrespective of their ratification of human rights treaties, because it has become part of customary international law.<sup>125</sup> Additionally, it would appear that the principle of non-discrimination, although not explicitly listed as such under Article 4(2) ICCPR, is effectively non-derogable in practice due to its status in Article 4(1) ICCPR as a basic requirement for any derogation to be permissible under the Convention.<sup>126</sup> The principle of non-discrimination applies equally to situations of armed conflict, although its exact scope and meaning will need to be determined according to international humanitarian law.

It is to some extent inevitable that people are classified into different groups. The crucial question then becomes whether there are objective and reasonable criteria for these distinctions. In determining this, a two limb test has been adopted, explicitly or implicitly, by most human rights bodies, which requires that any difference in treatment must: (1) pursue a legitimate aim; and (2) be proportionate. With respect to the first limb, this will not usually be very difficult for states to meet: most distinctions can be justified on the grounds of pursuing some aim that qualifies as legitimate, for example those of national security. More difficult to satisfy is the second element of the test, the proportionality requirement, which reflects the basic notion that a fair balance ought to be struck between the interests of the community and respect for individual rights. Here, certain grounds of distinction are generally regarded as inherently suspect and therefore require particularly strict scrutiny. In a counter-terrorist context, this is especially true of those relating to race, ethnicity, and religion, upon which many states' anti-terrorism practices and their stigmatizing effects are premised.

Such concerns have been especially evident in law enforcement practices, especially those concerning 'profiling' - generally defined as the systematic association of sets of physical, behavioural, or psychological characteristics with particular offences and their use as a basis for making law enforcement decisions. Profiles can be either *descriptive*, that is, designed to identify those likely to have committed a particular criminal act and thus reflecting the evidence the investigators have gathered concerning this act; or they may be *predictive*, that is, designed to identify those who may be involved in some future, or as-yet-undiscovered, crime. Profiling is, in principle, a permissible means of law enforcement activity. While it is recognized that personnel and other policing resources are not unlimited, when law enforcement agents use broad profiles that reflect unexamined generalizations, rather than

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<sup>124</sup> Arts 2-3, and 26 ICCPR; art 14 and Protocol 12 to ECHR; arts 1, and 24 ACHR; and arts 2-3, 18(3)-(4), and 28 African Charter.

<sup>125</sup> See, eg, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, 32.

<sup>126</sup> See further, eg, UNHRC, 'CCPR General Comment No. 29: States of Emergency (Article 4)' (24 July 2001) CCPR/C/21/Rev.1/Add.11 (UNHRC General Comment No 29), para 8.

specific intelligence or careful analysis of hard data, the relevant practices may constitute disproportionate interferences with human rights. Furthermore, any profiles based on ethnicity, national origin, and religion are not only likely to be under-inclusive in that they may lead law enforcement agents to miss a range of potential terrorists who do not fit the respective profile, but they are likely to be counter-productive also in terms of alienating the people groups affected.

Another concerning trend has involved distinguishing between nationals and non-nationals, even though the ‘battle lines’ of current efforts to fight against international terrorism are not drawn along the borders of states. This makes the issue of citizenship an irrelevant factor, unless a difference in terms of dangerousness between citizens and non-citizens may be demonstrated, in which case differential treatment may be justifiable so long as it is a proportionate (that is, suitable and effective) means of addressing the terrorist threat. This has been a significant issue in the context of preventive detention, even though the right to liberty protects citizens and foreign nationals equally. In rule of law terms, the situation is generally made worse by the fact that determinations on preventive detention tend to be the result of an administrative process which does not afford those affected adequate, if any, due process. This is despite the fact that one of the most important aspects of the concept of equality and non-discrimination is the right to equality before the courts. Similarly, rule of law concerns exist with respect to the establishment of special tribunals to try terrorist suspects who are non-nationals only.

### ***Recommendations:***

- Many of the rule of law concerns associated with the practice of ‘profiling’ relate to the use of *predictive* terrorist profiles. In contrast, if, in the context of an investigation into a terrorist crime that has already been committed, there are reasonable grounds to assume that the suspect fits a certain *descriptive* profile, then reliance on characteristics such as ethnic appearance, national origin, or religion may be justified. Similarly, these factors can be employed to target search efforts where there is specific intelligence suggesting that someone fulfilling these characteristics is preparing a terrorist act.
- For the purpose of preventive counter-terrorist efforts, profiling should only be based on behavioural patterns. This is, in any event, a significantly more efficient approach than reliance on ethnicity, national origin, or religion. At the same time, it is important that behavioural indicators are implemented in a neutral manner and are not used as mere proxies for ethnicity, national origin, or religion. Where it is not possible to rely on specific intelligence or useful behavioural indicators for preventive counter-terrorist efforts, controls must be universal, affecting everyone equally. Where the costs for blanket searches are deemed to be too high, the targets must not be selected on an ethnic or religious basis, but randomly. Accordingly, the UN Special Rapporteur has recommended the use of universal or random checks as these are not only non-

discriminatory, but also impossible for terrorists to evade and hence more effective than measures based on profiling.<sup>127</sup>

Various international human rights bodies have made a number of further important recommendations with regard to terrorist profiling, which are also endorsed here:

- The UN Special Rapporteur, the EU Network of Independent Experts on Fundamental Rights, and European Commission against Racism and Intolerance (ECRI) have all called on states to establish clear and strict standards as to what factors law enforcement agents may or may not employ for their search efforts in the counter-terrorist context.<sup>128</sup> These guidelines should make clear that criteria such as ethnicity, national origin, and religion may only be used in the very limited circumstances explained above.<sup>129</sup>
- The UN Special Rapporteur, UN Committee on the Elimination of Racial Discrimination, and ECRI have recommended that the use of terrorist profiling practices by law enforcement agencies is clearly documented and monitored. Thus, law enforcement officers should be required to record the stops and searches they carry out for counter-terrorist purposes, including the outcomes of the stops.<sup>130</sup>
- The UN Special Rapporteur and ECRI have urged states to establish systems of transparent and independent oversight of law enforcement agencies to ensure compliance of counter-terrorist practices with human rights standards, as well as to provide effective means of holding law enforcement agents accountable for any violations of human rights.<sup>131</sup>
- The issue of effective training is also of great importance, as is reflected in the recommendations of various human rights bodies. In order to prevent discriminatory counter-terrorist practices, it is crucial that appropriate systems of training of law enforcement officials are developed and implemented. Such training should include a substantial component on human rights and non-discrimination, as well as clear instructions to law enforcement agents as to what factors they may legitimately employ for terrorist profiles. As part of such training, it should be made clear that profiling based on stereotypical generalizations that certain ethnic or religious groups pose a

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<sup>127</sup> UN Human Rights Council, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (29 January 2007) UN Doc A/HRC/4/26 (UN Human Rights Council Report of the Special Rapporteur), para 84.

<sup>128</sup> UN Human Rights Council Report of the Special Rapporteur (n 127) para 86; EU Network of Independent Experts on Fundamental Rights, 'Opinion No. 4: Ethnic Profiling' (December 2006) 26; ECRI, 'General Policy Recommendation No 11: Combating Racism and Racial Discrimination in Policing' (29 June 2007) CRI (ECRI General Policy Recommendation No 11) 39 para 3.

<sup>129</sup> UN Human Rights Council Report of the Special Rapporteur (n 127) para 86.

<sup>130</sup> UN Human Rights Council Report of the Special Rapporteur (n 127) para 87; UNCERD, 'ICERD General Recommendation No 31: Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System' (2005) UN Doc CERD/C/GC/31/Rev.4, paras 1-2; ECRI General Policy Recommendations No 11 (n 128) paras 2, and 42.

<sup>131</sup> UN Human Rights Council Report of the Special Rapporteur (n 127) para 88; ECRI General Policy Recommendations No 11 (n 128) para 10.

greater terrorist risk than others is not only impermissible but also ineffective and even counterproductive.<sup>132</sup>

- It is important that national parliaments review anti-terrorism laws at regular intervals to assess whether they have discriminatory effects and, if necessary, amend the relevant pieces of legislation.

## 6.7. Outsourcing to Private Security Providers<sup>133</sup>

Recent years have witnessed the increasing use by some states of private security companies (and exceptionally private military companies) in the area of counter-terrorism, for example to detain, transfer, and interrogate suspected terrorists, or to use force against individuals during a counter-terrorist operation.

Such outsourcing has the potential to by-pass the clear lines of accountability that should exist within states in relation to its armed forces, police, and other state agents such as intelligence officers. As agents of the state, the state bears direct responsibility for any internationally wrongful acts committed by such agents,<sup>134</sup> when carrying out counter-terrorist functions that include combat or police enforcement operations against terrorists, intelligence gathering, or when arresting, detaining, or interrogating suspected terrorists. The exercise of such ‘public powers’ by states in the performance of their inherently governmental functions signifies that the state remains responsible whether they are performed by state agents or private providers; so that if a particular government does contract out some or all of these functions to private security providers, then responsibility of the state is still engaged if wrongful acts are committed by private actors when performing such functions under contract with the state.<sup>135</sup>

The issue a contracting state has is to ensure that there are clear and effective lines of accountability in place when it does contract out such important functions. It is doubtful whether the contract itself, and mechanisms for supervising and enforcing it, will be robust enough to provide the levels of accountability that should be present. Some states have attempted to fill this potential gap in accountability by extending military jurisdiction to private contractors,<sup>136</sup> but this does not necessarily work in the absence of military discipline

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<sup>132</sup> UN Human Rights Council Report of the Special Rapporteur (n 127) para 89; ECRI General Policy Recommendations No 11 (n 128) paras 4, and 16.

<sup>133</sup> This section is drawn from detailed analysis contained in ND White, ‘The Montreux Process and the Draft Convention: Developing a Responsibility Regime for PMSCs?’ (2012) *Journal of Criminal Justice Ethics* (forthcoming); ND White, ‘Regulatory Initiatives at the International Level’ in C Bakker and M Sossai (eds), *Multi-Level Regulation of Private Military and Security Contractors: The Interplay Between European, International and Domestic Norms* (Hart, 2011) 11; ND White, ‘The Privatization of Military and Security Functions and Human Rights: Comments on the UN Working Group’s Draft Convention’ (2011) 11 *Human Rights Law Review* 133.

<sup>134</sup> Art 4 ILC Articles on State Responsibility 2001 (n 14).

<sup>135</sup> Art 5 ILC Articles on State Responsibility 2001 (n 14). See too J Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) 100.

<sup>136</sup> For example, on 23 June 2011, the US Senate Judiciary Committee unanimously passed the Civilian Extraterritorial Jurisdiction Act (CEJA), S.1145, designed to hold civilian contractors to the same standards of

over such contractors, or in the absence of integration of such contractors in the armed forces of a state.

There remains a lack of clarity about the precise boundaries of what is ‘inherently governmental’, which is understandable given the different approaches of states to the role and functions of government. Counter-terrorist activities such as the transfer, transport, and guarding of suspected terrorists, arguably do not fall within the remit of what is inherently governmental and therefore outsourcing them does not automatically give rise to state responsibility. Direct state responsibility may be still be occasioned if the private providers act under the instructions, direction, or effective control of the state in carrying out the conduct;<sup>137</sup> but otherwise states will not be directly responsible for any wrongful acts committed by them in the performance of non-governmental functions.

In any event, there is recognition in international law that, for any counter-terrorist function (whether seen as inherently governmental or not) contracted out by governments to private companies, such contracting states owe positive obligations of due diligence to ensure that private providers do not violate the rights of others.<sup>138</sup> This requires not only clear provisions in procurement contracts, but also systems of state regulation such as licensing, reporting, and monitoring of performance by private contractors. Such positive obligations are recognized in the Montreux Document of 2008 endorsed by major contracting states;<sup>139</sup> also in the Draft Convention on the Regulation of Private Military and Security Contractors put forward to the Human Rights Council in 2010;<sup>140</sup> and finally in the ‘Protect, Respect and Remedy’ Framework that the UN Secretary General’s representative for Business and Human Rights has developed. The latter document contains a statement that embodies the concept of a state’s due diligence obligations, namely its ‘duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication’.<sup>141</sup> The adoption of a form of the Draft Convention, containing an oversight committee with competence to review states’ fulfilment of their obligations in relation to private security providers, would provide the necessary supervision of the due diligence obligations of states.

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accountability as Defense Department contractors and service members. If enacted, CEJA would extend US criminal jurisdiction to cover serious crimes committed abroad by people employed or contracted by any US department or agency other than the Department of Defense without impacting upon the conduct of US intelligence agencies abroad. See separate submission of CD Osburn. For further discussion of the US approach see, eg, C Huskey and S Sullivan, ‘United States: The American Way – Law and Policy Governing Private Military Contractors after 9/11’ in Bakker and Sossai (n 133) 331.

<sup>137</sup> Art 8 ILC Articles on State Responsibility 2001 (n 14).

<sup>138</sup> See further C Hoppe, ‘Positive Obligations of the Hiring State in Connection with the Provision of “Coercive Services” by a Private Military or Security Company’ in F Francioni and N Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law and Private Contractors* (Oxford University Press, 2011) 111.

<sup>139</sup> Montreux Document on Private Military and Security Companies (Swiss Government and ICRC, 2008) (Montreux Document), Part I.A para 3(a), <<http://www.icrc.org/eng/resources/documents/misc/montreux-document-170908.htm>> accessed 15 December 2011.

<sup>140</sup> See ‘Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right to Self-Determination’ (2 July 2010) UN Doc A/HRC/15/25, arts 4-5, 7, 12, 19, and 21.

<sup>141</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect, and Remedy’ Framework (21 March 2011) UN Doc A/HRC/17/31, para 6. This was endorsed by the Human Rights Council: (16 June 2011) UN Doc A/HRC/RES/17/4. See too separate submission of CD Osburn.

The fulfilment of states' positive obligations to ensure that private providers of counter-terrorist services do not violate the human rights of individuals should help to ensure that the private security providers themselves operate with due diligence to respect the human rights of individuals (including those of suspected terrorists). The development of an International Code of Conduct for Private Security Providers in 2010, to which companies become signatories, helps to fulfil the due diligence expectations placed on private companies to respect human rights by proper impact assessment, training, vetting, reporting and accountability.<sup>142</sup> The development of an effective, independent oversight mechanism for the Code is essential if it is to positively impact on company behaviour.

### ***Recommendations:***

- Any governments contracting with private providers for counter-terrorist services of an inherently governmental nature - such as combat, police enforcement, intelligence gathering, arrest, detention, and interrogation - should ensure that it accepts responsibility for any wrongful act committed by such private providers in the course of performing their duties, and that direct lines of accountability are present in addition to contractual ones.
- For any counter-terrorist service that is outsourced to the private sector, contracting states should recognize that they owe positive obligations to ensure that private actors do not violate the human rights of individuals. As a part of these obligations, contracting states should develop access to justice mechanisms for victims of human rights abuse at the hands of private security providers even if that abuse is committed overseas.
- Procurement contracts with private providers should contain enforceable obligations on the private providers to respect the human rights of individuals in the course of any counter-terrorist operation.
- States contracting with private providers for counter-terrorist services should have in place a system of domestic regulation that will enable the governments to ensure that private providers undertake proper training of personnel in human rights law and international humanitarian law; proper vetting of personnel to ensure that individuals do not have a record of violence; proper training in the use of firearms and clear rules on the use of firearms in self-defence only; full impact assessment of the effect of the presence of private providers on human rights; and effective accountability mechanisms that will provide redress for victims of human rights abuse.
- States, including contracting states, should support the adoption of an acceptable international convention governing private security providers that contains within it an

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<sup>142</sup> International Code of Conduct for Private Security Providers 2010, paras 21, 45, 48, 50-1, 55, 63, 66-8, <[http://www.icoc-psp.org/uploads/INTERNATIONAL\\_CODE\\_OF\\_CONDUCT\\_Final\\_with\\_Company\\_Names.pdf](http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_with_Company_Names.pdf)> accessed 16 December 2011.



oversight mechanism to ensure that states accept their responsibilities under international law.

- Contracting states should ensure that any private security provider they contract with is a signatory to the International Code of Conduct; and that the Code of Conduct is accompanied by a robust and independent oversight mechanism to ensure that every signatory company is human rights compliant.<sup>143</sup>

## 7. JUDICIAL MEANS OF CONTROL AND REDRESS

Counter-terrorist operations must be kept within a rule of law framework; and failure to do so should lead to accountability before national and, if appropriate, regional or international courts. It is a fundamental tenet of government that the state is, and must be held, accountable for the actions of all of its agents, including contractors carrying out state functions. This holds *a fortiori* for those working in connection with national security issues, in particular when the state and those persons acting officially for the state assume additional powers over persons within the state's territory or falling within its effective control. Additionally, the notion of positive obligations, requiring that the state adopt reasonable measures to prevent violations and to investigate, prosecute, punish, and provide reparation when serious human rights abuses arise, is well recognized by international courts and bodies as arising under all general human rights treaties.<sup>144</sup> The obligation arises whether the wrongful act is committed by private or foreign state actors. In certain circumstances, there are also obligations upon states enshrined in international law to prevent and/or respond to very serious violations of international law, not least where any violation amounts to a breach of *jus cogens* norms.

The pivotal role of the courts must be recognized – whether at the national, regional, or international level – in interpreting, developing, and enforcing such rule of law principles in the context of counter-terrorism. In particular, the judicial role is central to reducing impunity and to ensuring justice in relation to four categories of actor: non-state terrorist actors; states in their counter-terrorist responses; international organizations in their counter-terrorist responses; and victims of terrorist attacks. In this way, the courts have a crucial role to play not only in enabling victims to vindicate their rights, but also in restoring the authority of the state (and also that of intergovernmental organizations) and the rule of law. Indeed, while states have the right and responsibility to safeguard national security interests, they may not preclude access to a court on the basis of such interests.

What has been evident from an extensive examination of state and institutional practices is the existence of diverse underpinning tensions which can hinder rule of law adherence. Of particular relevance to the role of the courts is the tension that exists with respect to whether

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<sup>143</sup> See also separate submission of CD Osburn.

<sup>144</sup> See, eg, *Osman v United Kingdom* (Application No 23452/94) (1998) 29 EHRR 245, para 116; *A v United Kingdom* (Application No 25599/94) ECtHR Judgment of 23 September 1998 (not reported), para 22; *Z and others v United Kingdom* (Application No 29392/95) (2002) 34 EHRR 3, para 73; and *Case of Velasquez Rodriguez v Honduras* (n 16) paras 172–5.

executive security imperatives should be balanced *against*, or accommodated *within* the scope of, the existing rule of law framework considered earlier. Unsurprisingly too, there has been a concerted effort by the courts to reduce those matters which have traditionally been non-justiciable, especially those aspects of executive action relating to defence and security issues which have raised significant rule of law concerns in recent years including in the context of multi-national counter-terrorist operations.

The courts have dealt with a number of prominent issues central to establishing a legitimate counter-terrorist operation within the rule of law, which reviewed below.

### 7.1. Justiciability and National Security Concerns<sup>145</sup>

Governments are naturally reluctant litigants before courts given that their primary concern when faced with terrorist threats or attacks is the security of their citizens, and thus the gathering of evidence and the correct treatment of suspects may not always be as high a priority. The theme of national security concerns, and their relationship with the rule of law, has been a dominant and recurring one for understandable reasons. Although there are some discernible differences in terms of approach, as a general rule regional and other international tribunals do not apply a doctrine of state secrets, and do not defer automatically to states' own assessments of the need for restrictions on rights in the interests of national security. Instead, they adopt a more nuanced approach to respecting states' national security concerns, being concerned especially with the pursuit of a legitimate aim where any restrictions of, for example, due process exist; and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be pursued. Further, any limitations cannot impair the essence of fair trial rights, particularly the requirements of adversarial proceedings and equality of arms, and must incorporate adequate safeguards to protect the interests of the parties.

Due to the significant legal obstacles that any victims (or their families) of security imperatives traditionally need to overcome to bring a claim against the state - for example, in accessing relevant classified information - human rights courts especially have developed certain legal presumptions to assist litigants. For example, where a *prima facie* case can be made against the state in such circumstances, the onus is likely to shift from the claimant to the state to demonstrate the steps it took to protect the rights of persons subject to their jurisdiction and to take adequate steps to investigate any allegations of abuse.<sup>146</sup>

Another general theme in terms of the approach of the courts since 9/11 has been their strict maintenance of the parameters of the applicable legal framework, even in response to terrorism. Therefore, for example, the ECtHR has remained consistent to its approach of insistence upon high rule of law standards, even though it remains fully cognizant of the difficulties which face states in the fight against international organized crime or terrorism.

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<sup>145</sup> See especially Myjer (n 85); García Ramírez (n 85); and I Kane, 'Reconciling the Protection of Human Rights and the Fight against Terrorism in Africa', Chapter 31.

<sup>146</sup> See, eg, *Saadi v Italy* (n 93) para 129; *Astamirova v Russia* (Application No 27256/03) ECtHR Judgment of 26 February 2009, paras 70-81.

Whilst such challenges may be a relevant factor which is taken into account when determining, for example, the proportionality of certain measures, nevertheless they cannot justify departing from the demands of the ECHR, which apply equally to civil and military services engaged in fighting terrorism.<sup>147</sup> Indeed, the ECtHR perceives the upholding of human rights as being a precondition to security: there is no security without human rights, and human rights are at least in great danger without security, making them interdependent.

The IACtHR has been equally robust in its enforcement of the ACHR as well as other specialized human rights conventions within the Inter-American system. More generally, its jurisprudence has put pressure upon OAS Member States within its jurisdiction to increasingly incorporate international human rights law within their domestic legal orders, through constitutional, legal, jurisdictional, and political means. It has resisted any attempts to ‘reconcile’ security imperatives with the fundamental rights of terrorists or to ‘strike a balance’ between them by making ‘concessions’. Instead, the IACtHR has reviewed executive objectives and responses on their individual merits and in accordance with their inherent requirements.

In particular, the IACtHR’s case law on terrorism-related cases reveals its clear and unequivocal rejection of any rule of law excesses committed in the course of counter-terrorist responses and of any attempts to justify them in terms of circumstances of special gravity. It has focused especially on anti-terrorism criminalization; criminal proceedings (starting from investigations and ending with final appeals); and the execution of the sanctions imposed. For example, the IACtHR has emphasized the importance of both formal legality and substantive legality of any criminal activities a state seeks to punish.<sup>148</sup> Such an approach has brought with it a number of rule of law benefits, for example: reviews of domestic criminal law definitions of terrorist behaviour; the exclusion of certain acts from criminal law definitions; emphasis on the importance of adhering to basic criminal justice guarantees, including those of due process and fair trial (especially the independence, impartiality, and competence of the court); and improvements in the conditions of detention and imprisonment. Furthermore, the IACtHR has been concerned by any practices of self-amnesty, which may conceal and create impunity gaps for serious deeds committed in the context of the fight against terrorism and deny victims of access to justice and reparations. Consequently, the IACtHR’s approach has been to reiterate the fundamental duty of all states under Article 1(1) ACHR to safeguard human rights,<sup>149</sup> and it has rejected that self-amnesty laws have any legal effect.

Despite the progress which has been made, as with other regional and international judicial mechanisms, the IACtHR itself recognizes that there is much work still to be done, not least in terms of revising national definitions of terrorism; reviewing, reforming, and strengthening domestic procedural systems, especially the investigation and subsequent prosecution of terrorist offences; and, ultimately, eliminating the many different forms of human rights

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<sup>147</sup> See, eg, *A and others v United Kingdom* (Application No 3455/05) (2009) 49 EHRR 29, para 126.

<sup>148</sup> See *Case of Castillo Petruzzi and others* (Judgment on the merits, compensation, and costs) IACtHR Series C No 52 (30 May 1999), paras 117-20; and *Case of Cantoral Benavides* (Judgment on the merits) IACtHR Series C No 69 (18 August 2000), para 156.

<sup>149</sup> *Case of Castillo Petruzzi and others* (n 148) para 103.

violations which current occur under the guise of pursuing counter-terrorist security imperatives.

One other regional court which should be mentioned here is the more recently established ACtHPR, which was created under the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights.<sup>150</sup> Its primary mandate is to strengthen existing levels of human rights protection, including by 'complement[ing] and reinforc[ing] the functions of the African Commission on Human and Peoples' Rights' (ACHPR).<sup>151</sup> Although its jurisprudence is in the earlier stages of development, including on national security issues, it has the potential to make an important judicial contribution here also not least due to the complementary roles of the ACHPR and the ACtHPR in their respective mandates to protect human rights. In particular, under the Rules of Procedure of the African Commission,<sup>152</sup> in certain circumstances of State Party non-compliance the ACHPR may transfer a matter to the Court for review. Such reconsideration of a case by the ACtHPR will not only enable the two institutions to cooperate with respect to the interpretation to be given to relevant provisions of the African Charter in the fight against terrorism, but will also force the state in question, in the event of any finding against it of human rights violations, to make appropriate reparations to the victim(s). In addition, the ACHPR may 'submit a communication before the Court against a State party if a situation that, in its view, constitutes one of serious or massive violations of human rights as provided for under Article 58 of the African Charter, has come to its attention'.<sup>153</sup> This could include significant human rights violations committed by a state in response to the aftermath of a terrorist attack. The ACHPR has already relied upon this provision in a security context when, on 21 March 2011, it referred to the ACtHPR a complaint against Libya following the bombing of the city of Benghazi by the Libyan air forces after the popular uprising in the city, as well as the numerous arrests and detentions of persons who had demonstrated peacefully in major cities around the country.<sup>154</sup>

In terms of identifying an overall approach, it is evident from the jurisprudence of the ECtHR and IACtHR, and suggested by the mandate and developing jurisprudence of the ACtHPR, that while the courts are fully aware of the difficulties facing Contracting States to meet national security imperatives, nevertheless they remain insistent upon existing rule of law obligations being upheld as the bedrock of national counter-terrorist responses.

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<sup>150</sup> Adopted during the 34<sup>th</sup> ordinary session of Heads of State and Government of the OAU in Ouagadougou, Burkina Faso on 9 June 1998, and entered in force on 24 January 2004 (ACtHR Protocol).

<sup>151</sup> See Preamble ACtHPR Protocol.

<sup>152</sup> See Revised Rules of Procedure of the African Commission (adopted 6 October 1995) Rule 118(1) (ACHPR Rules of Procedure), <[http://www.achpr.org/english/\\_info/rules\\_en.html](http://www.achpr.org/english/_info/rules_en.html)> accessed 9 January 2012.

<sup>153</sup> See ACHPR Rules of Procedure (n 152) Rule 118(3).

<sup>154</sup> See ACHPR, *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* (Application No 004/2011) Order for Provisional measures of 25 March 2011.

## 7.2. Legality of Emergency Powers<sup>155</sup>

Both national and international courts have vital roles to play in terms of determining the legality (or not) of any reliance by states upon emergency powers. Due to the extensive violations of human rights perpetrated in the context of emergency situations declared as a result of national security concerns associated with terrorist activities, the courts and international human rights bodies have developed a narrowly construed case law regarding the derogation of fundamental human rights. In terms of courts, the ECtHR and IACtHR<sup>156</sup> have been especially active here.

More generally, in reaching their findings, it is important that courts fully comprehend the nature, realities, and gravity of the threats facing the executive, recognizing that states are best placed to make national security assessments. Nevertheless, they must also make it clear that such discretion and the nature of states' responses are not unlimited, including due to the dangers exceptional measures pose to the rule of law.<sup>157</sup> Treading such a fine line in terms of seeking to reconcile the needs of security and the rule of law represents a significant and recurring source of tension. In determining whether or not the (continued) declaration of a state of emergency is lawful, there are a number of guiding principles articulated within both national and international human rights instruments and jurisprudence.<sup>158</sup> One is whether a particular norm or restrictive measure is constitutionally *adequate* to reach the pursued objective. Another is that the intervention or restriction of a right must be strictly *necessary* to reach the legitimate aim pursued, limiting the exercise of fundamental rights to the minimum extent absolutely necessary. A third is the *proportionality* of any measures, in particular the requirement that any intervention strikes a balance between the positive public order effects sought and the negative effects on fundamental guarantees which should be limited to the greatest extent possible, and do not unduly confer arbitrary powers upon the executive. Finally, it is imperative that any measures adopted are non-discriminatory in nature, for example against particular racial or religious groups.

Closely related is another key function of the courts here, namely to ensure that all governmental measures that result in any limitation of human rights (including where no state of emergency is declared) remain under effective judicial scrutiny. Another significant role is to ensure the availability of adequate forms of redress for the violation of fundamental human rights under the guise of exceptional circumstances requiring exceptional measures. An important example of this principle of control concerns the right to *habeas corpus*, which international law considers to be an indispensable procedural guarantee, which implies that

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<sup>155</sup> See especially Landa (n 85); Myjer (n 85); and García Ramírez (n 85).

<sup>156</sup> A notable exception is the African Charter which does not contain a specific clause relating to the suspension of rights. This absence has been endorsed by the ACHPR, which has confirmed that the rights recognized in the African Charter cannot be limited or restricted on account of emergency or special situations - ACHPR, 'Communications 279/03 – Sudan Human Rights Organisations and the Sudan 296/05 – Centre on Housing Rights and Evictions/The Sudan' EX.CL/600(XVII) 135, para 167. That said, this may be achievable in practice under art 27(1) African Charter which establishes that the rights recognized by the Charter must be exercised with consideration of the rights of others, collective security, morality, and common interests.

<sup>157</sup> See, eg, *Klass and others v Germany* (n 63) paras 48-9; and *A and others v The United Kingdom* (n 147) para 173.

<sup>158</sup> With respect to the interpretation of derogations permissible under art 4(1) ICCPR see UNHRC General Comment No 29 (n 126), especially paras 2-3.

its exercise should not be impeded under any legal scheme.<sup>159</sup> Thus, *habeas corpus* becomes a mechanism of control of the legality of *inter alia* counter-terrorist responses within the hands of the judiciary, especially those of the constitutional courts.

### ***Recommendations:***

- The presence of terrorist violence does not automatically trigger the application of emergency powers. To cross the threshold set by international human rights law for emergencies, states must demonstrate that such violence has reached a scale which endangers the independence and integrity of the country. Also, even in the presence of a true emergency, international human rights law has consolidated a trend prohibiting any derogations from *habeas corpus* and certain fundamental due process rights. The non-derogability of fundamental due process rights is similarly established under international humanitarian law.
- A crucial issue that remains to be addressed is whether the non-derogation of certain aspects of the right to liberty applies only in regard to the detention of suspected terrorist in peace time. For example, the doctrine of the Inter-American system concludes that detentions related to terrorist activities that transpired in the framework of an armed conflict must be assessed in light of the principles and mechanisms prescribed under international humanitarian law, which afford a different level of protection. Clarifications on whether this approach is appropriate only in the context of international armed conflicts, or whether it would also apply in a non-international armed conflict, has become an essential aspect when assessing the protection that suspected terrorist must be afforded under international law.
- Judges must have the necessary conditions and resources at their disposal to explore all appropriate verification options and have access to all relevant information when deliberating on any declarations of emergency and resultant suspension of fundamental human rights guarantees. Not only is this essential for the accuracy of their rulings in any specific case, but it is also important for the creation of *stare decisis*, legal precedents, and generally applicable rules which will influence determinations in future terrorism related cases, whether domestically or internationally, within a framework of predictability and legal certainty which is founded upon the rule of law.

### **7.3. Executive Use of Immigration Powers<sup>160</sup>**

An overarching policy and not solely legal question is whether expulsion mechanisms in the shape of immigration tribunals should be used at all in pursuing legitimate security

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<sup>159</sup> See, eg, *Habeas Corpus in emergency situations* (Arts. 27.2, 25.1 and 7.6 of the American Convention on Human Rights) (Advisory Opinion OC-8/87) IACtHR Series A No 8 (30 January 1987), para 40; and *Judicial Guarantees in emergency situations* (Art. 27.2, 25 and 8 of the American Convention on Human Rights) (Advisory Opinion OC-9/87) IACtHR Series A No 9 (6 October 1987), paras 22-4, 31-3, and 38.

<sup>160</sup> See N Mole, 'Restricted Immigration Procedures in National Security Cases and the Rule of Law: An Uncomfortable Relationship', Chapter 27.

imperatives, as is reflected in some recent state practice. In terms of their potential utility as an instrument of counter-terrorism, this is highly dubious. Typically any such expulsions merely enable those who have been found to be committed to perpetrating terrorism to join, or rejoin, terrorist networks and terrorist training schools which operate overseas, thereby placing these individuals in situations where they can work more effectively to plan or perpetrate terrorist acts. Consequently, serious consideration must be given by states as to whether they might not be better served in security terms through more effective national intelligence gathering efforts, which result in evidence that may be relied upon in bringing more effective criminal prosecutions and, if appropriate, incarceration. In parallel, this will require some reconsideration of existing executive policies and practices regarding the non-disclosure of sensitive materials for the purpose of criminal justice proceedings, not least the benefits that such proceedings may also bring in terms of safeguarding national security.

Such (often inappropriate) use of the immigration system also raises significant rule of law concerns. One important issue is whether fair trial guarantees which apply to disputes involving the determination of a criminal charge or a civil rights or obligation, should apply to such expulsion proceedings. The notion of 'a criminal charge' is not confined to the formal initiation of criminal proceedings, but includes any official action which carries the implication that an individual has committed a criminal offence, and which substantially affects the situation of the suspect. Since acts of terrorism are criminal offences, and expulsion (and/or detention) clearly substantially affects an individual's situation, it is arguable that fair trial guarantees should apply to expulsion proceedings even though no formal criminal charges are being brought.

Another significant procedural concern here has been recourse to what can effectively constitute secret trials, relying on secret evidence. Any use of secret and restricted procedures to deprive people of their citizenship may not only send disconcerting messages to the members of settled ethnic minority communities, but may run an enhanced risk that wrong decisions will be taken, sometimes with irreparable consequences for the affected individuals. Certainly, the introduction of any restricted procedural rights in the context of measures adopted to combat terrorism is something that must be watched with great vigilance if the rule of law is not to be seriously eroded under the guise of national security imperative agendas. This concern is even greater when those whose procedural rights are being restricted are already marginalized by being foreigners. Certainly, the ECtHR has been concerned here with ensuring both the procedural as well as substantive aspects of due process, including those of guaranteed under Article 6 (fair trial) and Article 13 (right to an effective remedy) ECHR.<sup>161</sup>

### ***Recommendations:***

- *Criminal prosecution instead of (or before) expulsion on suspicion of terrorist activities:*  
Where there is an allegation that an individual has committed criminal offences

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<sup>161</sup> See, eg, *A and others v United Kingdom* (n 147), including para 233; and *Ben Khemais v Italy* (Application No 246/07) ECtHR 24 February 2009, paras 80-8.

(including offences relating to terrorism), criminal prosecutions should take place. Expulsions, particularly expulsions lacking procedural safeguards, predicated on such allegations of criminal conduct should not be used as a substitute for criminal prosecutions.

- *Open and transparent scrutiny of the risk of prohibited ill-treatment:* An individual who is being subjected to expulsion on national security grounds, and who alleges that his expulsion will expose him to a real risk of absolutely prohibited ill treatment, must have access to judicial procedures which permit open and transparent scrutiny of that risk. This is particularly important in circumstances where a *prima facie* risk has been established and is alleged to have been dispelled by diplomatic assurances.
- *No balancing act and no risk of a balancing act:* Only once it has been judicially established in expulsion proceedings that there is no real risk of prohibited ill treatment can an examination of the threat the individual poses to national security be considered. This will ensure that no balancing act is being carried out, or is perceived to be being carried out.
- *Judicial scrutiny of the factual basis on which it is alleged that an individual being expelled is a threat to national security:* Any allegation that an individual is a threat to national security must be subject to independent judicial scrutiny. That scrutiny must be able to review the nature of the threat to national security that is posed, so as to ensure that it is not being inappropriately invoked. It must also be able to review the factual basis on which the allegation is predicated.
- *Secret evidence which cannot be scrutinized by an independent judge cannot be relied on in any circumstances:* If the authorities are unwilling to disclose evidence to an independent judge they cannot rely on it, even by inference or implication. The decision as to whether evidence remains secret must be made by a judge. If the judge decides it is unnecessary for it to remain secret it must be disclosed or withdrawn.
- *Secret hearings must be rigorously controlled by independent judges:* Where secret evidence is put before an independent judge, the exclusion of the affected individual and his lawyer must be rigorously controlled by independent judges and must never be used to assess the risk of prohibited ill treatment on expulsion.
- *Effective remedies:* Individuals threatened with expulsion on national security grounds must have effective access to effective national remedies - with suspensive effect - before they are expelled.
- *The protection of the ECtHR:* Individuals who are threatened with expulsion on national security grounds in a Contracting State to the ECHR must have effective access to the ECtHR, including access to the granting of interim measures. States must adopt the measures necessary to ensure that interim measures ordered by the Court are binding in national law and practice, as well as under the ECHR. A similar approach is true of other regional human rights courts.



- *Expulsions regulated by EU law*: Where an expulsion on national security grounds is proposed in a situation which is governed by EU law, EU Member States must ensure that the prescribed EU substantive and procedural requirements are followed, including the protection guaranteed by the EU Charter of Fundamental Rights. Similarly, states which are members of other regional organizations should respect applicable regional obligations and standards

#### 7.4. Use of Military Trials and Commissions<sup>162</sup>

Another form of counter-terrorist instrument utilized by some states which raises significant rule of law concerns is the use of military trials or commissions. Organs of military justice have often been empowered to try civilians for certain criminal acts, including terrorism, which would normally have been dealt with by the regular courts. A significant motivating factor for such an approach has been the perceived need to establish more expeditious procedures and robust punishment as a tool of terrorism prevention. There is also the post 9/11 tendency to treat terrorism and counter-terrorism as a form of warfare, which tend to enhance the appeal of military courts. Typically, these take the form of either regular courts martial or specially created military commissions such as those operating at Guantánamo Bay.

In addition to decisions of national courts, the jurisprudence of the UN treaty bodies, IACtHR, and ECtHR has been especially influential here.<sup>163</sup> One prevailing concern is that in an accountable state, governed by the rule of law, any criminal military jurisdiction must have a restricted and exceptional scope which is limited to proceedings concerned with the protection of military values and objectives, and to dealing with persons who are in the active service of the armed forces. Otherwise, there will be a violation of the right to natural justice which is a pre-condition of the right to a fair trial. The point of departure, therefore, is that although international human rights bodies have not explicitly found that the military trial of civilians *per se* violates international human rights law, any reliance upon such systems is generally frowned upon and not accepted unless there are exceptional reasons justifying their creation and the necessary safeguards are in place.

In the very exceptional circumstances in which the military trials of civilians may be justified – which must be assessed on a case by case basis - states must afford the accused the full due process protections enshrined in international human rights law. Respect for fundamental fair trial rights is also required in the context of an armed conflict given the protections provided under international humanitarian law principles.<sup>164</sup> Generally suspected terrorists must be treated as civilians for the purposes of their trial, which must therefore be governed by

<sup>162</sup> See C Kannady, P Masciola, and M Paradis, 'The 'Push-Pull' of the Law of War: The Rule of Law and Military Commissions', Chapter 25; and C Martin, 'The Role of Military Courts in a Counter-Terrorism Framework: Trends in International Human Rights Jurisprudence and Practice', Chapter 26.

<sup>163</sup> See, eg, UNHRC: 'Concluding Observations of the Human Rights Committee: Peru' (26 October 2001) UN Doc A/56/40 (Vol I) paras 76(4), 76(11)-(12); 'Concluding Observations of the Human Rights Committee: Egypt' (24 October 2003) UN Doc A/58/40 (Vol I) para 77(16); *Case of Castillo Petruzzi and others* (n 148); *Case of Cantoral Benavides* (n 148); *Incal v Turkey* (Application No 41/1997/825/1031) ECtHR Judgment 9 June 1998.

<sup>164</sup> See, eg, *Hamdan v Rumsfeld* 548 US 557 (2006) 635.

international human rights law and practices. The exception is where the acts for which such persons are charged occurred in the context of an armed conflict and their actions involved direct participation in the hostilities, in which case any criminal proceedings should be governed by international humanitarian law. Significantly, international practice reveals that in recent times no international human rights body has found an instance in which the military trial of civilians was justified.

The jurisprudence of the IACtHR is illustrative of both the approach and specific principal concerns of other human rights bodies, especially those relating to deficiencies of due process afforded terrorist suspects, in particular regarding the independence and impartiality of such courts and commissions and any subsequent appeal and review procedures.<sup>165</sup> The common non-adherence to these principles of natural justice in the context of military courts is one primary reason for the IACtHR's concern whenever persons indicted for acts of terrorism face such proceedings. Additionally, it is essential that the accused and his/her defence counsel have the opportunity to not only interrogate witnesses, but also to submit their own evidence and challenge that submitted by the prosecution. The IACtHR has stressed also that any confession made by the accused will only be admissible if it was obtained without duress.<sup>166</sup>

Similar concerns have been expressed with respect to any reliance upon military commissions, notably those created most recently for the trial of detainees being held at Guantánamo Bay. In addition to flawed policy decisions not to follow the Geneva Conventions and laws of war, and to engage in coercive interrogation techniques and other forms of detainee abuse, the US Administration chose to depart from its time-tested dual systems of criminal justice under the Uniform Code of Military Justice and federal courts set up under Article III of the US Constitution. In doing so, it chose to construct a military commissions system of justice that abandoned the core values of both the national military and the civilian adversarial criminal justice systems, together with their established systems of due process. Indeed, a principal original motivating factor to create military commissions was to avoid affording fundamental rights such as *habeas corpus*. This was a significant mistake that could have been avoided with amendments to the existing criminal justice systems to accommodate battlefield evidence and national security concerns, while at the same time preserving the fundamental time-tested due process rights of an accused to face a fair system of justice when detained and accused of war crimes. Whilst some important procedural changes have taken place - including the introduction of increased basic safeguards and due process insisted upon by the US courts<sup>167</sup> - rule of law criticisms and concerns remain and the related damage, not least

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<sup>165</sup> See, eg, the case law on the use of unidentifiable 'faceless' judges, which the IACtHR has ruled is in breach of the accused's right to a fair trial, not least to an independent and impartial court, eg *Case of Castillo Petruzzi* (n 148) paras 119, and 133; *Case of Cantoral Benavides* (n 148) paras 127, and 156; and *Case of Lori Berenson Mejía* (Judgment on the merits, compensation, and costs) IACtHR Series C No 119 (25 November 2004), paras 117, 119, and 147.

<sup>166</sup> See, eg, *Case of García Asto and Ramírez Rojas* (Judgment on the preliminary exception, merits, reparation, and costs) IACtHR Series C No 137 (25 November 2005), para 160; *Case of Cantoral Benavides* (n 148) paras 96, 104, and 127; *Case of Loayza Tamayo* (Judgment on the merits) IACtHR Series C No 33 (17 September 1997), para 58.

<sup>167</sup> See *Hamdan v Rumsfeld* (n 164); *Hicks v Bush* 397 F.Supp.2d 36 (DDC 2005); and *Bacha v Obama*, slip opinion (DDC 30 July 2009).

upon the wider legitimacy of both national and US-led counter-terrorist operations, has been immeasurable.

***Recommendations:***

- Every effort should be made to accommodate national security concerns within existing military and civilian rather than any special systems of criminal justice. A key component of such systems is that they must have effective judicial review mechanisms, including for the protection of such fundamental rights as *habeas corpus*. The decision-making authority on these issues should reside with the judiciary and not with prosecutorial authorities.
- The military trial of civilians should be prohibited under current international human rights law unless the existence of very exceptional circumstances justify, in the context of a particular case, the need to resort to military tribunals. International experts have listed as examples of such exceptional circumstances cases concerning the military occupation of foreign territory where regular courts are unable to undertake the trials.
- Suspected terrorists must be treated as civilians for the purposes of their trial, unless the acts for which they are charged occurred in the context of an armed conflict and their actions involved direct participation in the hostilities, in which case any criminal proceedings should be governed by international humanitarian law.
- In the very exceptional circumstances in which the military trials of civilians can be justified, states must afford the accused the full due process protections enshrined in international human rights law. Respect for fundamental fair trial rights is also required in the context of an armed conflict given the protections provided under international humanitarian law principles.

**7.5. Human Rights and Targeted Sanctions<sup>168</sup>**

The courts have also had some limited opportunity to review the rule of law compliance of certain institutional counter-terrorist responses, most notably the system of targeted measures used against certain suspected terrorists or terrorist groups created by the Security Council's 1267 sanctions regime. In trying to avoid the impact on economic and social rights of its sanctions regimes against states, the Security Council, in crafting a 'smart' alternative, has trespassed nevertheless on the civil and political rights of individuals. Such targeting of individuals through Security Council mandatory sanctions that must be implemented by states means that individuals who seek redress against such measures must pursue justice through appropriate national and regional courts, and international human rights bodies.

These courts and bodies have thus had to grapple with the need to protect security while simultaneously protecting the rights of (rightly or wrongly) suspected terrorists. In doing so, a number of principles have been articulated, which are aimed at ensuring greater

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<sup>168</sup> See especially A Rosas, 'Counter-Terrorism and the Rule of Law: Issues of Judicial Control', Chapter 4.

accountability of such institutional measures, motivated especially by their potential to impact considerably upon basic human rights protections. More specifically, the EU Courts have confirmed that there is, in principle, ‘full review’ of the legality of restrictive measures.<sup>169</sup> This does not imply, however, that the Courts are unwilling to grant the political institutions a margin of discretion, given the security concerns involved, as long as a fair balance is struck between the requirements of the rule of law and security considerations. If some minimum guarantees are not respected, notably the obligation to provide reasons for listing, and the right of the individual concerned to be heard, the balance struck will not be fair.<sup>170</sup> The ‘punitive’ and quasi-criminal nature of such measures should be recognized thereby bringing them within the protections specified in Article 14 ICCPR, at least if they extend beyond temporary administrative measures.

When determining these matters in the specific context of sanctions, it has been suggested that the first questions to ask, which are also of wider rule of law concern as states struggle to fulfil their security imperatives, include the following: does a system which enables the freezing of funds and other similar restrictive measures for an indefinite period, imposed by a political body against persons suspected, but not tried, of being associated with terrorists, without adequate guarantees concerning the right of defence and lacking any judicial or even quasi-judicial control *ex post*, constitute good law?; and can the brand of terrorism, which has existed for hundreds of years, but which on the other hand still lacks a precise universal definition and thus easily lends itself to extensive applications, justify derogations from human rights and humanitarian law rules beyond the leeway these rules permit?

It is submitted that many national courts of EU Member States would have come to a similar result as the European Court of Justice did in *Kadi*,<sup>171</sup> if called upon to review national measures to implement the counter-terrorist sanctions at issue in that case. Irrespective of the EU and EU law, the strengthening of legal controls at the UN level should be encouraged, and to this end the creation of an ombudsperson in 2009 is to be welcomed. It is not very likely, however, that the UN sanctions regime will in the foreseeable future imply any system of judicial control. If this is so, and the global institutional system cannot guarantee respect for the fundamental values on which it pretends to be based - in other words, the rule of law and respect for basic human rights - this task will be incumbent upon both national courts and EU Courts (and potentially other regional human rights systems also). They cannot but uphold their most fundamental mandate, which is to ensure the right to effective judicial protection of these significant rights. The Security Council itself has recognized that states should comply with the relevant principles of international law, including human rights law, when complying with Security Council targeted measures,<sup>172</sup> thus recognizing that security measures such as targeted sanctions - though the same principles would apply to any other

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<sup>169</sup> See Cases T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533; Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

<sup>170</sup> See, eg, Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* [2006] ECR II-4665, para 107.

<sup>171</sup> *Kadi and Al Barakaat International Foundation* (n 169).

<sup>172</sup> See, eg, UNSC Res 1456 (20 January 2003) UN Doc S/RES/1456 para 6.

targeted counter-terrorist measures not least control orders and preventive detention - must be kept within the rule of law.

***Recommendations:***

- Security Council resolutions are binding on Member States, and may override other international agreements or treaties under Article 103 UN Charter. Consequently, it is imperative that the Security Council, in passing resolutions on *inter alia* anti-terrorism measures, ensures and itself adheres to the fundamental guarantees and principles of human rights provided for under the UN Charter and various other international instruments and conventions, especially those of a non-derogable nature.
- States should ensure that they fulfil their obligations under Security Council resolutions in accordance with their obligations under international human rights law. In the event of a direct conflict between obligations there should be a presumption in favour of human rights obligations unless the Security Council has expressly and exceptionally overridden specific human rights temporarily for imperative reasons of peace and security.
- The jurisdiction of the International Court of Justice should be expanded to afford it the power of judicial review of UN institutional practices, in particular to ensure that a right balance is struck between the two objectives of ensuring and maintaining international peace and security and ensuring the protection of fundamental human rights.

**7.6. Redress for Victims of Terrorist Attacks<sup>173</sup>**

As a global phenomenon, terrorism has to be addressed globally, not only in terms of prevention and repression, but also in terms of ensuring victims' redress and access to justice. Yet, despite the fact that victims lie at the very core of terrorist attacks, they have not attracted commensurate levels of international interest or support.<sup>174</sup>

A significant current weakness is the absence of any coherent or comprehensive international legal framework that specifically governs issues relating to victims of terrorist crimes. This could be attributable, at least in part, to the fact that states are still unable to agree upon an internationally accepted definition of terrorism, which in turn makes it very difficult to define a 'victim of terrorism' for the purposes of reparations at the international level. That said, the absence of agreement on a definition is no justification for the international community to fail to provide adequate reparations for victims of terrorist attacks. Indeed, there is no shortage of existing norms which could be drawn upon in shaping such an international framework.

At the domestic level, some national systems already have well developed legislation and mechanisms for compensating the victims of terrorist attacks. In fact, certainly within the

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<sup>173</sup> See I Bottiglieri, 'Realizing the Right to Redress for Victims of Terrorist Attacks', Chapter 33.

<sup>174</sup> Eg, during the last biennial review of the UN CT Strategy, no mention was made in UNGA Res 64/297 (8 September 2010) UN Doc A/RES/64/297 to victims of terrorist attacks.

European region, current state practice in many countries suggests the emergence of a regional rule on the provision of victims' redress in case of violent crimes, even if not specifically for terrorist incidents. In turn, this and other norms are reflected within a number of specific European instruments<sup>175</sup> from which an international framework could draw key principles and procedures. Furthermore, a number of international principles already exist for the reparation of victims of both ordinary and serious crimes, which could similarly inform an international framework.<sup>176</sup> There have also been some encouraging recent developments, which have included provisions within the ICC Statute regarding the redress of and participation by victims.<sup>177</sup> For example, under the Statute victims are entitled to seek and obtain reparations directly from the ICC. To some extent at least, the absence of a coherent international framework appears to be explicable more in terms of poor political will (perhaps coupled with financial factors in the current economic climate) rather than normative *lacunae*.

Much could still be achieved in the way of positive developments if the international community were to focus on the adoption of general principles and guidelines to encourage states to adopt domestic schemes for the compensation of terrorist crimes, and on reparation standards that countries should observe in their respective laws relating to terrorism. The need for such principles is pressing. In particular, domestic compensation schemes for victims of terrorism suffer from a number of common problems which could be addressed by an international framework, especially: restrictions over questions of *locus standi*, or the right of victims to institute proceedings against the state for compensation; state compensation schemes that are not based on an enforceable right of victims to receive compensation; state compensation schemes that are generally established on an *ad hoc* and *ex post facto* basis; and state compensation schemes that generally cover only monetary aspects of redress. Furthermore, victims of terrorism should not be grouped together with 'regular' crime victims, because their unique situation and needs should be recognized as such. While victims' groups can and have played a pivotal role - for example, in seeing that states take concrete action to reveal the truth where terrorist attacks have occurred, and to ensure that domestic systems provide for some form of redress for families and survivors - the responsibility for such actions ultimately lies with state authorities.

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<sup>175</sup> See, eg, Council of Europe's: Convention on the Prevention of Terrorism 2005 (n 11); Guidelines on the Protection of Victims of Terrorist Acts 2006 (adopted on 2 March 2005 by the Committee of Ministers); and the European Convention on the Compensation of Victims of Violent Crimes (adopted 24 November 1983, entered into force on 1 February 1988).

<sup>176</sup> See 'Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment' (16 January 1997) UN Doc E/CN.4/Sub.2/1997/104; 'Civil and Political Rights, Including Questions of: Independence of the Judiciary, Administration of Justice, Impunity. The right to restitution, compensation and rehabilitation for victims of gross human rights and fundamental freedoms'. Final Report of the Special Rapporteur, Mr. M. Bassiouni, submitted in accordance with Commission resolution 1999/33' (18 January 2000) UN Doc E/CN.4/2000/62 ('Civil and Political Rights Report'); 'The Administration of Justice and the Human Rights of Detainees, Question of the impunity of perpetrators of human rights violations (civil and political) final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119' (26 June 1997) UN Doc E/CN.4/Sub.2/1997/20; the 'Revised Final Report' (2 October 1997) UN Doc. E/CN.4/Sub.2/1997/20/Rev.1; and 'UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power', UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34.

<sup>177</sup> Art 79 ICC Statute.

### ***Recommendations:***

- Redress for victims must be carried out in line with non-discrimination principles, consistent with internationally recognized human rights law. Domestic schemes must not discriminate among victims on grounds such as ‘race, colour, gender, sexual orientation, age, language, religion, political or religious belief, national, ethnic or social origin, wealth, birth, family or other status, or disability’.<sup>178</sup>
- Redress should extend beyond monetary compensation. Compensation funds must be coupled with restorative justice elements, such as the provision of state apologies (where appropriate), rehabilitation programs, the determination of remembrance days, the award of medals of honour or other public tributes, the installation of monuments, etc.
- Knowledge of the truth constitutes a fundamental component of the right to justice and redress for victims of major crimes. Governments should reduce their tendency to classify materials unnecessarily as ‘state secrets’ and facilitate and encourage their departments to make full disclosure of information relating to terrorist acts.
- Redress for victims of major crimes such as those related to terrorism, must embrace the duty of the state to investigate, prosecute, and punish those responsible. This responsibility entails also the duty to cooperate and assist appropriate judicial organs to this end, for example through the setting up of mechanisms such as truth commissions, commissions of enquiry, and fact-finding commissions.
- In terms of the substantive content of an international framework for the redress and reparations of victims of terrorist attacks, this should include the basic principle that reparations should take the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition; or the recognition of a state obligation to provide redress, while leaving each state free to choose the particular means it wishes to employ within the framework of its own domestic law.

### **7.7. Redress for Victims of Counter-Terrorist Responses<sup>179</sup>**

In addition to the perhaps more high profile and obvious victims of terrorist attacks, is a second category of victim, namely those of counter-terrorist responses which violate fundamental rule of law norms as has been described extensively throughout much of this report.

In terms of the applicable international legal framework, there is a number of governing human rights norms. More generally, Article 2(3)(a) ICCPR states that there is an obligation upon States Parties ‘to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been

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<sup>178</sup> See Civil and Political Rights Report (n 176) Principle XII.

<sup>179</sup> See especially Rodley (n 67); Duffy and Kostas (n 119); and separate submission of CD Osburn.

committed by persons acting in an official capacity’.<sup>180</sup> In addition, provision is made for reparations to be made available in respect of particular violations, whether in the context of a more general human rights treaty,<sup>181</sup> or in subject-matter specific conventions.<sup>182</sup>

Redress is not limited to financial compensation, but rather may include criminal sanctions also for those responsible for the violations.<sup>183</sup> Similarly, under an armed conflict regime, international criminal responsibility may be involved, not only pursuant to a war crime (including grave breaches of the Geneva Conventions), but also under the international criminal law rubric of crimes against humanity. For example, Article 7(1)(e) ICC Statute states that ‘imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law’ constitute a crime against humanity; and Article 7(1)(i) explicitly recognizes enforced disappearance as a crime against humanity. While the threshold problem is the contextual requirement of the alleged violation being part of an attack against a civilian population, which will generally be hard to cross, nevertheless the articulation of such state practices in terms of constituting crimes against humanity militates against any interpretation of international human rights or humanitarian law that would seek to excuse such practices as lawful.

Nevertheless, although civil and criminal law provisions exist aimed at securing justice for victims of *inter alia* human rights violations committed in pursuit of claimed security imperatives, this is not always achievable in practice due to the reluctance by many governments to disclose the evidence necessary to bring a claim on security grounds. In response, the courts have often taken an approach which seeks to balance the needs of the victim with the public interest in protecting security. In some instances this has triggered executive attempts to restrict judicial oversight of intelligence gathering activities, for example the disclosure of intelligence material provided by a third state without its permission. Other attempts to avoid liability have included: legal arguments relating to the extra-territorial nature of such practices, trying to exploit *lacunae* attributable to differing national, regional, and international interpretative approaches; and the *lex specialis* of international humanitarian law, thereby precluding any scrutiny by *inter alia* human rights bodies; and even the apparent seeking of diplomatic assurances. As the very nature of some of the most concerning state practices, such as extraordinary rendition, is to limit or avoid accountability and liability, such executive responses are both deeply concerning and do little to promote public confidence that a state’s counter-terrorist responses are rule of law based.

More generally, there is a pressing need to better understand and clarify the applicable legal framework, including that governing responsibility for human rights violations. More generally, Article 31 International Law Commission’s Articles on Responsibility of States specifies that where states are responsible for the commission of internationally wrongful acts,

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<sup>180</sup> Similarly, see art 8 UDHR.

<sup>181</sup> See, eg, art 9(5) ICCPR with respect to any ‘victim of unlawful arrest or detention’.

<sup>182</sup> See, eg, art 14 CAT; art 2 International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) (Enforced Disappearance Convention). Both require that adequate compensation be given to victims of torture and enforced disappearances respectively.

<sup>183</sup> See, eg, art 4 CAT; and art 4 Enforced Disappearance Convention.



that they are under an obligation to make full reparation for the resultant injury, whether the damage is material or moral in nature. Another issue of state responsibility that is gaining currency in the wake of litigation, enquiries, etc concerning extraordinary rendition is the nature of aiding and assisting in the commission of human rights violations. Certainly, the increased attention by a broad range of state and non-state actors, public enquiries, and judicial proceedings, is serving to clarify legal standards concerning intelligence relationships and international cooperation more broadly. Another topical issue in terms of standard setting here relates to the non-binding Montreux Document on Private Military and Security Companies. This is standard setting in terms of providing that states which employ private security companies have a responsibility to provide victims of human rights violations committed by such companies with effective remedies, including compensation.<sup>184</sup>

In summary, although many of the state practices described in this report involve the commission of serious violations of a range of international norms, giving rise to state and individual responsibility under international law and the right to remedy and reparation, very few are properly investigated, and even fewer are brought before the courts in a manner which is just for both any alleged victims and perpetrators. Adequate access to justice for victims is an inherent element of any rule of law based counter-terrorist responses.

### ***Recommendations:***

- Governments should fulfil their international legal obligations by allowing victims of unlawful counter-terrorist responses, for example torture, to pursue civil suits against the perpetrators within national courts.
- Where necessary, there should be legislative reform of any state secrets privilege to ensure that victims of abuse have effective remedies for any violations committed, including under human rights law.
- Apart from their legal obligations, states should recognize that it is good policy to allow victims a right to remedy through civil suits which carry a number of benefits, which include: civil actions are a beneficial addition to criminal actions, which may not create sufficient accountability for human rights abuses due to lack of will to prosecute; monetary compensation provides victims of, for example torture or other forms of ill treatment, with the necessary funds for treatment and rehabilitation; and it promotes public confidence - the absence of an enforceable right to redress for serious crimes against civilians can only alienate local populations (for example, when engaged in post-conflict reconstruction), which in turn may undermine the effectiveness of ongoing operations (for example, counter-insurgency efforts).
- Positive obligations of states under human rights and general international law, together with those specified under international humanitarian law, should be reflected in

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<sup>184</sup> Montreux Document (n 139): Statement number 4; and Recommendation number 72 (under ‘good practices’ section).

government guidelines and operational codes, and backed up with effective oversight, to ensure that they are given effect.

- Where particular allegations of violations point to the possibility of criminal sanctions for their perpetrators, it is essential that these are properly investigated and, where there is sufficient evidence, prosecuted within national courts in the same way as any other serious criminal allegation.

## **8. NON-JUDICIAL MECHANISMS OF CONTROL AND ACCOUNTABILITY**

Another significant theme considered relates to non-judicial mechanisms, which are also important to securing greater levels of control and accountability in the counter-terrorist responses of both states and international organizations. Although the judicial mechanisms considered in the previous section have played a pivotal role, it is nevertheless evident that they are incomplete and insufficient alone to reduce current levels of impunity (whether terrorist, state, or institutional) and to ensure adequate redress for victims. Certainly, the obstacles that victims have encountered in national level litigation highlight the importance of meaningful international judicial and non-judicial oversight mechanisms and the availability of remedies outside national jurisdictions, including transnational justice alternatives and human rights supervisory mechanisms.

There are many different forms that non-judicial mechanisms may take. One, which has featured prominently, is the multi-faceted role played by civil society (such as NGOs, journalists, and academics), both in terms of raising the plight of victims of terrorism and counter-terrorist responses, and exposing unlawful state practices.<sup>185</sup> Others, which include parliamentary oversight, human rights mechanisms, and ombudsperson, are considered here.

### **8.1. National and Regional Parliamentary Oversight<sup>186</sup>**

A significant non-judicial mechanism for increasing the accountability of counter-terrorist policies and practices of national and institutional executives and their agents is that of parliamentary oversight, the importance of which was highlighted in relation to the recent practice of extraordinary renditions. It is crucial that government agencies involved in counter-terrorism are subject to a combination of effective internal and external controls (both judicial and political). In particular, there is the need to ensure that the scope of such oversight extends to all relevant actors, not only intelligence agencies and specialized law enforcement or military units, but also the related actions of the police, justice, immigration,

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<sup>185</sup> One of the best known is the work of the journalist, Dana Priest, in highlighting the US programme of extraordinary rendition. See, eg, D Priest, 'Foreign Network at Front of CIA's Terror Fight: Joint Facilities in Two Dozen Countries Account for Bulk of Agency's Post-9/11 Successes' *Washington Post* (18 November 2005).

<sup>186</sup> See especially J Oikarinen, 'Parliamentary Oversight of Counter-Terrorism Policies', Chapter 34.

border security services, as well as contractors employed to perform such services. Such scrutiny must be independent and unhindered in order to strengthen public confidence that fundamental values, together with legal and ethical standards, are not being abused.

There is no single normative framework or model for parliamentary oversight to permit the scrutiny and increased accountability of the executive arm of government. That said, as a foundational principle, the ultimate authority and legitimacy of agencies involved in counter-terrorism should be derived from constitutional and legislative approval of their powers, operations, and expenditure by the parliament. Certainly, the existence of appropriate parliamentary oversight mechanisms brings with it a number of important benefits, which include: strengthening the public legitimacy of governmental agencies as state actors; increasing the awareness and expertise on counter-terrorist policies within parliament, resulting in better informed decision-making; enhancing the critical debate on basic policy choices and making the likely scope for misunderstanding, misinformation, and partisan politics narrower; and, as a non-judicial mechanism, providing continual feedback for the relevant government services, and consequently contribute to the clarity and effectiveness of their mandate.

Even where the requisite legal and/or constitutional framework is in place, to be truly effective it is essential that parliamentary oversight bodies have the necessary powers to carry out their functions effectively, which in turn requires the necessary levels of genuine political will including by the executive. Commonly, however, these critical elements are not (truly) present. This is especially evident with respect to accessing information and documents relating to the executive and its relevant services, for example in order to scrutinize counter-terrorist law enforcement activities involving the intelligence agencies. Frequently, as with judicial proceedings, the executive cites national security as a ground for non-disclosure. For this and other reasons, in practice most parliamentary oversight bodies tend to be limited to public information and structural oversight, including scrutiny of general policy, administration, and financing rather than operational oversight based on classified information (although this does occur occasionally). Where access to sensitive information is given, parliamentary oversight bodies have a commensurate obligation to set up and maintain the necessary technical framework (establishment of a secure infra-structure) and to ensure the necessary expertise to handle any classified material and protect it from unauthorized disclosure. In turn, this raises such issues as appropriate levels of vetting and security clearance of oversight body members and their staff.

A different type of challenge is attributable to the growing privatization or outsourcing of security and intelligence related work by governments, in particular because here questions of oversight and accountability are no longer exclusively limited to the domain of government services. These activities require the establishment of both clear lines of responsibility for, and appropriate levels of, control, especially because any outsourcing of security functions does not absolve a state of responsibility for the actions of those private actors, whether on the basis of direct attribution or of due diligence. This may take various forms, such as licensing and mechanisms for ensuring proper remediation in case of loss or damage caused to individuals. (See section 6.7).

Another complex issue is that of regional oversight where inter-state cooperation is involved to counter increasingly transnational terrorist threats, especially where third party states are involved which may have different understandings of democracy and its underpinning principles and/or not subject to the oversight mechanisms of a particular regional organization as a non-Member State. Whether or not cooperation is between Member or non-Member States, there is a strong argument to be made that existing national democratic oversight bodies engage in networked oversight, not only with each other, but also in cooperation with regional parliamentary bodies where these exist and have a meaningful mandate. This is essential if executive accountability gaps are to be avoided, or at least the associated risk minimized. Certainly, one significant recommendation of the influential Marty Reports<sup>187</sup> - following investigation into the involvement by some European states in the US extraordinary rendition programme - was that the democratic oversight of national and foreign intelligence services must be significantly strengthened and improved, which requires inter-state/intergovernmental cooperation not least in terms of information sharing. Although the Marty Reports were themselves constrained in terms of being unable to access and review all relevant, classified materials, they created significant political waves to re-examine and reform existing oversight procedures. Indeed, this European experience in regional parliamentary oversight might be of value to other regional organizations and their parliamentary components.

### ***Recommendations:***

- It is crucial that government agencies involved in counter-terrorism are subject to a combination of effective internal and external controls (both judicial and political). This is a requirement that should be filled in part by effective parliamentary oversight. It can be argued that each oversight mechanism needs to play its role in a democratic society to achieve an appropriate level of oversight and accountability to support the democratic legitimacy of counter-terrorist policies. The mandates and powers of different oversight institutions should therefore be systematized as far as practically possible in order to avoid oversight gaps in any particular area.
- The added value of effective parliamentary oversight, vis-à-vis other forms of oversight, is its potential to ensure broader democratic legitimacy of policies and actions that to a certain degree need to take place outside of the public eye. Parliamentary oversight should therefore be comprehensive enough to credibly assess: the compliance of counter-terrorist policies with the law; and the effectiveness and efficiency of those policies and activities, together with the appropriateness of their financial and

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<sup>187</sup> Rapporteur Dick Marty, Parliamentary Assembly Council of Europe (PACE) (Committee on Legal Affairs and Human Rights), 'Alleged Secret Detentions in Council of Europe Member States: Information Memorandum II' (22 January 2006) AS/Jur (2006) 03 rev; Council of Europe, 'Secretary General's Report under Article 52 ECHR on the Question of Secret Detention and Transport of Detainees Suspected of Terrorist Acts, Notably by or at the Instigation of Foreign Agencies' (28 February 2006) SG/Inf (2006); and related follow-up by the PACE Committee on Legal Affairs and Human Rights, 'Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report' (11 June 2007) Doc 11302 rev.

administrative practices. Even in the sensitive area of operational secrecy, as the Venice Commission of the Council of Europe has recommended, ‘although there may, exceptionally, be grounds for not notifying the parliament in advance of a transfer of authority to exercise police or security powers in a specific case, there must afterwards be full governmental accountability to the parliament for all such decisions.’<sup>188</sup>

- Organizationally, the requirements of effective parliamentary oversight bodies are fundamentally the same as for other oversight institutions. As UN Special Rapporteur Martin Scheinin has noted, it is important that ‘oversight institutions have the power, resources and expertise to initiate and conduct their own investigations, as well as full and unhindered access to the information, officials and installations necessary to fulfill their mandates.’<sup>189</sup> This should include appropriate levels of cooperation by all government services with a stake in counter-terrorist action, as well as the provision of all relevant documentation and other evidence. In return, parliamentary oversight bodies need to demonstrate maturity and professionalism in their handling of classified information and personal data, not least by upgrading their technical facilities, practices, and codes of conduct as required.
- Although the need for, and benefits of, efficient parliamentary oversight are clear, it is also plain to see that the challenges associated with achieving a consistent and high level of parliamentary oversight are great. Analyses of the activities of both standing parliamentary oversight bodies, and *ad hoc* parliamentary committees and inquiries, seem to indicate a mixed record – positive results have often been coupled with worries ranging from the lack of true political clout, to the existence of too much party-political polarization on key issues. The search for best practices, not least in achieving the right balance in the parliament-executive relationship, should continue.
- The challenges involved with ensuring effective oversight in situations of inter-state counter-terrorist cooperation are significant also, yet every effort must be made to strengthen it. Oversight limited to national boundaries or regional organizations is clearly not enough at a time when counter-terrorist cooperation and technical support activities link nations bilaterally and regional organizations to third countries. For example, ongoing efforts to improve inter-parliamentary cooperation, coupled with the demonstrated influence of regional parliamentary bodies as different as the EU European Parliament and Parliamentary Assembly of the Council of Europe, point to the potential of having an international or regional dimension to parliamentary oversight. While doubts remain regarding the associated difficulties and complexities, there is recognition that any inter-parliamentary forum must be representative and that this may be achievable by ensuring

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<sup>188</sup> Council of Europe (Venice Commission), ‘Report on the Democratic Oversight of the Security Services’ (11 June 2007) CDL-AD(2007)016, <[http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)016-e.asp](http://www.venice.coe.int/docs/2007/CDL-AD(2007)016-e.asp)> accessed 10 December 2011.

<sup>189</sup> UN Special Rapporteur Compilation of Good Practices Report (n 107) para 13 Practice 7.

that any procedures adopted are ‘as light and flexible as possible and minimi[ze] the call on resources.’<sup>190</sup>

- Pragmatism is most likely a general prerequisite for meeting the challenges of any form of parliamentary oversight, not least that associated with global counter-terrorist cooperation. In this regard, the work already done by the Inter-Parliamentary Union<sup>191</sup> (and others) on standards and best practices should also be strengthened as it provides a method of dialogue and learning among different stakeholders. In step with standards and best practices, it is also crucial to acknowledge the importance of supporting the institutional development and strengthening of parliaments, which is instrumental in giving reality to proper parliamentary oversight in fragile or emerging democracies.

## **8.2. Regional and International Human Rights Mechanisms<sup>192</sup>**

A number of systems exist at both the regional and international levels which play a pivotal role in securing greater rule of law compliance, especially in relation to human rights obligations. Additionally, the UN and many regional organizations appoint independent experts as special rapporteurs with mandates on specific human rights issues, for example the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.<sup>193</sup> Whilst their outputs are not legally binding, nevertheless they are important in terms of shaping normative developments and policy debates, not least in terms of articulating those standards which all states should adhere to. Bodies or organs which are treaty-based play an important part here too, especially in terms of their monitoring and jurisprudential functions. In particular the project considered the jurisprudence and influence of the UNCAT, UNHRC, IACHR, ACHPR, and CPT, whose work is representative of these bodies.

One important function that a number of these bodies perform is the monitoring of states’ human rights practices through physical visits and inspections. For example, since 1961 the IACHR has conducted approximately 100 such on-site visits with subsequent observational reports. However, such visits are not without their own difficulties, especially because they require consent and at least some degree of compliance from the state concerned both prior and during any visit, which is not always forthcoming.

Physical inspections are a primary function of the CPT also, which monitors the (mis)treatment of persons in diverse detention facilities in order to prevent torture and other forms of ill treatment especially. The treatment of persons held by state agents has been observed to vary greatly depending on the general context, for example, during peacetime,

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<sup>190</sup> UK House of Commons European Scrutiny Committee, ‘National parliaments’ scrutiny of Europol’ (Committee Session of 9 February 2011) in European Scrutiny Committee’s 26<sup>th</sup> Report (Session 2010-12), para 10.20.

<sup>191</sup> P Fluri, AB Johnson, and H Born (eds), *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices* (Inter-Parliamentary Union and Geneva Centre for the Democratic Control of Armed Forces, Geneva 2003).

<sup>192</sup> See especially Cerna (n 57); Casale (n 111); and Kane (n 145).

<sup>193</sup> See, eg, UN Special Rapporteur Compilation of Good Practices Report (n 107).

periods of recurrent terrorist activity, a state of emergency or an internal conflict; and the branch of public service responsible for the detention, for example whether police custody, prison, or security service detention. There are particular risks of ill treatment associated with unofficial places of detention, including unlisted facilities operated by special forces, temporary holding places in the field, and even ‘black sites’, which have become a feature of some states’ counter-terrorist responses. The risk of any detention facilities, not least such ‘exceptional’ ones, not adhering to their rule of law obligations increases where independent monitoring by a preventive body such as the CPT cannot be carried out for whatever reason.

Bodies such as the CPT are instrumental also in the interpretation of international obligations, not least in terms of how they should be implemented in practice by states, and in working towards greater consistency of approaches. They can also play an important preventive role in terms of seeking to respond to risks or occurrences of ill treatment before they become too acute, unlike a court which is limited to reviewing particular violations after they have already occurred. Furthermore, they have the power to make recommendations to the relevant authorities for improving the treatment and conditions of persons deprived of their liberty and to submit proposals and observations concerning existing and draft legislation. In terms of other positive developments, although most regions have in the past not had the benefit of independent detention monitoring systems such as the CPT, the increasing ratification of the Optional Protocol to the CAT (OPCAT)<sup>194</sup> by states from all regions introduces independent preventive monitoring mechanisms at the international and national levels. The challenge for States Parties to the OPCAT will be to fulfil their obligation to provide full access for independent monitoring of all places of deprivation of liberty, including those operated or used by the security and intelligence services.

A number of these bodies, which include the UN treaty bodies, ACHPR, and IACHR, also have important jurisprudential functions with respect to the interpretation and development of norms relating to their founding human rights treaties, although their related mandates do vary. With respect to the ACHPR, its function here and more generally has been constrained by its powers and mandate, as well as by available resources. Nevertheless, it has been developing its own body of jurisprudence for a number of years, including on human rights violations relating to security and counter-terrorist responses, thereby making an important contribution to the interpretation and development of not only its own continental but also international human rights norms.<sup>195</sup> Its current role and influence in moving towards increased adherence to human rights norms on the African continent could be strengthened, however, if closer collaboration were achieved between the ACHPR and the ACtHPR and their respective mechanisms. Of especial importance here is increased dialogue with and bringing pressure to bear upon regional and continental policy-makers regarding the necessity and benefits of combating terrorism in a human rights compliant manner.

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<sup>194</sup> Adopted on 18 December 2002 by UNGA Res 57/199, entered into force on 22 June 2006.

<sup>195</sup> See, eg, ACHPR, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (Communication No 218/98) Decision of 7 May 2001; ACHPR, *Forum of Conscience v Sierra Leone* (Communication No 223/98) Decision of 6 November 2000; and ACHPR, *International Pen, the Constitutional Rights Project, Interights [and Civil Liberties Organisation] v Nigeria* (Communication Nos 137/94, 139/94, 154/96, and 161/97) Decision of 31 October 1998.

In comparison, the IACHR has a more established and developed system, not least due to its pivotal role as the legal stepping stone between victims and the IACtHR because the former do not have direct access to the latter.<sup>196</sup> Nevertheless, it too is significantly restrained in its jurisprudential role by the fact that its formal mandate is limited to principles of international human rights law and does not include international humanitarian law.<sup>197</sup> This is despite the prevalence of security related human rights violations within the American continent, some of which have escalated to situations of armed conflict. Significantly, this important omission within its mandate has the potential to create impunity gaps for both non-state and state actors. In turn, this impacts upon the ability of affected victims to secure adequate if any redress and reparations, including detainees being held extra-territorially under an armed conflict regime.

### ***Recommendations:***

#### ***CPT***

See section 6.2 above.

#### ***IACHR***

- OAS Member States should be invited to review the current legal framework of the inter-American system for the protection of human rights functions, in particular with a view to facilitating its application of international humanitarian law in states that are in a situation of armed conflict. This is important due to the increasingly transnational nature of the regional and international threats posed by non-state actors, and the related rule of law violations which occur in response to such threats by governments relying upon armed conflict paradigms.

#### ***ACHPR***

The ACHPR holds a key position in the ‘network’ of mechanisms for the protection of human rights in Africa, for which the African Charter grants it a very broad mandate. Therefore, the ACHPR should take immediate action to clearly stipulate AU Member State obligations regarding the implementation of the Organisation of African Unity (OAU) Convention on the Prevention and Combating of Terrorism<sup>198</sup> (OAU Convention), highlighting the rights of victims of terrorist acts and, above all, guiding the actions of all States Parties on these issues. In particular, a number of specific recommendations are made:

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<sup>196</sup> See, eg, *Martin Javier Roca Casas* (Peru) IACHR Report No 39/97, Case 11.233 (19 February 1998) para 116 (reprinted in the IACHR’s Annual Report 1997); and *José Francisco Gallardo* (Mexico) IACHR Report No 43/96, Case 11.430 (15 October 1996) para 89 (reprinted in the IACHR’s Annual Report 1996) which enforce the international law principle that where a state violates an international obligation which results in harm, that a duty exists upon it to make adequate reparation to the victim(s).

<sup>197</sup> *Case of Las Palmeras v Colombia* (Preliminary objections) IACtHR Series C No 67 (4 February 2000).

<sup>198</sup> Adopted 14 July 1999, entered into force 6 December 2002.



- The adoption of the ACHPR's Guidelines and Principles on the protection of human rights in the framework of the fight against terrorism in Africa.<sup>199</sup>
- A review and strengthening of the mandates of the special mechanisms of the ACHPR in order to supervise the actions of all AU States Parties more effectively on these issues.
- The organization of regular meetings with the specialized organs of the AU to exchange information on the best practices to adopt in order to ensure the solid protection of human rights in the framework of the fight against terrorism.
- The organization of seminars for States Parties to identify and exchange best practices and measures in order to ensure their more effective enforcement of the African Charter, and better engagement with the ACtHPR, regional courts, and similar institutions.
- The insertion of a section on the fight against terrorism in the ACHPR's annual report to enable regular evaluation of the related actions of States Parties.

For their part, individual AU Member States should make efforts to ensure that the OAU Convention and its Additional Protocol<sup>200</sup> are fully integrated into their domestic legal systems; that the officials in charge of enforcing their legislation have a clear awareness of their obligations in terms of human rights protection in the framework of the fight against terrorism; and, above all, that they report regularly and accurately to human rights protection mechanisms on their practices in that regard. More concretely, states should:

- Harmonize their legislations with the African Charter, the OAU Convention and its Protocol, and all other human rights treaties they have ratified.
- Add modules on the protection of human rights in the framework of the fight against terrorism to their training curricula of officials in charge of enforcing national legislation (*inter alia* security forces, magistrates, lawyers, and territorial administration officials).
- Prepare a guide on human rights protection in the framework of the fight against terrorism, based on the ACHPR's Guidelines and Principles, for officials in charge of enforcing legislation.
- Include in AU Member States' regular reports to human rights protection bodies a section on the fight against terrorism, specifying all of the actions taken for that purpose.
- Hold regular consultations of human rights NGOs and national institutions to evaluate progress achieved in that area.

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<sup>199</sup> ACHPR, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (16 May 2002) DOC/OS(XXX)247.

<sup>200</sup> AU Protocol of 2004 to the Organisation of African Unity Convention on the Prevention and Combating of Terrorism 1999 (adopted 8 July 2004, entered into force 12 January 2006).

### 8.3. Institutional Mechanism: Ombudsperson<sup>201</sup>

Recent concerns relating to levels of impunity in counter-terrorist responses have not been limited to states rather have extended to international organizations also. Many of the principal aspects of such concerns are epitomized by the Security Council's 1267 sanctions regime. A primary concern, from a rule of law perspective, has been that although the UN has claimed that inclusion on the list and their accompanying sanctions are non-criminal and preventive in nature, it has many hallmarks of a criminal process, and the impact upon individuals is often highly deleterious not least on a person's livelihood, employability, and reputation. Another has been that the regime did not initially provide for the notification of individuals or entities listed, nor were those designated informed of the case supporting their designation; rather, there was no mechanism for individual recourse.

The journey towards being rule of law based has been a slow and partial one for the Security Council. The first milestone was when the General Assembly called upon the Security Council to ensure that fair and clear procedures existed for placing individuals and entities on sanctions lists and for removing them.<sup>202</sup> This resulted in the eventual creation of the Office of the Ombudsperson in December 2009 and the renewal and strengthening of the mandate of the same in June 2011.<sup>203</sup> The creation of the Office has brought some positive developments. For example, whilst the Ombudsperson does not possess judicial or compulsory power, the processes being put in place facilitate and encourage cooperation by states in the provision of information. In practice, while it is too early to assess their overall effectiveness with any precision, the cooperation of states to date has been good. If the process functions in an optimum way, this will provide a real opportunity for petitioners to 'know' the case against them, leading to a meaningful opportunity for a response to that case. Nevertheless, accessing all relevant information (especially sensitive or classified materials) for the purpose of reviewing the listing and potential delisting of individuals remains problematic, not least in terms of how it may be achieved in a manner acceptable to states. Some form of access is required to provide a level of procedural fairness akin to the kinds of reviews which should take place in administrative proceedings in national and regional contexts, when national security or other sensitive information is implicated. It remains to be seen how the process will function on those occasions and whether an institutionalized approach to this question can be developed to allow for a sufficient level of procedural fairness to be accorded.

An important contribution made to the delisting process is the report written by the Ombudsperson based on her findings which is presented to the 1267 Committee in their deliberation processes. While decision-making power clearly and firmly rests with the Committee, the report should better inform the process. The new recommendatory power and associated trigger mechanism accorded to the Ombudsperson in Security Council Resolution 1989 should further enhance the fairness of the process.<sup>204</sup> The presentation of this report,<sup>205</sup>

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<sup>201</sup> See especially K Prost, 'Fair Process and the Security Council: A Case for the Office of the Ombudsperson', Chapter 16; Jillani (n 74); and Corell (n 66).

<sup>202</sup> This is reflected within, eg, the UN CT Strategy, Action Plan: Pillar II, para 15.

<sup>203</sup> UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904 paras 20-1.

<sup>204</sup> UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989 provides that the Ombudsperson may make recommendations in the Comprehensive Report. Further, if the Ombudsperson recommends delisting, 60 days

which includes the petitioner's answer to the case, provides a means by which the petitioner can be 'heard' by the decision-maker in the absence of any procedure for the holding of oral sessions which a petitioner may participate in. Further, the preparation of the report, with the Ombudsperson's review of information accompanied by analysis and observations, and its ultimate presentation before the Committee, is believed by some to provide an independent mechanism of review appropriate in this very particular context.

Nevertheless, some key issues of disagreement and concern remain. One of the most significant concerns what standards should apply to the 1267 Committee, not least in terms of procedural fairness. Certainly, much of the writing and judicial determinations on these issues seem to assume a standard of procedural fairness which mirrors that of national or regional legal systems. In particular, although the sanctions regime is non-judicial in nature, due to its criminal and punitive characteristics in practice, there is nevertheless support for the proposition that the review process more closely reflect the fundamental guarantees and principles of the rights to a fair trial (for example, as expressed in Article 14 ICCPR to which most UN Member States are States Parties) – not only because such principles are non-derogable in the context of judicial proceedings, but also as a safeguard to the Security Council's significant powers (under Articles 25 and 103 UN Charter especially).

It has been suggested that such standards are not appropriate for the unique context of the Security Council, rather that there needs to be procedural fairness appropriate for this very particular situation. Therefore, by focusing on the fundamental components of fairness, as opposed to the mechanics by which they are delivered, it has been argued that the Office of the Ombudsperson, when functioning to its full potential, can provide the necessary fair and clear process in this distinct context, especially the right to be informed, the right to be heard, and the right to effective review. Not all would agree with such a position, however. While the creation of this Office is an encouraging step towards greater rule of law compliance, and is certainly significant in creating the first formal administrative review mechanism of the Security Council in the exercise of its powers, many believe that it falls short in terms of addressing all related rule of law concerns. In particular, it has been suggested that the system cannot be regarded as being fully in conformity with human rights obligations unless there is a judicial body at the end of the process which conforms with the fundamental principles of a fair trial in the determination of an individual's civil rights and obligations, not least in terms of a public hearing by an independent and impartial tribunal established by law,<sup>206</sup> and an ability to appeal any refusal to be delisted. A further significant limitation on the role and influence of the Ombudsperson is that her recommendations are neither binding nor has her post been invested with any power to remove a petitioner's name from the list, although the recent changes introduced by Security Council Resolution 1989 (2011), which considerably enhance the influence of the Ombudsperson during the decision-making process, do go some way to mitigating these limitations.

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later the name will be removed from the List unless the Committee by consensus agrees to retain it or the matter is referred to the Security Council for a vote.

<sup>205</sup> For the latest report, see Letter dated 21 July 2011 from the Ombudsperson addressed to the President of the Security Council, UN Doc S/2011/44.

<sup>206</sup> *Case T-85/09 Kadi v Commission Case* [2010] nyr, para 128.

Certainly, in terms of a longer term, more effective approach, consideration could be given to expanding the jurisdiction of the International Court of Justice in order to afford it the power of direct judicial review of UN institutional practices, in particular to ensure that a right balance is struck between the two competing objectives of ensuring and maintaining international peace versus international justice. This would include recognition that, in exceptional circumstances, it may be justifiable for the Security Council to override certain human rights as a temporary measure. Just as the Security Council can extend the regime to tackle modern forms of piracy (which is closely linked to terrorism) off the coast of Somalia to cover the territorial waters of that state (when normally it only applies on the high seas),<sup>207</sup> so too can it temporarily suspend an individual's right to freedom if that person poses an imminent threat to security. This should be seen as the extent of the overriding powers of the Security Council under Article 103 UN Charter.

### ***Recommendations:***

- The effectiveness of the Office of Ombudsperson to the 1267 Sanctions Committee should be increased, in particular through affording it greater powers, not least that some, if not all, of its recommendations should be binding upon the relevant parties. The power to hear complaints against wrongful inclusion of a name in the black list should be made more effective.
- Increased clarity and certainty are required regarding the exact nature of the international standards and principles, especially those of international human rights law, that currently influence the Ombudsperson's review process and 1267 Sanction Committee's determinations.
- Every effort should be made to accord those persons listed adequate levels of due process, especially those articulated within Article 14 ICCPR, and to clarify current areas of ambiguity such as the exact standard to which the petitioner has to prove their case in order to be delisted.
- Targeted individuals' freedom of movement should only be restricted temporarily, and should be reviewed if an extended restriction is necessitated by imperative reasons of security.
- Efforts should be made to reduce the impact of targeted sanctions on members of the listed individual's family.

## **9. COOPERATION**

Terrorism and violent extremism represent transnational threats that may only be truly addressed through diverse forms of coordinated and coherent multi-lateral partnerships

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<sup>207</sup> UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851.

involving states and international, regional, and/or sub-regional organizations because no political entity will successfully counter them in isolation. Consequently, improving and strengthening current levels of international cooperation – of which every aspect is rule of law based - is crucial for successfully combating terrorism and bringing terrorists to justice. It is unsurprising, therefore, that a significant focus of current counter-terrorist discourse and efforts centre around the ‘operationalizing’ of the UN CT Strategy, including through the identification of best practices which may be transferable (albeit potentially in a modified form) to other counter-terrorist contexts and/or jurisdictions.<sup>208</sup>

Four different examples of regional and international cooperation were considered, to examine some of the challenges to increased cooperation, how some of these have been overcome, and rule of law implications where there is more work to be done: Eurojust’s role in facilitating cooperation between national judicial authorities; INTERPOL’s function of ensuring and promoting the highest levels possible of mutual assistance between all criminal police authorities; African continental cooperative efforts under the AU; and practices developed by the ICC for the handling of sensitive materials and handling of significant volumes of facts and documents. In addition, the adoption of a number of the other recommendations made throughout this report would further facilitate improved inter-agency and inter-state cooperation and are relevant for the development of best practices.

### **9.1. Eurojust<sup>209</sup>**

When it comes to judicial cooperation, effective mutual legal assistance is key to the successful prosecution of criminal cases, whose scope often extends to more than one national territory. In this regard, the role played by different regional and international organizations and their coordinating institutions - such as Eurojust and the Ibero-American Network for International Legal Cooperation- is critical to ensure proper coordination including between prosecutors and judges.

In the EU, as with any regional organization, primary responsibility for tackling terrorism resides with its Member States, with domestic authorities conducting criminal investigations and prosecutions, and trials taking place before national courts. Particular challenges are posed, however, where more than one state is involved in trying to bring suspected terrorists to justice for alleged criminal acts, which is increasingly the case due to the transnational nature of terrorist organizations such as al Qaeda. For example, when terrorist organizations commit criminal acts in more than one EU Member State, the limitations derived from the principles of sovereignty and territoriality hamper the investigative and judicial authorities of each affected Member State from gaining a full overview of these acts. Furthermore, there are many legal challenges associated with one state seeking to apprehend a terrorist suspect within the territory of another state, not least in terms of gaining the necessary consent and executing an arrest warrant.

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<sup>208</sup> See, eg, Global Counter-Terrorism Forum, ‘Cairo Declaration on Counterterrorism and the Rule of Law: Effective Counterterrorism Practice in the Criminal Justice Sector’ (22 September 2011).

<sup>209</sup> See M Coninx, ‘Strengthening Interstate Cooperation: The Eurojust Experience’, Chapter 35.

In responding to such challenges following the 9/11 terrorist attacks, the EU took two important steps towards strengthening existing levels of inter-state cooperation on terrorism matters. First, it sought to improve levels of coordination and cooperation between the law enforcement and judicial authorities of Member States, especially through the revision of the scope of competences and powers of Europol, and the creation of Eurojust as a new body. The primary purpose of Eurojust is to support the national investigations and prosecutions by Member States of serious forms of crime, including terrorism. Second, traditional instruments of judicial cooperation were simplified or replaced by new instruments which addressed some fundamental obstacles to cooperation such as those attributable to the principles of sovereignty and territoriality.<sup>210</sup> Undoubtedly, achieving the necessary level of political will to make such changes was in no small part attributable to the prevailing political climate, especially the significant pressure residing upon EU institutions to respond to terrorist threats more effectively.

More specifically, Eurojust has four principal functions: (1) the facilitation of the exchange of information between the judicial authorities of the different Member States involved in investigations and prosecutions against the same terrorist organization; (2) the provision of support to the judicial authorities of Member States in the issuing and execution of European Arrest Warrants; (3) the facilitation of investigative measures and gathering of evidence necessary for prosecuting the suspects of terrorism offences at trial stage (specifically, witnesses' testimony, scientific evidence, searches and seizures, the interception of telecommunications); and (4) the freezing and confiscation of the benefits from other criminal offences that are suspected as being used for terrorist financing.<sup>211</sup> Importantly, Eurojust has its own legal personality and therefore is able to conclude formal agreements, including with third party states and international organizations. All of these activities have the objective of strengthening inter-state cooperation by providing a forum where practitioners and decision-makers from all relevant disciplines and perspectives may exchange views on how best to coordinate their counter-terrorist efforts, ranging from bringing a particular terrorist suspect before a national court to wider anti-terrorism policy and legislative matters. Each of these functions, which aim 'to support and strengthen' cooperation and coordination between the national authorities of Member States, must be expressly requested by the latter.

In terms of developing best practices for strengthening regional cooperation between not only Member States but also third party states (for example, where a suspected terrorist has taken refuge), both the importance and possibility of achieving these is illustrated by Eurojust's efforts to develop close cooperation between national judicial authorities. This has included

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<sup>210</sup> Council of the EU: Extraordinary Council Meeting, 'Justice, Home Affairs and Civil Protection' (20 September 2001) Council document 12019/01 (Presse 327); subsequently reinforced in Extraordinary Council Meeting, 'Justice, Home Affairs and Civil Protection' (19 March 2004) Council document 7555/04 (Presse 94); Extraordinary Council Meeting, 'Justice, Home Affairs and Civil Protection' (13 July 2005) Council document 11116/05 (Presse 187).

<sup>211</sup> Eurojust was established by Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L63; as amended subsequently by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2009] OJ L138.

mechanisms for promoting the exchange of relevant information between interested parties, for example in order to ensure the simultaneous detention of the suspects of terrorist organizations operating in and out of different EU Member States; and to gather the necessary evidence to ensure their subsequent prosecution and conviction where appropriate, protecting the integrity of such evidence in the process. Additionally, Eurojust has developed a number of other internal practices, such as holding regular meetings of its Counter-Terrorism Team to identify and discuss new trends and threats on terrorism, and to develop solutions to recent practical problems experienced on judicial cooperation; and the designation of at least one national correspondent for Eurojust for terrorist matters by each Member State to facilitate access to all necessary information regarding prosecutions of and convictions for terrorist offences and its subsequent communication to Eurojust.<sup>212</sup>

Importantly, in all of its activities, the effectiveness of such cooperative efforts has been indivisibly linked to respect for and compliance with the rule of law, ranging from ensuring that any judicial cooperation fully respects the fundamental rights of suspects and sentenced persons, to requiring that information processing and exchange accord with fundamental rights of data protection and security. Closely linked to this, Eurojust has the possibility of making proposals for the improvement of the legal instruments on judicial cooperation in criminal matters, especially the adoption and implementation of any legislative initiatives that would further facilitate effective, efficient, and rule of law inter-state cooperation, not least through the closing of any *lacunae* within the existing legal framework. Nevertheless, despite Eurojust's work being rule of law based, the overall effectiveness of its developed mechanisms and practices is vulnerable to the same obstacles facing any international cooperative efforts. In particular, disparities in national legislation and the co-existence of multiple jurisdictions within a regional organization's membership will inevitably cause conflicts and dissenters when countering terrorism. Nevertheless, its approach to issues of inter-state judicial cooperation demonstrate how it is possible to develop effective practices which not only genuinely assist in bringing terrorist suspects to justice, but do so in a way which respects and upholds the rule of law.

### ***Recommendations:***

- The experience gained by Eurojust clearly shows the need to promote the exchange of relevant information between judicial authorities, and to develop a close cooperation between them, not least to ensure the simultaneous detention of the suspects of terrorist organizations operating in and out of different Member States; and to gather the necessary evidence to ensure their prosecution and subsequent conviction where appropriate, protecting the integrity of such evidence in the process.
- To be effective in the fight against terrorism, such judicial cooperation must also be compatible with the fundamental rights of the suspects and sentenced persons. In particular, within the context of the EU, the case law of the ECtHR and of the EU

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<sup>212</sup> Council Decision 2005/671/JHA of 20 September 2005 for the exchange of information and cooperation concerning terrorist offences [2005] OJ L253, art 2.

Courts should be fully respected, as well as the guarantees and rights applicable to the national criminal proceedings of individual EU Member States. Rules governing the processing and exchange of information, and the fundamental right of data protection, should be fully respected, as well as the principles and safeguards for the freezing and confiscation of criminal assets.

- Eurojust has made significant progress in terms of facilitating closer collaboration between European partners, third party states, and international organizations, especially where the harmonization between their respective anti-terrorism norms would be unrealistic. However, continued efforts should be made to sign new agreements with other countries where potential terrorism-related risks are high (for example, the hosting of terrorist training camps or organizations).
- Disparities in national legislation and the co-existence of multiple jurisdictions within the EU's Membership will inevitably cause conflicts and dissenters when countering terrorism. Political dialogue at the international level on potential threats to the rule of law and to human rights should not cease, but rather continue to grow.
- When contemplating fair and effective ways to counter terrorism in an international environment, continued efforts towards the harmonization of national legislation, and the sharing of information and best practices, is strongly recommended. This includes the adoption and development of tools such as joint investigation teams which allow effective actions and decisions to be taken on a case by case basis.
- The battle against terrorism cannot be won if efforts to fight it are limited to one region or one continent. It is in the interest of all concerned to build a universal legal and judicial area which enables effective global and coordinated action against terrorism to be taken. Therefore, actors in the field of counter-terrorism should not only attempt to harmonize their clauses, but also to share information and draw inspiration from each others' initiatives. Many of its developed practices of cooperation here would be transferable to other contexts, including outside of the EU.

## **9.2. INTERPOL<sup>213</sup>**

Another important organization to international counter-terrorist operations is INTERPOL. In terms of its basic legal framework for counter-terrorist activities, when it was created in 1946, it was envisaged that INTERPOL's primary role would be the prevention and combating of ordinary law crimes through facilitating the widest possible mutual assistance between all criminal police authorities within the limits of the laws, including through the establishment of any necessary institutions.<sup>214</sup> Significantly, INTERPOL's founding Constitution strictly forbade 'the Organization to undertake any intervention or activities of a political, military, religious, or racial character' (Article 3), effectively preventing it from engaging in counter-

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<sup>213</sup> See separate submission of J Sollier.

<sup>214</sup> Arts 2-3 INTERPOL's Constitution (adopted at the 25<sup>th</sup> INTERPOL General Assembly (Vienna, June 1956), and came into force on 13 June 1956.



terrorist activities. However, in response to the subsequent development of international law and the increase in terrorist activities, INTERPOL has been able to overcome most of these limitations, including through its 'theory of predominance' which means that it does not consider itself bound by the categorization of a particular offence by the requesting state, but rather itself examines each request on a case-by-case basis to assess whether the political or the ordinary law element is predominant.<sup>215</sup> In addition, it was subsequently agreed that INTERPOL could process co-operation requests concerning terrorist cases, albeit under certain conditions.<sup>216</sup>

Nowadays, INTERPOL has designated the fight against terrorism as a priority crime area and has committed significant resources to supporting Member countries in their efforts to protect their citizens from all types of terrorism. In doing so, it has developed a number of important tools and best practices aimed at strengthening international cooperation. One is I-24/7, its secure global police communications system, which enables INTERPOL to collect, store, analyse, and exchange information about suspected individuals and terrorist groups with its member countries. Additionally, INTERPOL co-ordinates the circulation of alerts and warnings by means of specific tools such as its colour-coded international notices system. At the forefront of its counter-terrorist activities is the Fusion Task Force. Created in 2002, the Task Force's primary objectives are to identify members of groups involved in international terrorist activities and to provide a searchable database of wanted or suspected terrorists. To assist in the subsequent locating of suspected or convicted individuals is its 'Red notice' which is aimed at facilitating the provisional arrest of a person wanted by its Member countries with a view to extradition based on an arrest warrant or a court decision; in doing so, the notice also benefits non-Member countries by alerting them to an individual's (suspected) activities. Finally, the INTERPOL-United Nations Security Council Special Notice was created in 2005 to alert Member countries of individuals and entities associated with Al Qaeda and the Taliban, as listed by the Security Council's 1267 Committee, and to help countries implement the freezing of assets, travel bans, and arms embargoes.

As with other states and international organizations, INTERPOL faces a number of important obstacles to its counter-terrorist function, which have resulted in the development of various institutional practices to overcome them. One significant source of such obstacles has been the absence of a universal definition of terrorism, especially because what is considered to be terrorism in one country may be regarded as political activism in another. In making its determinations, INTERPOL adopts an approach which is similar to that of the sectoral anti-terrorism conventions, namely by focusing primarily on the qualifying nature of the criminal acts involved rather than on the ideologies or qualifications of terrorist organizations themselves. What this means in practice is that sometimes complex and profound background analysis is required – especially in relation to offences such as membership of a terrorist organization,<sup>217</sup> training of alleged terrorists, or supporting terrorism – in order to decide

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<sup>215</sup> This framework for determining Article 3 of INTERPOL's Constitution was agreed in Resolution AGN/20/RES/11, adopted at the 20<sup>th</sup> INTERPOL General Assembly (Lisbon, 1951).

<sup>216</sup> Resolution AGN/53/RES/7, adopted at the 53<sup>rd</sup> INTERPOL General Assembly (Luxembourg, 1984).

<sup>217</sup> Especially where an organization has a political wing and an armed wing in which case the separation between the two might be extremely difficult.

whether the case can be defined as terrorism and in order to avoid the incorrect labelling of persons as ‘terrorist’.

Another important source of challenges has concerned cooperation with the Security Council, including with respect to the INTERPOL-United Nations Security Council Special Notice.<sup>218</sup> In terms of the applicable legal framework, INTERPOL and the UN entered into a Cooperation Agreement in 1997,<sup>219</sup> which establishes a general framework for cooperation, which was supplemented by two further arrangements specific to the fight against terrorism: an exchange of letters dated 5 January 2006 which set out five areas for cooperation, including the creation of a United Nations-INTERPOL Special Notice to assist the 1267 Sanctions Committee in circulating information about individuals who are the subject of their sanctions;<sup>220</sup> and a second exchange of letters dated 29 December 2006 which established increased cooperation between the UN and INTERPOL to further assist the work of the 1267 Sanctions Committee.<sup>221</sup>

Despite its successes, a number of shortcomings with these cooperative efforts have also been identified. First, the issuance and especially the updating and possible deletion of the Special Notices proved to be quite complicated, primarily because the 1267 Committee did not have direct access to INTERPOL's databases, which created some situations whereby the two bodies were working from different or even contradictory information. Furthermore, the widely known problems relating to the 1267 Committee's delisting procedure also had an impact upon INTERPOL's work. Contrary to the Red notice, the Special Notice is not based on an arrest warrant, but simply on the listing of the individual on the Security Council's list. Therefore, a tension exists as to how INTERPOL may concurrently respect its international obligations to both the 1267 Committee and the individuals concerned, not least when the latter challenge their listing. Especially problematic has been the situation where INTERPOL has information that certain individuals have been cleared of any criminal culpability by a national court in a Member country, yet such persons remain on the 1267 Committee's list. Under the terms of the United Nations-INTERPOL agreements, continued listing prohibits the removal of the Special Notice from INTERPOL's database.

Some of these shortcomings were addressed by a third Supplementary Arrangement relating to the 1267 Committee which was established in 2009. In particular, it provides for: the issuance of Special Notices at the request of UN Sanctions Committees more generally; and gives access by the UN Department of Political Affairs to INTERPOL's police information system at the request and on behalf of a given Committee. By enlarging the areas of cooperation between INTERPOL and these Committees, the scale of information sharing - including with national authorities who ultimately are largely responsible for bringing terrorist actors to justice - was significantly increased thereby making it more effective; and by granting direct access by the Sanction Committees to INTERPOL's database the information sharing process has become more efficient, streamlined, and accurate, which in

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<sup>218</sup> As of 10 January 2012, 322 Special Notices have been published.

<sup>219</sup> Cooperation Agreement between the United Nations and the Interpol Criminal Police Organization (INTERPOL) signed on 8 July 1997.

<sup>220</sup> In response to UNSC Res 1617 (29 July 2005) UN Doc S/RES/1617.

<sup>221</sup> Encouraged by UNSC 1699 (8 August 2006) UN Doc S/RES/1699.

turn will improve the protection of the rights of those individuals impacted by these sanctions regimes.

### ***Recommendations:***

- Enhance the exchange of information: Currently, there is a lack of confidence and trust in global communication networks which undermine efforts to achieve a more comprehensive and firm response to countering terrorism, especially as terrorist activities are without borders or regions. Therefore, every effort should be made to enhance the exchange of relevant information between law enforcement authorities (including through the utilization of global databases and communication networks such as INTERPOL's 24/7 communication network), which remain a key tool in combating terrorism effectively. Furthermore, any concerns regarding existing communication networks should not prevent the exchange of information via regional networks or the sharing of non-sensitive information (eg on stolen and lost documents, firearms, etc which could be used in the preparation of terrorist attacks).
- Increasing the efficiency of cooperation between the justice sector and law enforcement authorities: The rapid circulation of extradition or mutual legal assistance requests through existing communication channels is a crucial aspect of transnational cooperation that is referred to in numerous international treaties and conventions. Experience has shown, however, that numerous states are characterized by a dichotomy that prevents their justice departments from creating synergies with law enforcement authorities and vice versa. Justice authorities often ignore the tools and services at hand, while law enforcement authorities frequently lack the necessary understanding for the needs of the justice authorities and the applicable domestic and/or international legal regime. Consequently, it is recommended that joint training initiatives for justice and law enforcement authorities occur in order to generate increased mutual awareness and understanding of the other's role in the fight against terrorism, not least to achieve more holistic and cohesive approaches which strengthen rather than undermine levels of cooperation.

### **9.3. African Union<sup>222</sup>**

The AU, together with its predecessor the OAU, in its efforts to promote increased and more effective inter-state and institutional counter-terrorist cooperation, has sought to develop a common framework to regulate states' conduct and to enable them to address both the root causes and other factors that encourage terrorist activities on the continent. A significant achievement in this regard was reaching consensus on and the subsequent adoption of the OAU Convention, which represented the continent's first anti-terrorism criminal justice instrument. Not only did the Convention include a continental definition of terrorism, but it

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<sup>222</sup> See M Ewi and A du Plessis, 'Criminal Justice Responses to Terrorism in Africa: The Role of the African Union and Sub-Regional Organizations', Chapter 36.

also embedded the political exemption principle - which depoliticizes terrorist acts thereby making them punishable as criminal offences – within statutory law for the first time in Africa. It also institutionalized the extradition principle of *aut dedere aut judicare* and other important norms for inter-state cooperation on criminal matters.

Despite such positive developments and several goodwill efforts by the AU to augment the criminal justice regimes and their effective implementation – including through an additional protocol, a plan of action, and the establishment of an African Centre for the Study and Research on Terrorism (ACSRT) - the AU's legal framework suffers from a number of significant weaknesses. One of them arises from the wording of the definition of terrorist acts in Article 3 OAU Convention. Although a regional definition is normally to be welcomed, not least for the purpose of achieving increased harmonization between national criminal justice systems, the definition in the OAU Convention has raised a number of concerns. One of the most important is its potential to create impunity gaps for any terrorists who seek to justify their activities within the scope of its exemptions, for example violence committed as part of a struggle against any occupation, aggression, or domination by foreign forces. Additionally, the definition has been criticized for its negative impact upon national anti-terrorism legislation, due primarily to it being overly broad and ambiguous not least in terms of its scope, which have hindered rather than facilitated more effective continental cooperation. Furthermore, the OAU Convention failed to incorporate adequate human rights mechanisms to bring either terrorist actors (especially deterrence or punitive measures and sanctions) or Member States (for any abuses committed in their responses to terrorism) to account.

The AU has tried to address some of these legal and other obstacles existing under the Protocol to the OAU Convention, which entrusts the AU's Peace and Security Council (PSC) with the primary responsibility of harmonizing and coordinating efforts in the prevention and combating of terrorism in Africa (Article 4). It is expected to establish the operating procedures for information gathering, processing, and dissemination, as well as the mechanisms to facilitate the exchange of information on patterns and trends in terrorist activities. Significantly too, the AU has adopted a Comprehensive African Anti-terrorism Model Law<sup>223</sup> to assist Member States in the full and effective implementation of not only the OAU Convention, but also other international and UN counter-terrorist instruments. This should strengthen international cooperation not only on the continent but with non-African states also. Although not intended to be formally binding on states, the Model Law creates a 'blueprint' for states' effective domestication of regional and international legal obligations, providing guidance and a template reflecting an African perspective. Issues include provision for a new 'African arrest warrant', and the drawing up of a 'black list' of terrorist entities in Africa. One other important initiative is the ACSRT whose primary objective is to strengthen the AU's capacity to counter terrorism, in particular through promoting research, centralizing information, conducting studies, analysing different forms of terrorism and terrorist groups, as well as developing training programs, including with the support of international partners. Among some of the best practices developed by the Centre are assessments of the threats and

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<sup>223</sup> Adopted by the AU Assembly (Malabo, 30 June to 1 July 2011).

vulnerabilities of African states to terrorism; and training programmes covering critical topics such as bomb disposal, and the protection of critical infrastructures against terrorism.

Whether and to what extent the PSC and the other initiatives will achieve their primary objectives will, to a large extent, depend upon whether or not they are underpinned by the necessary financial and human resource capacities, together with the requisite levels of accompanying political will of AU Member States. Historically, counter-terrorist initiatives have been poorly resourced, and terrorism has not been considered to be a high priority issue in many parts of Africa, where Member States are struggling with other more pressing economic, environmental, developmental, and poverty eradication issues.

Another principal focus of the AU has been to develop mechanisms for increased cooperation with the various regional economic communities (RECs) in order to strengthen intra-African cooperation at both the regional and continental levels. This has included focusing on the normative and practical implementation of its counter-terrorist regime, which is a primary objective of the Protocol to the OAU Convention.<sup>224</sup> The specified measures include: the establishment of contact points on terrorism at the regional level; liaison with the AU Commission in Addis Ababa in developing measures for the prevention and combating of terrorism; promotion of cooperation at the regional level in accordance with the provisions of both the Protocol and the OAU Convention; the harmonization and coordination of national measures to prevent and combat terrorism; the establishment of modalities for sharing information on the activities of the perpetrators of terrorist acts, and on the best practices for the prevention and combating of terrorism; assistance to Member States to implement regional, continental, and international instruments for the prevention and combating of terrorism; and reporting regularly to the AU Commission on measures taken at the regional level to prevent and combat terrorist acts.

As at the continental level, however, significant challenges remain. Most of these are explicable by the fact that counter-terrorism was never a defining feature of the RECs' founding mandates; rather, as suggested by their names, the RECs were created primarily as vehicles for regional economic integration and development. Nor does any single REC possess a binding and comprehensive legal instrument which criminalizes terrorist offences. Nevertheless, they remain important players in wider continental efforts in the fight against terrorism, not least in terms of enforcing and monitoring the AU's normative and policy framework. Certainly, the principle of complementarity that underpins the AU-RECs relationship, especially if further strengthened in practice, could constitute a unique African best practice for lessons learned for other regions.

One other significant rule of law concern regarding the effectiveness of the existing legal framework in practice is the inadequacy of existing levels of human rights compliance. Although most African states have incorporated the key provisions of the African Charter into their national constitutions, not only do these often fall short when translated into national legislation and practice, but states often fail to comply with mechanisms for

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<sup>224</sup> See too AU, 'The Plan of Action of the African Union on the Prevention and Combating of Terrorism in Africa' (Algiers, 14 September 2002), Section E.

monitoring state compliance, especially the submission of state reports to the ACHPR. Nor do the African regional and continental mechanisms for protecting human rights in the context of the fight against terrorism fare much better, in particular in terms of preventing or at least limiting repressive state practices in counter-terrorist responses. Although the ACHPR has an essential role to play here, it is constrained from responding more robustly by its lack of judicial capacity and real political influence, limited as it is to making recommendations. That said, the recently created ACtHPR should be in a stronger position for ensuring the day-to-day protection of human rights and reconciling issues of counter-terrorism. What remains evident is that both institutions have important, as yet unrealized potential, to reverse current trends, not least in ensuring that the AU's normative framework is accompanied by greater human rights compliance in practice.

### ***Recommendations:***

- Every effort should be made to strengthen coordination among the RECs, between the RECs and the AU (as outlined in the Protocol to the OAU Convention), and between the RECs and the UN. Such coordination could be enhanced through regular meetings to discuss issues of implementation regarding the AU and UN regimes.
- The RECs should be encouraged to adopt common counter-terrorist strategies, including training programmes (and manuals) to harmonize counter-terrorist activities and capacity-building in their respective regions.
- The capacity of the RECs on border security and control matters needs to be improved, and the necessary technical assistance given to strengthen their enforcement and monitoring roles in the implementation of regional and international counter-terrorist instruments.
- All RECs should establish counter-terrorist bodies, such as counter-terrorist units or programmes for capacity-building, to facilitate coordination.
- All RECs and the AU should engage relevant civil society organizations to strengthen the role and involvement of the AU on the implementation of regional and UN regimes, including the UN CT Strategy, UN Security Council Resolutions 1373, 1450, and so forth. Such cooperation should be extended to the relevant UN bodies, including the CTC/CTED and CTITF.
- The AU, in coordination with the RECs, should devise a specific programme of work with the RECs. This should include a common black list of terrorist groups and individuals; and a continental arrest warrant to facilitate the pursuit of terrorists in Africa.
- The role of the PSC should be strengthened. It should meet quarterly to discuss developments in the threat of terrorism and progress with the implementation of the AU counter-terrorist regimes. Furthermore, the Committee should enhance its coordination with RECs by organizing periodic meetings with heads of RECs.

- The AU and the RECs should assist those states in need of support and capacity-building, especially in the areas of investigation, prosecution, and witness protection in proceedings on terrorism cases.
- The ACtHPR should be fully operationalized, strengthened, and given a specific mandate for the protection of human rights relating to the counter-terrorist activities of its States Parties. In this regard, the ACHPR should be strengthened and entrusted with the responsibility to streamline national counter-terrorist legislation in accordance with human rights obligations, and to ensure that no aspects of those laws contravene the African Charter.
- Sub-regional human rights courts should also be mandated and strengthened to monitor and enforce human rights in relation to governmental counter-terrorist activities. These courts should be accessible by individuals, groups, organizations, and states.
- The African Centre for the Study and Research on Terrorism should be restructured to align its human and financial resource capacities with its current mandate to strengthen its contribution to the prevention and combating of terrorism in Africa. The Centre should be encouraged to work closely and carry out joint projects with relevant civil society and other institutions. This will help to strengthen its research, information gathering, data development, and training capabilities.

#### **9.4. International Criminal Court<sup>225</sup>**

International criminal courts and tribunals have considerable experience in dealing with complex, sensitive issues relating to the prosecution of the most serious criminal acts. Consequently, they have developed a number of best practices which may inform and assist national courts and authorities especially to strengthen both their judicial (criminal and civil) and non-judicial mechanisms (including ombudsperson and parliamentary oversight) for bringing non-state terrorist actors and governmental actors alike to account, securing justice and reparations for their respective victims in the process. Two examples of the developed practices of one court, the ICC, are considered here; undoubtedly there are more which could be drawn upon and adapted to national contexts.

The first relates to the handling of confidential, classified, and other forms of sensitive information necessary for both bringing a prosecution and defending any criminal allegations, including in terms of its release to and subsequent handling by the court and any disclosure to the defence. As has been evident throughout this report, a recurring theme of considerable rule of law tension has been the reluctance (or more commonly refusal) by the executive to hand over vital evidence without which it is usually impossible for the person or people most affected – whether suspected terrorist, expelled asylum-seeker, or victim – to effectively challenge executive decision-making and/or bring successful claims for compensation. Any denial of due process or other forms of justice is so detrimental to a rule of based response to

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<sup>225</sup> See Rastan and Bekou (n 74).

terrorism that every effort must be made to find solutions to what appears to be effectively an impasse in terms of current state practice.

With respect to the ICC, the starting point is that the ICC Statute created a mixture of horizontal and vertical regimes which impose obligation on States Parties to cooperate fully with the Court, while subjecting the modalities for their execution via domestic procedures. This means that despite the traditional prerogative of states in mutual legal assistance to refuse cooperation, any refusal may become the subject of judicial examination.<sup>226</sup> Therefore, for example, any refusal based on an invocation of national security grounds is reviewable by Chambers and may lead to a finding regarding the *bone fides* of the claim and the drawing of relevant (potentially negative) inferences in the case at hand. Nor may a state invoke a *lacuna* in its own domestic law, or deficiencies thereof, as justification for its failure to perform a treaty obligation.<sup>227</sup> Importantly too, non-compliance with a request may have serious repercussions for the state concerned, which in serious cases may even lead to collective enforcement action being authorized against it under a Chapter VII Security Council resolution, though such measures are the exception rather than the norm.<sup>228</sup>

Where a request is complied with by the state concerned, there is a presumption that information obtained during the course of an investigation will be gathered for its potential use as evidence in open court.<sup>229</sup> That said, in the case of the ICC, the Prosecutor has the authority to accept documents or information, either in whole or in part, on the condition of confidentiality and subject to an agreement with the information-provider not to disclose such materials further without its prior consent.<sup>230</sup> While the ability of the Prosecutor to obtain documents and information on a confidential basis may prove critical for the investigative process, this must be balanced against other protected interests, notably the rights of the defence and the requirements of a fair trial.<sup>231</sup> On this point, the Court's Appeals Chamber has articulated a number of guiding principles: potential tensions between the requirements of confidentiality and those of a fair trial should be avoided pre-emptively by the Office of the Prosecutor; any confidentiality agreements should be concluded in a manner that will allow the Court to resolve any potential tensions that may arise; and if disclosure cannot be effected, the Chamber must provide for an appropriate remedy to ensure that fairness results, which may require consideration of other counter-balancing measures, or in the extreme situation withdrawal of affected charges or termination of the proceedings. This, however, also means that the defence does not enjoy an absolute right to the disclosure of every item of potentially exculpatory material under Article 67(2) or the inspection of

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<sup>226</sup> Art 72 ICC Statute.

<sup>227</sup> See, eg, *Prosecutor v Tihomir Blaškić* (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-14-AR108 (29 October 1997), para 65. This reflects the approach of the International Court of Justice too, see eg *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory* (Advisory Opinion) [1932] PCIJ Series A/B No 44, 24.

<sup>228</sup> See, eg, UNSC Res 1207 (17 November 1998) UN Doc S/RES/1207, where the UNSC condemned the failure of the Federal Republic of Yugoslavia to execute the arrest warrants issued by the ICTY and demanded the immediate and unconditional execution of those arrest warrants.

<sup>229</sup> Art 67 ICC Statute; ICC Regulations of the Court, ICC-BD/01-01-04 (2004), Regulation 20.

<sup>230</sup> Art 54(3)(e) ICC Statute.

<sup>231</sup> See, eg, Prosecutor's duties of disclosure under art 67(2) ICC Statute.



material under Rule 77 in its entirety – it may be restricted on the basis of judicial supervision and the requirement of confidentiality to which the judges themselves will be bound.<sup>232</sup>

The second best practice considered here relates to a tool developed for managing the vast quantities of facts and evidence that investigators, prosecutors, judges, and defence lawyers especially are required to master during the trial of any complex serious crimes, whether international crimes before an international court or domestic terrorist offences before a national court. Relating such facts and evidence to the legal requirements of these serious crimes poses a major challenge. Terrorism cases, like criminal justice for atrocities, are fact-rich; they draw upon numerous documents and witness statements. Being able to organize such data efficiently and accurately has an impact on case selection, the strength of a case, as well as fairness and judicial economy. Each piece of evidence must be analysed – page by page or, where required, paragraph by paragraph – by relating each piece of information contained in that page or paragraph with one or more of the constituent elements or one or more of the crimes with which the person is charged, including the contextual elements of those crimes.

Consequently, the ICC has adopted a mechanism of in-depth analysis charts which can assist in both ensuring the expediency of the criminal process and in protecting the rights of the accused,<sup>233</sup> including by enabling these facts and data to be handled in a systematic and organized manner which *inter alia* assist the defence in recognizing the potential relevance of disclosed materials to the defence case.<sup>234</sup> The need for fairness and expediency is not limited to the ICC; rather many of the same issues of the length of criminal processes, the associated costs, the level of bureaucracy involved, etc apply equally to the investigation and trial of complex (terrorism) cases at the national level also. Although the use of in-depth analysis charts is not without its own challenges – not least in changing the way that the involved parties work before and during a criminal trial - nevertheless the associated benefits are significant, offering a blueprint which could easily be adapted to other fora.

### **Recommendations:**

- International criminal justice institutions have developed a number of best practices for the handling of confidential information which pay due regard to the rights of the defence and the requirements of a fair trial, that may be applied to terrorism cases

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<sup>232</sup> *The Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’) ICC-01/04-01/06 OA 13 (21 October 2008), paras 47-8.

<sup>233</sup> See, eg, *Situation in the Central African Republic in the case of the Prosecutor v Jean-Pierre Bemba Gombo* (Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties) ICC-01/05-01/08-55 (31 July 2008) (*Bemba Disclosure Decision*), including paras 66, 69, 72-3; *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol) ICC-01/04-01/07-956 (13 March 2009), para 1; and *Prosecutor v Jean-Pierre Bemba Gombo* (Decision on the ‘Prosecution’s Submissions on the Trial Chamber’s 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart’) ICC-01/05-01/08-682 (29 January 2010).

<sup>234</sup> *Bemba Disclosure Decision* (n 233) para 67.

handling similar categories of classified information. These should be examined in detail in order to identify existing procedures which may be adapted by national and regional courts to overcome some of the existing evidential obstacles to bringing terrorist and governmental actors to account for their actions as well as securing justice and reparations for their respective victims.

- Dealing effectively with large quantities of facts and evidence is key to the success of a case, not least in rule of law terms. The experience of the ICC in utilizing in-depth analysis charts offers an example of important lessons learned in increasing the effectiveness of fact-rich cases, which may be transferable to national prosecutions of terrorism related cases. States are strongly encouraged to examine and consider implementing this mechanism within their domestic criminal justice systems, especially for the prosecution of serious and complex criminal offences, not least terrorist ones.

## **10. BENEFITS OF ADHERENCE TO THE RULE OF LAW AND CONSEQUENCES OF NON-ADHERENCE<sup>235</sup>**

Adherence to these norms represents a significant challenge for all states. However, the lessons of history, including recent examples, highlight the imperative to re-establish the credibility of states whose rhetoric endorses the rule of law when fighting terrorism, while their state practices suggest otherwise.

A commitment to rule of law based responses has a number of key hallmarks. One is that it is demonstrated by unequivocal actions demonstrating compliance with its precepts and underpinning legal principles in practice, even when the cost of compliance appears to be high. Another is that every effort is made to resist any exceptional measures and departures from established mechanisms and procedures. Therefore, no-one is arrested, detained, or questioned for extended periods of time on vague grounds; no exceptional interrogation methods are employed; no special detention centre openings are authorized, holding persons indefinitely without trial; no prolonged imprisonment periods for suspects are sanctioned; and no new discriminatory laws are created. Rather, those in positions of power use their judgment to resist any extra-legal or disproportionate responses, including those demanded by emotional public responses to acts of terrorism, using the moment to emphasize the importance of protecting democratic values and the rule of law. Ultimately, a refusal to erode a state's core values and principles, and insistence that counter-terrorist policies and practices are both lawful and legitimate, will safeguard a nation not least by clearly distinguishing counter-terrorism from terrorism and maintaining public confidence in executive decision-making.

In contrast, any blurring of the distinction between terrorism and counter-terrorism, including through any engagement in extra-legal responses to terrorism, generally fuels the problem

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<sup>235</sup> See especially C Campbell, 'Beyond Radicalization: Towards an Integrated Anti-Violence Rule of Law Strategy', Chapter 10.

rather than extinguishes it. Empirical evidence suggests, for example, that torturing one can result in the radicalization of one hundred, not least because a government's use of indiscriminate repression seems to assist the flow of recruits to, and communal support or toleration for, terrorist groups. While 'radicalization' of itself is not necessary problematic - the term has often been misused or misunderstood in recent counter-terrorist discourse: to engage in mass protests (with degrees of radicalization inevitable) can be to express democratic impulses - it may form the stepping stone to violent mobilization against the state by its own citizens which clearly is problematic. Therefore, in terms of identifying and addressing (potential) root causes of terrorism, it is suggested that egregious and indiscriminate harsh overt repression by the state under the guise of tackling terrorism is likely to have counter-productive effects overall, not least in terms of triggering violent mobilization against the state by its own citizens.

Given that a developed insurgency is famously difficult to defeat, the primary aim of counter-terrorism therefore must be to avoid its initial eruption (most obviously by addressing grievances). But once protest mobilization has taken place it is critical to avoid the kind of acts which can trigger 'backlash', not least the killing of protestors or mistreatment of prisoners. While strategies that entail lower levels of rule of law degradation can sometimes be effective, this seems largely limited to the declining phase of the violent protest cycle. In general, strategies that maximize rule of law adherence seem to pose the least risk of escalating conflict in the early stages. They also seem to offer the greatest possibility: (a) for avoiding circumstances leading to further rounds of mass mobilization; and (b) of containing conflict pending peace negotiations. Certainly, empirical data gathered - where states have engaged in violence rather than responding to that of others - demonstrates that state action is often key to conflict escalation, and central to 'backlash' effects, requiring 'anti-violence' rather than 'anti-terrorist' strategies. Such practices and their consequences challenge some current counter-terrorist approaches and discourse, not least in relation to the role of law itself which should not be limited to a norm-system, but should also be regarded as a system of communication in terms of messaging and framing during conflict. When insurgency has already taken root, the only feasible strategy is likely to be some dialogue with the group leading to a settlement (with inevitable compromises), with the end goal of using law to bring the adversary into a better way of doing politics, and to bring the state into operating a model of human security compatible with it. It would, of course, be much better to insist on rule of based responses from the outset and to avoid (or at least reduce) the likelihood of violent mobilization against the state.

Ultimately, when the actions of states founded upon the rule of law no longer reflect their declared values, this serves to destroy the distinction between these states and those ready to embrace or acquiesce in terrorism. It also undermines efforts to place terrorist factions at the margins of society, paving the way for more people to be radicalized and encouraged to engage in violent action against the state. Consequently, any attempts to rationalize violations of the law on the grounds of meeting security imperatives (whether or not legitimate ones) constitute a most corrosive danger to national security. Simply put, counter-terrorist responses that are not rule of law based, whatever their perceived short-term benefits, not

only lack legality and legitimacy, but they are ultimately counter-productive in policy and operational terms and difficult to distinguish from terrorism itself.

### ***Recommendations:***

- Reconceptualize the state's role as an actor, acknowledging that its 'anti-terrorist measures' may have a capacity both to suppress terrorism and insurgency and to contribute to their escalation. In any given situation, the dominance of escalatory or of suppressive effects may fluctuate over time.
- Empirical data link these escalatory effects to rule of law degradation, though the nexus is not automatic. The acts that seem to have greatest mobilizing effects (and therefore critical to avoid), are killing demonstrators (during the mass mobilization protest phase), and perceived prisoner abuse. Particular attention is therefore needed in relation to legal protections against prisoner abuse, and against the misuse of lethal force.
- The employment of hypotheticals is implicated in the promotion of these escalatory measures. Future strategies should abandon their use in favour of reliance on primary empirical data on terrorists and insurgents; on their violence; and on the effect of state action on the communities on which it impacts.
- The correct analytical approach suggested here is one of law as a system not only of norms, but also of communication.
- Simple 'balancing' metaphors for rights limitation in situations of insurgency and terrorism are inadequate. New models could provide that where a need is shown for limiting a right in a particular sphere, this limitation is compensated for by the enhancement of other rights, so that the overall level of rights protection in the area is maintained.
- There is a need to reclaim the value of democratic radicalization. Empirical data suggest that while many are radicalized, few make the jump to violent mobilization; they also suggest that egregious acts of state repression are implicated in this shift. To demonize 'radicalization' as a concept may obscure the importance of that nexus.
- The end goal is not to defeat 'the enemy', but rather to use law to bring him or her into a better way of doing politics, and to bring the state into operating a model of human security compatible with it.

## **11. CONCLUDING REMARKS**

Without a definition of terrorism there can be no fully coherent corpus of counter-terrorist law. That said, as is evident in this report, a number of relatively clear rules exist already, ranging from rules governing the use of force against terrorists; to their capture, detention, and treatment; to ultimately the trial of terrorists. Most of these rules derive from

international human rights law, though elements of the other three key sets of principles underpinning the international rule of law framework, upon which the UN CT Strategy is founded, are discernible here too. While international human rights law may be derogated from in situations of terrorism, the above analysis has shown that true states of emergency are exceptional and even if established do not justify draconian, sweeping measures. Instead, a rule of law based response requires a carefully calibrated scale of counter-terrorist measures which are a combination of a criminal justice approach based on human rights compliant domestic and international criminal law, with a preventive approach that relies on carefully assembled intelligence enabling law enforcement officers to prevent the commission of crimes as well as to prosecute those planning such crimes on the basis of clearly defined criminal offences.

A fully developed criminal justice/preventive paradigm is both legitimate and effective for tackling terrorist threats, thereby reducing the military paradigm to situations of armed conflict only, when international humanitarian law is the primary legal regime. This regime has its own internal coherence and has clear norms for dealing with means and methods of warfare that employ terrorism. Such a regime should not be confused with the range of international laws applicable outside of armed conflict, though states should ensure that in their treatment of any suspected terrorist that principles of human rights law are complied with. Furthermore, states should not seek to create or exploit arguable *lacunae* within the international rule of law framework; rather they should ensure that their policies and practices are fully within the rule of law by ensuring the highest achievable level of compliance with its underlying obligations and rights, thereby affording (suspected) terrorists the benefit of the full protection of law even in cases of doubt regarding the applicable rules.

To ensure a reduction in both impunity (for terrorist acts committed by non-state actors and for rule of law violations committed by state officials in meeting counter-terrorist security imperatives) and the lack of accountability found in this area of international law as well as others, both judicial and non-judicial means of control, accountability, and redress for victims need to be strengthened. Judicial means should be based on the established criminal justice paradigm, thereby normally excluding military trials and commissions, and should ensure that due process norms cover both criminal and other measures such as control orders or targeted sanctions. While judicial mechanisms can serve victims of terrorism and counter-terrorism by providing retributive justice, non-judicial mechanisms may also serve them by providing restorative justice, enabling the social fabric to be restored on the basis of truth and accountability. The rule of law should not just provide for the punishment of those who have committed wrongful acts, but should also provide a framework for rebuilding societies shattered by violence or the further strengthening of legal orders based on accountable government.

While many positive steps in this regard, and towards strengthening the international rule of law framework more generally, have occurred, it is evident that much essential work remains to be done. This includes strengthening the UN CT Strategy (as well as other rule of law compliant national and regional counter-terrorist strategies) in practice, not least because an effective strategy is a vital tool for preventing erratic, disproportionate, or even unlawful

executive responses under pressure. In tandem, resilience of both critical infra-structures and society need to be strengthened in order to minimize the impact of terrorist acts. The more a society is willing to accept risks, the less likely it is that its government will feel pushed to adopt intrusive or overly restrictive counter-terrorist measures. Ultimately, any erosions of the rule of law work against rather than promote or facilitate effective counter-terrorist responses. Therefore, states should concentrate not on pushing the boundaries of the law beyond breaking point, sometimes to the extent that they are indistinguishable from the very people they are seeking to outlaw and punish; but rather they should act as the principal subjects of international law that they consistently claim to be and thereby respect the rights and duties they have themselves created by treaty and custom.