

REDRESS

Seeking Reparation for Torture Survivors

**TERRORISM, COUNTER-
TERRORISM AND TORTURE**

**INTERNATIONAL LAW IN THE FIGHT AGAINST
TERRORISM**

JULY 2004



**REALISED WITH FINANCIAL SUPPORT FROM
THE EUROPEAN INITIATIVE FOR DEMOCRACY AND HUMAN RIGHTS**

The Redress Trust
87 Vauxhall Walk, 3rd Floor
London, SE11 5HJ
Tel: +44 (0)207 793 1777 Fax: +44(0)207 793 1719
Website: www.redress.org

ACKNOWLEDGMENTS

This report was written by Gabriela Echeverria, Legal Advisor (International), and edited by Carla Ferstman, Legal Director.

REDRESS would like to express its sincere appreciation to Evelyn Sook May Yuen for her assistance in the research and preparation of this report and to Kevin Laue and Clementine Olivier for their many helpful comments on the draft of this report.

CONTENTS

INTRODUCTION	1
PART 1. THE DISCOURSE.....	3
1.1. DEFINITION/NON-DEFINITION OF TERRORISM.....	3
1.1.1. <i>Defining the 'Crime' of Terrorism in Domestic Law</i>	<i>4</i>
1.1.2. <i>Vague and Overbroad Definitions of Terrorism.....</i>	<i>5</i>
1.1.3. <i>Defining the Crime of Terrorism: Some Principles and Guidelines of International Law</i>	<i>7</i>
1.1.4. <i>The Advantages and Disadvantages of Vague Definitions.....</i>	<i>11</i>
1.2. TERRORISM: A THREAT CONSTANTLY REQUIRING AN UPDATE OF INTERNATIONAL LAW.....	13
PART 2. THE LEGAL FRAMEWORK	14
2.1. TERRORISM AND COUNTERTERRORISM UNDER INTERNATIONAL LAW	14
2.1.1. <i>Counter-terrorism: A New Obligation under International Law.....</i>	<i>15</i>
2.1.2. <i>Lack of Human Rights Safeguards in Implementing the "New" Obligation to Counter Terrorism.....</i>	<i>15</i>
2.2. TORTURE AND ILL-TREATMENT UNDER INTERNATIONAL LAW	17
2.2.1. <i>The Absolute Prohibition of Torture and Ill Treatment.....</i>	<i>17</i>
2.2.2. <i>Torture: A Jus Cogens Principle and Non-Derogable Right.....</i>	<i>18</i>
2.2.3. <i>The Absolute Obligation of Non-Refoulement under International Law.....</i>	<i>19</i>
2.3. TORTURE WITHIN THE DISCOURSE OF TERRORISM: QUESTIONING ITS ABSOLUTE PROHIBITION?	21
2.3.1. <i>National Security vs. Human Rights.....</i>	<i>21</i>
2.3.2. <i>Questioning the Official Prohibition of Torture: The 'Ticking Time Bomb Exception'</i>	<i>25</i>
PART 3. THE FACTUAL IMPLEMENTATION	27
3.1. TRANSFERS: FORCEFUL TRANSFER OF PERSONS SUSPECTED OF TERRORIST ACTS	27
3.1.1. <i>Law Governing inter-State Transfers: Extraditions, Deportations and Non-Refoulement.....</i>	<i>27</i>
3.1.2. <i>Procedural Guarantees for Inter-State Transfers of Individuals: Extraditions and Deportations</i>	<i>28</i>
3.1.3. <i>The Use of 'Diplomatic Assurances' and/or 'National Security' to Circumvent the Non-Refoulement Obligation</i>	<i>31</i>
3.1.4. <i>Unlawful Renditions: Forceful inter-State Transfer of Individuals Outside Legal Procedures.....</i>	<i>36</i>
3.2. DETENTIONS	39
3.2.1. <i>Conditions of detention and treatment during interrogations</i>	<i>39</i>
3.2.2. <i>Human Rights Safeguards against Torture and Cruel, Inhuman or Degrading Treatment and Punishment during Detention</i>	<i>40</i>
3.2.3. <i>International Humanitarian Law Safeguards against Torture and Cruel, Inhuman or Degrading Treatment or Punishment during Detention</i>	<i>43</i>
3.2.4. <i>Conditions of Detention and Treatment during Interrogation</i>	<i>44</i>
3.3. REPARATION: VICTIMS' RIGHTS TO PROCEDURAL AND SUBSTANTIVE REMEDIES	55
3.3.1. <i>The Right to a Remedy and Reparations for Victims of Torture and Cruel, Inhuman or Degrading Treatment or Punishment.....</i>	<i>55</i>
3.3.2. <i>Limiting the Right to Reparation: Torture and Counter-terrorism</i>	<i>57</i>
3.3.3. <i>Absence of Valid Justifications for Torture under International Law</i>	<i>70</i>
3.3.4. <i>General Immunities for Counter-terrorism actions and Military Operations Conducted in the 'War against Terrorism:' Impunity for Torture?</i>	<i>74</i>
CONCLUSIONS	75

INTRODUCTION

Terrorism is not a new phenomenon. Neither is torture, nor States' dilemma to "balance" national security and human rights when fighting 'terror.' Throughout modern history, 'terrorism' and 'counter-terrorism' have been words commonly used in the language of law and politics. And in fact, this is not the first time that a 'war on terror' has been launched.¹

So, is it true that there was a 'before' and 'after' 11 September 2001?

The atrocities committed on 11 September 2001 in the United States' cities of New York and Washington DC, commonly referred to as 9/11, are said to have changed the way that international law and politics are perceived and should be conducted. According to the United States (US) and some of its allies, the threat posed by terrorism today is so dangerous that it not only requires recourse to the international use of force (war)² but it even necessitates a rewriting of the laws and customs governing warfare. Almost three years have passed since the events on 9/11, during which the world has been witnessing this 'war' on terrorism--from Afghanistan to Iraq, from Guantanamo Bay to Abu Ghraib. During this time, much has been written on the legality of the use of force by States and on the need to balance States' national security interests with the obligation to protect human rights. *Was the war in Afghanistan and Iraq legal under international law? Are counter-terrorism measures proportional to the threats posed by terrorism?*

But, although addressed in the "public debate," there had been less written about the effects that the 'war on terror' has had and continues to have on the *absolute* legal prohibition against torture and other forms of cruel, inhuman or degrading treatment and punishment. However, the recent scandal at Abu Ghraib prison in Iraq, where photographs and videos of US soldiers abusing Iraqi detainees in ways that constitute torture or cruel, inhuman and degrading treatment were taken and circulated in the media, brought the issue of torture to the centre of the analysis of the 'war on terror'. *Were these isolated events? Were they inevitable consequences of the particular way in which this 'war on terror' is being fought? Are they evidence of a wider policy that may be attributed to the US administration in its 'war on terror'?*

This report analyses the impact of recent counter-terrorism measures on the practice of torture and other forms of ill-treatment. It explores how the discourse of terrorism is vague enough to allow States to justify almost all governmental actions in terms of national security and by doing so (whether in a "war" or in an "emergency") suddenly justify human rights violations, including torture and cruel, inhuman or degrading treatment and punishment. Furthermore, this report reviews the rationale, that torture and cruel, inhuman or degrading treatment and punishment are defensible as "effective means" of obtaining information.

This report draws significantly on the current arguments and actions to contextualise torture and other forms of ill-treatment when linked to counter-terrorism activities, including in the context of the 'war on terror'. However, the analytical scope of the present report is wider than simply scrutinising the way in which the US-led "war on terror" is currently being waged. Among other points, this report shows how the use of the word 'terrorism' to describe certain

¹ This is not the first time that the United States frames its fight against terrorism as a "war", during the Reagan administration, the US also referred to a 'war against terror'. See Charles Hill, *The Age of Terror* (Tablott and Chanda 2002).

² States have normally defined "terrorism" as an act that endangers their national security and thus creates a state of "emergency." In claiming there is a state of emergency, many States have derogated from human rights obligations in order to implement counter-terrorism measures. However, in the case of the US, it declared a 'war' against terror, and thus has claimed that its military interventions in Afghanistan and Iraq were acts of "self-defence" and that "some" of the laws and customs of war are applicable. See, Ansah, T., *War: Rhetoric & Norm-Creation In Response To Terror*, Spring, 2003, 43 Va. J. Int'l L. 797.

actions or situations serves to justify human rights violations that otherwise would be unacceptable to the public. The report also describes examples where States have used this term to justify illegal actions that have little or no relevance with what the public understands by *counter-terrorism* activities (such as using the veil of counter-terrorism to quash minorities, political opponents or ethnic groups).

The role of the United States is central in this analysis. While it is well known that many States around the world systematically practice torture, none of these States has the capacity to influence the international community in order to alter or attempt to rewrite the rules governing its prohibition. On the contrary, the international community normally serves as a restraining force to prevent such 'rogue' States from implementing torture policies. In fact, the US and other States have deemed it legitimate to implement economic sanctions and other measures to restrain States with "bad human rights records". Furthermore, until now, no State had attempted to claim that torture and/or other forms of cruel, inhuman or degrading treatment and punishment were "legal" under international law or that their governments were not bound to refrain from using such practices.³

The current position of the US towards the prohibition of torture and cruel, inhuman or degrading treatment and punishment is therefore, important in two respects: (i) The US has the capacity to influence international law and politics much more than any other State alone; and (ii) that its position has a "signalling effect" on other States which normally implement or acquiesce to acts of torture and other forms of cruel, inhuman or degrading treatment, and even on States that normally refrain from doing so.

This report also argues that it is possible to counter terror or similar threats without breaching international law, and that in fact arguing that it is necessary to violate human rights while countering terrorism is self-defeating. International law provides States facing serious emergencies with a certain leeway or flexibility in respect of how human rights obligations should be implemented. In this regard, human rights conventions provide States parties with the right to limit or derogate from certain obligations in times of crisis. Similarly, human rights courts have recognised that some cases require a wider margin of appreciation in the application of certain human rights obligations during emergency or crisis, but without going beyond the essence of the safeguards provided.⁴ States have accepted that this power is not absolute and have established procedural and substitutive conditions for the exercise of emergency powers. For example, Article 4 of the International Covenant on Civil and Political Rights (ICCPR), provides that States may abridge human rights in "limited circumstances":

"in times of public emergency *which threatens the life of the nation* [emphasis added] and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation..."⁵

³ Even though Israel had passed domestic laws allowing its security forces to physically abuse suspects of terrorism, such laws were declared illegal by the Israeli Supreme Court. Israel never attempted to argue that such measures were legal under international law, though it has argued that the Convention Against Torture does not apply to its soldiers in the Occupied Territories. See Report of the Palestinian Society for the Protection of Human Rights and the Environment (LAW), The Public Committee Against Torture in Israel (PCATI), and The World Organisation Against Torture (OMCT) *The Application of the Convention Against Torture in the Occupied Territories*, November 2001 (www.omct.org/pdf/procedures/2004/joint/PalestineMarch2003.pdf).

⁴ See for example, *Brogan and Others v UK* (1989) 11 EHRR 117 and *Fox, Campbell and Hartle, y* ECHR Ser A No. 202, 27 March 1991, [1991] IIHRL 27.

⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 *entry into force* 23 March 1976, available at: http://www.unhcr.ch/html/menu3/b/a_ccpr.htm. See also, Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), available at:

Thus, international law recognises that emergency powers, while sometimes necessary, must be narrowly drawn in order not to erode the very rights that are being defended. This is the thin line dividing democratic States ruled by law and authoritarian regimes. A secure State is necessary to protect those who dwell within it, but any argument that human rights must necessarily be subordinated to the security of the State should be regarded with caution. A State may be said to be secure only when all of its constituent elements – its territory, its inhabitants, and its government – are secure. Security of the inhabitants includes the inviolability of their human rights. In a State where human rights are insecure the State itself is insecure.⁶ Therefore, a fight against terrorism that does not maintain scrupulous respect for human rights will not result in enhancing national security, but instead will undermine it.

In March 2002, Mary Robinson, then High Commissioner for Human Rights, stated before the United Nations Human Rights Commission:

“Some have suggested that it is not possible to effectively eliminate terrorism while respecting human rights. This suggestion is fundamentally flawed. The only long-term guarantor of security is through ensuring respect for human rights and humanitarian law.”⁷

This report is divided in three parts. Part 1 analyses the political and legal discourse on terrorism: how ‘terrorism’ is not defined under international law and thus the characterisation of terrorist acts or terrorist groups becomes a subjective value judgment. Part 2 analyses the legal framework of terrorism and counter-terrorism after the events on 11 September 2001, as well as the legal status of the prohibition against torture and ill-treatment under international law. It further shows how the discourse of terrorism has been used to undermine the absolute prohibition against torture and cruel, inhuman or degrading treatment or punishment. Part 3 describes the factual implementation of this discourse: the consequences of contextualising the prohibition against torture in the terrorist rhetoric.

PART 1. THE DISCOURSE

1.1. DEFINITION/NON-DEFINITION OF TERRORISM

Terrorism is a colloquial term; nowadays it is commonly used by politicians as well as by the media. It describes a phenomenon studied by many disciplines including law, sociology and political science. However, there is no common understanding of its meaning. The word ‘terrorism’ means different things depending on the context where it is being used and who is using it. In fact, even though the term ‘terrorism’ has been used in international treaties and UN General Assembly and Security Council resolutions, there is no definition of terrorism under international law.⁸

<http://www1.umn.edu/humanrts/gencomm/hrc29.html>; “The Siracusa Principles on the Limitation and Derogations Provisions in the International Covenant on Civil and Political Rights,” *Human Rights Quarterly*, vol. 7, no. 1 (1985).

⁶ See Bert B Lockwood, Jr., Janet Finn and Grace Jubinsky, “Working Paper for the Committee of Experts on limitation Provisions”, *Human Rights Quarterly*, vol. 7, no.1 (1985), p.72.

⁷ Mary Robinson, statement at 59th session of UN HRC, 20 March 2002 (<http://www.unhcr.ch/hurricane/hurricane.nsf/NewsRoom?OpenFrameSet>).

⁸ It should be noted that there are a number of international conventions that relate to terrorist offences. However, these conventions prohibit certain listed acts without providing for any general definition of “terrorism.” As it will be discussed below,

The word “terror” was first used to describe Robespierre’s *terrorisation* of the royalists during the French Revolution. Since then, the term has been used to describe acts or situations that vary depending on the context and subjects applying the word. As noted by the UN Special Rapporteur on Terrorism, Kalliopi K. Koufa:

...some writers have aptly underlined a tendency among commentators in the field to mix definitions with value judgments and either qualify as terrorism violent activity or behaviour which they are opposed to or, conversely, reject the use of the term when it relates to activities and situations which they approve of. Hence the famous phrase “one man’s terrorist is another man’s freedom fighter.”⁹

Terrorism seems to be among the worst defined concepts. Yet this “word with no meaning and definition” has become a political and media buzzword.¹⁰ Indeed the only consensus over the meaning of ‘terror’ and ‘terrorism’ seems to be that there is no consensus.¹¹ This is quite surprising if we take into account the widespread use of the term in the current legal and political discourses. The situation calls to mind a US Supreme Court Judge’s comment: “I can’t define obscenity but I know when I see it.”¹²

1.1.1. Defining the ‘Crime’ of Terrorism in Domestic Law

There have been several attempts to elaborate a global definition of terrorism that meets the requirements imposed by the principle of legality and at the same time is ‘ideologically neutral’. In 1996, a UN *ad hoc* committee was set up to draft a comprehensive convention on terrorism but it was precisely the definitional problem that made this attempt a failure.¹³ During the work on the UN convention, the participating States were not able to agree on such basic questions as *what* the purpose of terrorism is or *who* can commit terrorism. In particular, no consensus had been reached regarding whether a definition should cover State terrorism and where the line is to be drawn between terrorism and legitimate struggles against oppression.¹⁴

Clear definitions are extremely important when entering the field of criminal law. Unfortunately, when laws at the domestic level define “terrorist acts” and “terrorist groups”

there have been several unsuccessful attempts to define terrorism at the United Nations. Furthermore, such definition cannot be found in customary international law either, although many international crimes that states describe as ‘terrorism’ can certainly be found under customary law (i.e. taking of hostages, war crimes, crimes against humanity).

⁹ “Terrorism and Human Rights,” Additional progress report prepared by Ms. Kalliopi K. Koufa, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, UN document E/CN.4/Sub.2/2001/31, 27 June 2001, para. 25, p.8 [hereinafter UN Terrorism Report].

¹⁰ Joseba Zulaika and William A. Douglas, *Terror and Taboo, the follies, fables and faces of terrorism*, Routledge, New York and London, 1996, p.97.

¹¹ See Galip Isen, *Discourse of Evil: Speaking Terrorism to Silence*, <http://www.reconstruction.ws/033/isen.htm>, citing Alex P Schmid and Albert J. Jongman, that list 22 different elements which figure in over hundred definitions; *Political Terrorism: A new Guide to actors, authors, concepts, data bases, theories and literature*, North Holland Publishing Co., Amsterdam 1988, p.5.

¹² Judge Potter Stewart. Idem. Cf. Ted G. Carpenter, *Cato Handbook for Congress: Reducing the Risk of Terrorism*, Cato Institute Policy Analysis no.625, 12 December 1996.

¹³ In 2003, the UN General Assembly recommended that a working group be established to “settle outstanding issues in two draft conventions on terrorism, including the definition of terrorism itself.” United Nations, “UN Committee Recommends Working Group for Anti-Terrorism Treaties”, *UN News Service*, 3 April 2003.

¹⁴ Acts of terrorism normally refer to acts committed by non-State actors. However, some argue that acts committed by States may also constitute terrorism (State terrorism) and others argue that some States sponsor terrorism by aiding non-State actors who commit terrorist offences. See the Report of the Ad Hoc Committee established by the General Assembly resolution 51/210 of 17 December 1996, fifth session (12-23 February 2001), A756/37.

with the purpose of establishing criminal liability for terrorist offences, the lack of clarity present in the international sphere is reproduced. States generally use imprecise language that leaves doubts as to the acts being prohibited, or excessively broad definitions that may encompass acts few would regard as terrorism. This trend is not exclusive of 'authoritarian' regimes. Since the events of September 11, many States have adopted new laws or amended already existing ones with the purpose of combating terrorism. And, as it will be described, many of these laws have imprecise language.¹⁵ Other States had no need to amend or adopt new laws but are applying existing vague anti-terrorist laws more vigorously.¹⁶

1.1.2. Vague and Overbroad Definitions of Terrorism

Definitions of terrorism often include a description of who may be a perpetrator and who may be a target of terrorist violence (e.g., the public, the government, property). However, these definitions also attempt to set out the range of 'motives' of the perpetrator that correspond to 'terrorism', and thus what makes 'terrorists' different from ordinary criminals. By focusing on the "motives" and not on the "gravity" of the act, definitions of terrorism tend to be overly broad and have the potential to cover acts that should not be criminalised under international law (such as civil liberties).¹⁷

For example, after 9/11, a Framework Decision on Terrorism was rushed within the European Union and agreed by the EU Council in December 2001. The decision, which was to be implemented by Member States by the end of 2002, provides for a common definition of terrorist offences and harmonises criminal penalties for such offences in the EU Member States.¹⁸ The Framework Decision lists a series of offences that are to be deemed as terrorism including "attacks upon the physical integrity of a person; and causing extensive destruction to a government or public facility, ...]" that are to be punished as *terrorist crimes* if they are committed with certain specific *aims*, including the aim of: "unduly compelling a country or an international organisation to perform or abstain from performing any act." In addition, "threats to commit such acts, as well as inciting, aiding or abetting terrorism are also prohibited".¹⁹

¹⁵ See Anti-Terrorism Measures, Security and Human Rights, Development in Europe, Central Asia and North America in the Aftermath of September 11, April 2003, Report by the International Helsinki Federation for Human Rights (IHF Report).

¹⁶ For example, Spain's anti-terror laws permit the use of incommunicado detention, secret legal proceedings, and pre-trial detention for up to four years. The proceedings governing the detentions of suspected al-Qaeda operatives apprehended in Spain in November 2001, July 2002, and January 2003, among others, have been declared secret (*causa secreta*). The investigating magistrate of the *Audiencia Nacional*, a special court that oversees terrorist cases, can request *causa secreta* for thirty days, consecutively renewable for the duration of the four-year pre-trial detention period. Secret proceedings bar the defense access to the prosecutor's evidence, except for information contained in the initial detention order. In November 2002, the United Nations Committee against Torture (CAT) expressed serious concern about incommunicado detention under Spain's criminal laws. A suspect can be held incommunicado for up to five days, without access to an attorney, family notification, services such as access to health care, or contact with the outside world. The CAT concluded that incommunicado detention under these circumstances can facilitate acts of torture and ill-treatment. In Spain, most suspected terrorist detainees are held incommunicado for at least the first forty-eight hours in custody. See *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights 25 March 2003 (http://hrw.org/un/chr59/counter-terrorism-bck4.htm#P306_71146).

¹⁷ The motive of the offender must be distinguished from the intent. Regarding terrorism, the motive will be to attain a political goal (such as to alter or destroy the fundamental principles and pillars of a country or international organisation). The intent will be to intimidate a population or part of it.

¹⁸ According to article 5 of the framework decision, Member States must ensure that the terrorist offences covered by the decision are punishable with custodial sentences that are heavier than those that would apply under national law for such offences in the absence of a special terrorist intent as defined in the decision. The offences covered by the decision must also be extraditable.

¹⁹ Council Framework Decision of 13 June 2002 on Combating Terrorism, at http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_164/l_16420020622en00030007.pdf.

As observed by the International Helsinki Federation (IHF), both the criteria for determining that a particular act is a terrorist act and the elements used to characterise the offences as terrorist are sufficiently vague and imprecise as to risk arbitrary implementation.²⁰ The IHF notes that several of the elements included in the EU Framework Decision are similar to those considered by the UN Ad Hoc Committee charged with drafting a Comprehensive Convention on Terrorism (expressions such as “serious damage,” “extensive destruction,” “intimidate a population,” “compel a government or an international organization to do or abstain from doing any act”),²¹ and that the Committee had reached no consensus regarding these elements. On the contrary, some States participating in the work on the convention have voiced concern that the draft definition is so vague and imprecise that it could give rise to politically motivated interpretations and selective application.²²

The definition in the EU Framework Decision could also lend itself to interpretations that threaten legitimate dissent. The definition is so vague that it can cover such serious crimes as hijacking a passenger/civil plane to compel a government to abstain from or perform any act, but could equally cover a simple demonstration of dissent, such as those organised by anti-globalisation or animal rights activists that sometimes undertake acts that violate the law (like damaging property) to make a government or international organisation abstain from or perform an act. The EU Framework Decision on Terrorism leaves much to the discretion of the individual Member States to determine where the line between legitimate opposition and terrorism is to be drawn. Of course, the interpretation of these legal definitions depends ultimately on the judiciary, and most EU Member States have independent and strong courts that may serve as a check on any overly broad application of the laws. However, the broad wording of the decision does create uncertainty as to what conduct will actually be penalised and in particular, the effect it may have with regard to freedom of association and expression.

Another example is the new “anti-extremism law” passed by the Russian Federation in late July 2002, that introduces a range of severe sanctions for activities considered to amount to ‘extremism’.²³ Human rights activists and opposition politicians have criticised the new law for its ambiguous wording and expressed fear that it may be used to repress legitimate non-governmental activities.²⁴ The law defines “extremist activity” as the planning, organisation, preparation and commission of actions aimed at:

- undermining the security of the Russian Federation
- taking over or appropriating official functions
- creating illegal armed units
- carrying out terrorist activities²⁵
- stimulating racial, national, religious or social hatred in connection with violence or calls for violence
- disparaging ethnic dignity

²⁰ Supra note 15.

²¹ General Assembly (fifty-fifth session), Sixth committee, Draft comprehensive convention on international terrorism, working document submitted by India (A/C.6/55/1). It should also be noted that similar elements are present in the 1997 UN Convention for the Suppression of Terrorist Bombings and the UN 1999 Convention for the Suppression of the Financing of Terrorism. However, in these conventions the broader phenomenon of “terrorism” is not defined but only the specific forms of terrorism that the conventions cover.

²² General Assembly (fifty-sixth session), Sixth Committee, Measures to eliminate international terrorism – Report of the Working Group (A/C.6/56/L.9). See also International Commission of Jurists, *Terrorism and Human Rights*, p. 205.

²³ Federal law on counteraction to terrorism, at <http://www.panorama.ru/works/patr/govpol/> (in Russian).

²⁴ See for example, Nabi Abdullaev, “Anti-Extremism Bill Riles Human Rights Activists”, St Petersburg Times, 7 June 2002; Robert Coalson, “Getting radical about extremism”, *RFE/RL Newswire*, 18 July 2002 and Fred Wair: “Russian bill pits free speech against national security”, *Christian Science Monitor*, July 2002.

²⁵ “Terrorist activities” are defined in previously existing Russian legislation.

- carrying out mass disorders, hooligan acts and vandalism acts motivated by political, racial, national or religious intolerance or hatred or intolerance or hatred against a particular social group
- propagating exclusiveness, superiority or inferiority of citizens on the basis of their religious beliefs or their social, racial, national, religious or linguistic affiliation.²⁶

A number of these elements defining extremist activities, such as “undermining the security of the Russian Federation,” “disparaging ethnic dignity” and “propagating exclusiveness, superiority or inferiority of citizens on the basis of their religious beliefs or social, racial, national or linguistic affiliation,” are vague and overly broad. Furthermore, no reference is made to the *gravity* of threat these actions must pose in order to be subject to the law.²⁷

Vague and/or overly broad definitions involve a fundamental measure of uncertainty and risk criminalising conduct that has nothing to do with what is normally understood by terrorism. Vaguely worded laws violate the fundamental principle of legality and lend themselves to arbitrary enforcement.²⁸ These definitions may result in interpretations that unduly restrict legitimate exercise of basic civil rights such as freedom of expression, association and assembly, or the rights of minorities to exercise their right to self-determination. What is more, these definitions lend themselves to selective application against opposition groups on the basis of political considerations.

Vaguely worded definitions of terrorism in domestic laws are particularly worrisome when applied by States lacking general human rights safeguards. The use of the label “terrorism” can legitimise the measures applied by a government to counter the said activity. For example, the Russian Federation, by comparing its own campaign in Chechnya with the US-led campaign against al-Qaeda and Osama bin Laden, has been able to reduce significantly the international scrutiny of its human rights record in Chechnya.²⁹ And second, by defining the problem as “terrorism” States have the prospect of generating greater international support for their position and securing bilateral and multilateral assistance, such as transfers,³⁰ extraditions of ‘terrorist’ suspects or obtaining military aid.³¹ As a recent report by a UN special working group on counter-terrorism policy concluded: “*labelling opponents or adversaries as terrorist offenders is a time-tested technique to de-legitimise and demonise them*”.³²

1.1.3. Defining the Crime of Terrorism: Some Principles and Guidelines of International Law

Despite the difficulties in drawing the line between terrorism and the legitimate struggle against oppression,³³ there are clear principles of international law that determine which acts should not be criminalised and which acts should not be justified on the basis of being part of

²⁶ IHF Report, supra 15.

²⁷ Ibid.

²⁸ See International Commission of Jurists, *Terrorism and Human Rights*, supra.

²⁹ See IHF Report, supra note 15, Chapter on Human Rights Abuses in Central Asia and Chechnya: the International Response After September 11.

³⁰ The inter-state transfer of individuals is analysed in Part 3 of this Report.

³¹ P. Ramsamy, A Discourse on Terrorism, Department of Political Science, National University of Malaysia, 15 January 2002 (<http://www.tamilcanadian.com/eelam/hrights/html/article/SU001021114204N209.html>) .

³² Report of the Policy Working Group on the United Nations and Terrorism, Annex to A/57/273, S/2002/875.

³³ See generally the Report of the Ad Hoc Committee established by the General Assembly resolution 51/210 of 17 December 1996, fifth session (12-23 February 2001), A756/37.

a political struggle. As discussed above, a definition cannot characterise as a criminal offence, acts which are "rights" protected under international human rights or humanitarian law—for example, the rights of freedom of expression, association and assembly endorsed in the International Covenant on Civil and Political Rights (ICCPR) or acts protected under international humanitarian law such as the right of belligerents to take up arms.

At the same time, international law protects the rights to self-determination, freedom and independence by recognising certain exceptions, where violent acts that would normally constitute domestic crimes are not penalised as such because they are political in nature: *political offences*.³⁴ However, although the political offence doctrine protects the absolute right to self-determination, independence and freedom as derived from the Charter of the United Nations, it is nonetheless *limited* under international law. As will be explained, there are certain acts that are so heinous that they cannot be considered 'political offences'. But it is the *gravity* of the act that limits the applicability of the political offence doctrine, not the *aims* or *objectives*. Therefore definitions of terrorism that cover violent acts with political aims should not criminalise those acts that under international law are considered "political offences".

The political offence exception doctrine was originally designed to protect the right to self-determination, freedom, and independence by providing an exception to inter-State obligations to extradite individuals.³⁵ As noted by the US Senate:

"There is no question that the British authorities in 1776 would have considered the guerrilla operations of the Americans to be murder and assault....Yes, there is no doubt whatsoever that such a treaty would have required us to extradite the patriots who fired the shot heard 'round' the world to swing on a British gallows....For this reason, the infant United States was properly wary of extradition treaties....And remembering our revolutionary origin, American courts developed the doctrine of the political offence exception: No extradition if the accused was sought for violent actions relating to a battle for his country's freedom." US Congress, Senate, Foreign Relations Committee, *Senate Report on Supplemental Extradition with the United Kingdom*, (Washington, DC: GPO, July 1985-86).

The political offence exception doctrine is well-established under international law and has been applied extensively by States.³⁶ The concept of political offence plays a very important role not only in extraditions but also regarding amnesties and prosecutions.³⁷

³⁴ While in some cases the political offence exception has been recognised even in the absence of a political uprising (see *Regina v Governor of Brixton Prison ex Parte Kozlunsky and others*, (1955) 1 Q.B. 540 (Judgm. of 13 Dec 1954); *in re Gonzales*, 217 F. Supp. 717 (S.D.N.Y. 1963) (Judgm. Of 23 May 1963), 34 I.L.R. 139, 141s (1967)) it is commonly required that the perpetrator is a member of a political organisation engaged in an uprising (Bassiouni, M.C., *The Political Offence Exception in Extradition Law and Practice in International Terrorism and Political Crimes*, 398, 405ss (M.C. Bassiouni ed. 1975). On the meaning of *political offence* see also Brownlie, *Principles of International Law* (5th ed. 1998) pg 319.

³⁵ Article 1 of the Charter of the United Nations, signed at San Francisco on 26 June 1945 and entry into force 24 October 1945, in accordance with Article 110. The requested State has the discretion to refuse extradition if there are substantial grounds for believing that the fugitive will be persecuted on account of race, religion or membership of a political organisation (Brownlie supra note 34; Volger, *Perspective on Extradition and Terrorism*, in *International Terrorism and Political Crimes* 391, 395 (Bassiouni ed. 1975); Oppenheim, *International Law* (Robert Jennings/Arthur Watts eds. 9th ed. 1992)).

³⁶ For general discussion on the background to the political offence exception see Phillips, R. S., *The Political offence exception and terrorism: its place in the current extradition scheme and proposals for its future*, 15 *Dick.J.Int'l L.* (1997) 337.

³⁷ Amnesties are normally justified, sometimes explicitly, as applying only to political, and not "commonly criminal," acts. See Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?* 43 *Va. J. Int'l L.* 173 (2002).

This principle is also reflected in the laws of war. For example, Article 6(5) of the 1977 Protocol II to the Geneva Conventions, that regulates internal armed conflicts like civil wars, specifically calls for a broad political amnesty to be granted to "persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained".³⁸ But as explained by the International Committee of the Red Cross (ICRC), the amnesty provision cannot be read as support for amnesties for war crimes or other offences committed in internal armed conflicts that constitute crimes under international law.³⁹ In other words, when international humanitarian law is the applicable *lex specialis*⁴⁰ regulating the manner in which war is conducted (*jus in bello*), the political offence exception is also recognised and it does not apply for the most serious crimes (i.e. like wilful killing of civilians).⁴¹

International humanitarian law regulates the manner in which war is conducted, including when persons are fighting against foreign occupiers and also against the ruling regimes of States (i.e. national liberation movements, revolutions or civil wars).⁴² Accordingly, belligerents should not be prosecuted when they fully respect the laws and customs of war, even though some acts would be considered as criminal outside an armed conflict (such as killing a person that is a combatant).⁴³ But as said before, certain acts are so heinous that they cannot be considered to be committed as part of a valid or legitimate "objective".⁴⁴ And thus, if a belligerent commits violent acts that are illegal according to the principles of international human rights

³⁸ As shown in the *travaux préparatoires*, Article 6(5) of the 1977 Protocol II to the Geneva Conventions was drafted with the intention to avoid common *political* persecutions (i.e. for treason or sedition) after [non-international] armed conflicts like civil wars. However, the drafters did not intend to provide an absolute amnesty. For example, the Soviet representative contended that persons guilty of crimes against humanity and genocide should not receive protection under a political amnesty, but rather 'rules should be laid down for their punishment.' Cited in N. Roht-Arriaza (1995), p. 59 fn 7 and 8.

³⁹ See letter of the ICRC Legal Division to the ICTY Prosecutor of November 24, 1995 and to the Department of Law at the University of California of 15 April 1997 (referring to CDDH, Official Records, 1977, Vol. IX, p. 319). Law at <http://www.redress.org/casework/AmicusCuriaeBrief-SCSL1.pdf>.

⁴⁰ The International Court of Justice decided in the Nuclear Weapons Advisory Opinion, that international humanitarian law acts as *lex specialis* to determine whether there has been an arbitrary deprivation of the right to life. *Legality of the Threat to Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ REP. 226 (July 8).

⁴¹ The Statute of the International Criminal Court lists crimes under international law that can be committed during peace and wartime. Article 8 lists acts that constitute war crimes, such as wilful killing of civilians or other protected persons under the Geneva Conventions; torture or inhuman treatment, including biological experiments; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; etc. See ICC Statute, U.N. Doc. A/CONF.183/9.

⁴² Article 1 of Protocol I states: "4. The situations referred to in the preceding paragraph include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." [Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)]. Similarly, Article 1 of Protocol II establishes: "1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." [Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977].

⁴³ See section on Prisoners of War, *infra* notes 364-370.

⁴⁴ On proportionality and other principles regulating the conduct of war see: Best, Geoffrey: *Humanity in Warfare. The Modern History of the International Law of Armed Conflicts* (London: Methuen, 1980); Green, L.C.: *The Contemporary Law of Armed Conflict*. (Manchester, Canada: Manchester University Press, 1993), Greenwood, Christopher: *Command and the Laws of Armed Conflict*, Strategic Combat Studies Institute Occasional Paper No.4, (Camberley: SCSI 1993), Greenwood, Christopher: 'Jus ad bellum and jus in bello in the Nuclear Weapons Advisory Opinion.' In *International Law, the International Court of Justice and Nuclear Weapons*. Edited by Chazournes, L. Boisson de; Sands, P. Cambridge University Press, 1999.

and humanitarian law no political offence exception can apply to shield the prosecution or extradition of the alleged perpetrators⁴⁵:

“No act [should] be regarded as political where the nature of the act is such as to be violative of international law, and inconsistent with international standards of civilized conduct...”⁴⁶

Similarly, acts that have political aims but fall within the protection of the political offence doctrine should not be criminalised (as ‘terrorism’ or any other offence). The need to respect this principle in the context of terrorism is clearly reflected in the 1987 General Assembly resolution denouncing the crime of terrorism:

“Reaffirming also the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination, and upholding the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”⁴⁷

Various extradition treaties are now restricting the political offence exception but unfortunately, the language used to exclude certain acts as ‘political offences’ is as vague and imprecise as the terrorism definitions.⁴⁸ Similarly, some international agreements are limiting the political offence exception but not always for the most serious crimes under international law, but rather, for vaguely defined acts of “terrorism”.⁴⁹ Consequently, under this new extradition system, an individual who has committed acts against a government and has fled to escape prosecution can be extradited without recourse to the political offence exception if the person is labelled a “terrorist”. No consideration needs to be given to the gravity of the “acts” committed or to the “regime” under attack. When assessing the extradition request, without the option of the political offence exception, it will make no difference for the sending State whether the acts allegedly committed were massive murder of civilians or lawfully killing soldiers, or whether the regime was democratic and respectful of human rights or repressive, colonial, racist or foreign occupier.

There are still other important human rights safeguards protecting individuals in extradition procedures (such as the prohibition to extradite a person to a country where there are substantial grounds to believe that he/she might face torture or other form of ill-treatment).⁵⁰ However, the developments in extradition proceedings to limit the political offence exception

⁴⁵ See generally REDRESS’ Amicus Brief on the Legality of Amnesties under International Law at <http://www.redress.org/casework/AmicusCuriaeBrief-SCSL1.pdf>.

⁴⁶ *Re Doherty*, 599 F. Supp. 270, 274 (S.D.N.Y. 1984). *Ahmad v. Wigen*, 726 F. Supp. 389, 407 (E.D.N.Y. 1989) (E.D.N.Y. is United States District Court for the Eastern District of New York). On 7 May 1996 the extradition magistrate denied Dr. Abu Marzook’s petition and ruled that he was extraditable because there was probable cause that he committed “crimes against humanity” and therefore he could not invoke the political offence exception. *Idem*.

⁴⁷ UN GA Res. A/RES/42/159, 94th plenary meeting, 7 December 1987.

⁴⁸ See for example Article 4 of the Extradition Treaty between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the United States of America (http://members.freespeech.org/irishpows/bb3/extradition_treaty.htm).

⁴⁹ See for example European Convention on the Suppression of Terrorism, Jan. 27, 1977, Eur. T.S. No. 90, 15 I.L.M. 1272, art. 1.

⁵⁰ See section on *non-refoulement* in Part 2 Legal Framework.

raise serious concerns with regard to the extent to which States are undermining the principle of self-determination when implementing anti-terrorism measures.⁵¹

1.1.4. The Advantages and Disadvantages of Vague Definitions

Restricting the term terrorism to clearly defined “politically motivated” acts that reach the threshold of “severity” to become for example, crimes against humanity or war crimes, is not always politically desirable.⁵² As explained above, “terrorism” is always linked with the political *aim* of challenging, destabilising or changing a regime and thus, by having unclear definitions of terrorism or simply no definition, States can label any dissident or rebel a ‘terrorist’. By doing this, States can de-legitimise and demonise the dissidence or rebellion, as well as dehumanise the dissidents/rebels (“terrorists” are normally described as individuals or groups that indiscriminately kill people, have no respect for human lives, and prefer violence to peace and harmony). Interestingly, Nelson Mandela’s African National Congress, while fighting against the Apartheid regime in South Africa, was considered according to a 1988 Pentagon report one of the “*more notorious terrorist groups*”.⁵³

Although vague definitions allow for arbitrary enforcement, if States have a strong and independent judiciary the imprecise language is less problematic. For this reason, it is common to see that during “crisis” or “emergencies,” governments tend to restrict the role of the judiciary in determining the appropriateness of security measures.⁵⁴ On the other hand, vague and imprecise definitions are very dangerous when there is a lack of independence in the judiciary or an ineffective judicial system and when States lack international scrutiny by human rights mechanisms, such as the European and Inter-American Court of Human Rights or UN human rights bodies like the Human Rights Committee.

This problem becomes more obvious at the international level when States execute international anti-terrorism measures. Implementation of international judicial decisions depends completely on the political will of States and tribunals rely on the pressure that the international community puts on States to comply with their decisions (i.e. decisions of the International Court of Justice are binding but there is no mechanism of enforcement).⁵⁵ Since there is no international definition of terrorism, States enjoy complete discretion when deciding what constitutes terrorism and what counter-terrorist measures are appropriate at the international level. If international courts or tribunals decide that the actions of States do not accord with international law, States can choose not to comply with such decisions. There are plenty of examples of States disregarding the decisions of international tribunals.

⁵¹ See notes 10 and 31.

⁵² War crimes can only be committed during armed conflicts but crimes against humanity can be committed during peacetime and war. See ICC Statute note 41. It is not completely clear whether non-state actors can commit crimes against humanity outside an armed conflict, although the majority of international jurists have qualified the attacks of September 11 in the US as a crime against humanity. For example, Benjamin Ferencz, former Nuremberg Prosecutor, explains: “Hijacking passenger planes and deliberately and intentionally smashing them into large buildings, thereby causing the death of thousands of innocent civilians is clearly a crime against humanity. With origins going back to antiquity, the judicial punishment of such crimes at the Nuremberg trials after the Second World War was affirmed by the United Nations and in many courts since that time... We’re not re-writing any rules. We don’t have to re-write any rules. We have to apply the existing rules. To call them “terrorists” is also a misleading term. . . We try them for mass murder. That’s a crime under every jurisdiction and that’s what’s happened here [on 9-11] and that is a crime against humanity.” (<http://www.benferencz.org/>)

⁵³ See Noam Chomsky, *Hegemony or Survival* (Penguin 2004) p. 110, pp. 3 citing Joseba Zulaika and William Douglas, *Terror and Taboo* (Routledge, 1996), p.12

⁵⁴ A good example is Guantanamo Bay, where the US executive branch argued that US courts had no jurisdiction. See Part 3, section 3.4.3.1. (Determining the legal status of detainees: due process remedies)

⁵⁵ The only enforcement mechanism within the United Nations system is the Security Council. The Council has the option to authorise military force under chapter VII of the UN Charter. See note 80 and accompanying text.

For example, in 1986, the US refused to accept the overall jurisdiction of the International Court of Justice.⁵⁶

But, some writers and political analysts highlight one additional issue. Having a clear definition of terrorism poses a problem to States when scrutinising *counter-terrorism* activities. For this reason, States tend to be obscure in their domestic definitions of terrorism and in the way they use these definitions.⁵⁷ For example, during the Reagan administration in 1981, a US Army manual defined terrorism as “the calculated use of violence or threat of violence to attain goals that are political, religious, or ideological in nature...through intimidation, coercion, or instilling fear.”⁵⁸ Since the definition of “terrorism” was virtually the same as the definitions of “counter-insurgency” and “counter-terrorism” in military manuals,⁵⁹ this and similar definitions were hardly used and finally replaced. Some observers have noted, that even the reformulation of these definitions still made “no principled distinction between ‘terror’ as defined by the US Congress and ‘counter-insurgency’ as allowed in US armed forces manuals”.⁶⁰

The line between terrorist acts and counter-terrorism activities is not always clear. Notably, in 1987, the US, as part of its ‘war on terror’, ordered its forces in Nicaragua to go “after soft targets” and to avoid the Nicaraguan army.⁶¹ This decision was taken after the International Court of Justice had declared the United States’ use of force against Nicaragua unlawful,⁶² and after the Security Council had endorsed the judgment and called on all States to observe international law (the US vetoed the resolution) and the General Assembly had passed a similar resolution.⁶³

Even though the *Nicaragua* case is a clear example where a State’s “counter-terrorism” measures against another State are considered illegal under international law,⁶⁴ some still argue that “the acts need to be analysed according to the surrounding circumstances...Many struggles for political freedom, such as the Contra insurgency in Nicaragua or the anti-Castro insurgency...have had some features in common with full-blown terrorism, but are distinguished as legitimate assertions of inalienable rights,”⁶⁵ in other words, that it is not possible to define ‘terrorism’ or ‘counterterrorism’ because it depends on the specific ‘actors’ and on the ‘validity’ of their aims.

⁵⁶ The US accepted the ICJ’s compulsory jurisdiction in 1946 but withdrew its acceptance following the Court’s judgment in 1984 that called on it to “cease and to refrain” from the unlawful use of force against Nicaragua. The US was “in breach of its obligation under customary international law not to use force against another state” and was ordered to pay reparations, although it never did, cf. *Nicaragua v. United States*. See note 62.

⁵⁷ Chomsky, supra note 53.

⁵⁸ The official US Code gave a more elaborate definition, essentially along the same lines. For US definitions see Chomsky, “Internationals Terrorism: Image and Reality”, in Alexander George, ed. *Western State Terrorism* (New York: Routledge, 1991).

⁵⁹ See Scott Atran, *Science* 299 (7 March 2003).

⁶⁰ *Idem*.

⁶¹ General John Galvin, commander of the US Southern Command (SOUTHCOM) explaining strategy to Congress; see Fred Kaplan, *Boston Globe*, 20 May 1987.

⁶² International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. U.S.*), Merits 1986 ICJ Report, 14, 114 (June 27).

⁶³ Only two countries opposed this resolution: the US and Israel (A/RES/43/11, 36th plenary meeting, 25 October 1988).

⁶⁴ The ICJ ruled that any form of intervention is “prohibited if it interferes with the sovereign right of choice of a political, economic, social and cultural system, and the formulation of policy”. According to the Court, intervention is “wrongful when it uses methods of coercion in regards to such choices”. See supra note 62.

⁶⁵ John Alan Cohan, *Formulation of a State’s Response to Terrorism and State-Sponsored Terrorism*, 14 *Pace Int’l L. Rev.* 77) 2002; citing Louis Rene Beres, *The Legal Meaning of Terrorism for the Military Commander*.

1.2. TERRORISM: A THREAT CONSTANTLY REQUIRING AN UPDATE OF INTERNATIONAL LAW

It has been argued that the threat of terrorism is greater than ever, that terrorists can have access to weapons of mass destruction, that the violence of 9/11 is unprecedented, and that an unregulated war is required to fight this new evil. According to some politicians and academics in the US, including public officials, international law “and” domestic law are irrelevant.⁶⁶ *But is it true that the world suddenly became extraordinarily dangerous on 9/11, requiring “new paradigms” that dismantle international law and institutions? Are the 1949 Geneva Conventions obsolete? Is domestic law—like the US Torture Act (18 U.S.C. section 2340)—inadequate to fight terrorism?*

By taking a look back at the last 50 years, it is possible to see that this is not the first time that the world has come across ‘an unprecedented danger’ that ‘requires’ a reformulation of international law and even of domestic law. In 1961, for example, US Attorney General Robert Kennedy, rejected a legal brief that held the Bay of Pigs invasion to be a violation of US neutrality laws by arguing that the US-run forces were “patriots” and therefore none of their activities “appear to be violations of our neutrality laws,” which “clearly...were not designed for the kind of situation which exists in the world today.”⁶⁷

Similarly, the attacks against Nicaragua—one of the highest priorities of the then ‘war on terror’ launched as the Reagan administration took office in 1981— were justified because “the policies and the actions of the government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States”.⁶⁸ Despite the general condemnation by the international community of US activities in Nicaragua,⁶⁹ the Reagan administration justified its [counter-terrorism] activities in Nicaragua on the basis that: Libyan Colonel Qaddafi was sending arms and adversaries to Nicaragua “to bring his war home to the United States”,⁷⁰ the Soviet Union had implanted there “a privileged sanctuary for terrorist and subversives just two days’ driving from Harling, Texas”⁷¹ and Soviet MiGs were threatening the US from Nicaraguan bases.⁷²

None of these “threats” were ever proved, but because of the last assertion, it was argued, a bombing in Nicaragua was necessary. Questions as to the reliability of this last claim were made, but it was added that if they were accurate, then it was clear that the US would have to bomb Nicaragua, because the planes would be “capable against the United States” (Senator Paul Tsongas).⁷³ These considerations were taken even after the decision of the

⁶⁶ See for example, Wedgwood, R., Keynote address *After September 11*, at Symposium, Responding to Rogue Regimes: From Smart Bombs to Smart Sanctions, 36 New Eng.L.Rev 725 (Summer 2002); Glennon, M.J., Military Actions Against Terrorists Under International Law, The Fog of Law: Self Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter, 25 Harv. J.L. & Pub. Poly 539, 540 (2002). Also the US administration, arguing that the Geneva Conventions do not apply, Donald H. Rumsfeld, Department of Defense News Briefing (Jan. 11, 2002) (transcript available at http://www.dod.gov/news/Jan2002/t01112002_t0111sd.html). Some even argue that in the context of terrorism the international prohibition against torture is not always applicable, Alan Dershowitz, *Want To Torture? Get a Warrant*, S.F. Chron., Jan. 22, 2002, at A19, Moore, M., *Torture and the balance of Evils*, 23 Israel L. Rev. 280, 323 (1989).

⁶⁷ Robert F. Kennedy cited in Michael McClintock, *Instruments of Statecraft* (Pantheon, 1992), p. 23.

⁶⁸ *New York Times*, 2 May 1985.

⁶⁹ See footnotes 62, 63, 64 and accompanying text.

⁷⁰ Ronald Reagan’s address to the American Bar Association, July 1986 in Chomsky, *Turning the Tide* (South End, 1986), p. 144.

⁷¹ Remarks at the White House Meeting for supporters of the United States Assistance for the Nicaraguan Democratic Resistance, 3 March 1996. Walter Robinson, *Boston Globe*, 22 March 1986.

⁷² Chomsky, *supra* note 53 pgs 103-104.

⁷³ *Idem*.

International Court of Justice had declared illegal the US intervention and support of the 'Contras' in Nicaragua.⁷⁴

Arguments claiming that a new and unprecedented terrorist danger exists today [and thus new rules are required] should be taken cautiously. This claim has been made several times over the past. It is reasonable to establish that strong measures to fight non-State terrorism and even 'non-State terrorism supported by States' need to be implemented; however these measures must conform with the rule of law. Otherwise, it will continue to make no difference if violent activity is qualified as terrorism or counter-terrorism, but it will only depend on the value judgment given by the persons defining it.

PART 2. THE LEGAL FRAMEWORK

2.1. TERRORISM AND COUNTERTERRORISM UNDER INTERNATIONAL LAW

As has been explained, there is currently no global definition of terrorism. However, there are several documents and instruments that consider the question of terrorism and counter-terrorism under international law. This is particularly so since the events of September 11, when the global campaign against terrorism assumed a prominent place in the work of many international organisations.

Several post-September 11 measures adopted to implement counter-terrorism procedures at the international level have significant consequences. In particular, as identified by most human rights bodies, there seems to be a tension between counter-terrorism and the need to guarantee human rights. Counter-terrorism measures have ranged from the strengthening of mutual cooperation and intelligence-sharing between police departments and security intelligence services and the adoption of new legislation to deal with the financing of terrorist activity,⁷⁵ to the adoption of new national security legislation to provide additional powers to investigative authorities and which introduce separate procedural frameworks for the investigation of terrorist offences,⁷⁶ including procedures for arrests, detentions⁷⁷ and trial. Under the stated intention of combating terrorism certain governments have applied these separate procedural frameworks to oppress on minority groups and political opponents.⁷⁸ The reach of counter-terrorism measures extends far beyond the criminal law. In many

⁷⁴ The 'counter-insurgency' supported by the US caused a lot of damage among the Nicaraguan population. A Reagan State Department official and historian Thomas Carothers observed that for Nicaragua, the death toll "in per capita terms was significantly higher than the number of US persons killed in the US Civil War and all the wars of the twentieth century combined." Thomas Carothers in Abraham Lowenthal, ed., *Exporting Democracy* (John Hopkins, 1991), his emphasis. See also Carothers, *In the Name of Democracy* (California, 1991).

⁷⁵ See, for example, UN Security Council Resolution 1373 (2001) of 28 September 2001, S/RES/1373 (2001); UN Security Council Resolution 1267/1999 of 15 October 1999; Council Regulation (EC) 881/2002, 27 May 2002; Council Regulation (EC) 2580/2001, 27 December 2001; Executive Order 13224 of 23 September 2001 (USA).

⁷⁶ E.g., use of 'stress and duress' techniques during investigation; recourse to computer profiling and other restrictions on privacy; unlimited rights of search and seizure.

⁷⁷ E.g., the holding of so called 'enemy combatants' in Guantanamo Bay, Cuba outside of the reach of the law; the adoptions of new powers which allow for the indefinite detention of terror suspects (United Kingdom).

⁷⁸ This has been reported in respect of Russia and Uzbekistan, among other states. See, generally, International Helsinki Federation for Human Rights, *Anti-terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11*, April 2003, available at: http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=390 (last accessed June 2004).

instances it impacts upon border controls and asylum and refugee processes and procedures for accessing information held by governments.⁷⁹

2.1.1. Counter-terrorism: A New Obligation under International Law

Chapter VII of the UN Charter grants the Security Council powers to take decisions binding upon all UN member States in order to maintain or restore international peace and security. In this respect, the Security Council may impose various forms of sanctions and, if other measures prove inadequate, it may authorise military action. Since the early 1990's, the Security Council has adopted a number of resolutions imposing sanctions on regimes found to support terrorism, including sanctions on the Taliban regime in Afghanistan.⁸⁰

On 12 September 2001, the Security Council took the unprecedented step of determining that 'terrorism' constitutes a threat to international peace and security, in its Resolution 1368.⁸¹ Equally important and unparalleled is the Security Council's subsequent Resolution 1373 (2001) of 28 September 2001 to create an international obligation to adopt specific measures to combat terrorism. Resolution 1373 also 'called on' States to take other steps to prevent and suppress terrorist acts. The Resolution included measures such as the screening of asylum seekers before granting refugee status and the criminalisation under domestic law of the provision of funds to terrorist organisations.⁸²

Thus, implementing counter-terrorism measures is not a matter of national policy anymore. After 9/11, UN Member States are not only entitled to defend their "national security" against terrorist threats but now have an obligation under international law to implement specific measures as set out in Resolution 1373 as well as "other measures" to combat terrorism.

2.1.2. Lack of Human Rights Safeguards in Implementing the "New" Obligation to Counter Terrorism

While the 2001 Security Council resolutions create an international obligation under Chapter VII of the UN Charter to take measures against terrorism, they do not establish a clear monitoring mechanism to review that such measures comply with other international obligations, including those arising under human rights and international humanitarian law. As observed by the Special Rapporteur on Terrorism:

"there is currently no international institution with a clear mandate to assess whether measures taken and justified by a State as necessary to combat terrorism are in violation of human rights standards which it has accepted, or which would require that a derogation be made. And it is, indeed, unfortunate that the Counter-terrorism Committee established by the Security Council does not believe this to be part of its mandate".⁸³

⁷⁹ This has been documented most recently in Sweden and the United States. See, International Helsinki Federation report, *ibid.* See also, European Commission Working Document, The relationship between safeguarding internal security and complying with international protection obligations, 5 December 2001 (COM 743/2001), at http://europea.eu.int/eur-lex/en/com/wdc/2001/com2001_0743en01.pdf.

⁸⁰ Security Council Resolution 1267 (1999), 15 October 1999.

⁸¹ The Resolution establishes: "Determined to combat by all means threats to international peace and security caused by terrorist acts" Security Council Resolution 1368 (2001), adopted by the Security Council at its 4370th meeting, on 12 September 2001.

⁸² S/RES/1373 (2001).

⁸³ UN Terrorism Report, *supra* note 9.

The tension between human rights and international humanitarian law obligations and the obligations to take measures to counter terrorism is reflected in the discourse of United Nations treaty monitoring bodies. For example, in considering the periodic report of the United Kingdom in December 2001, the UN Human Rights Committee noted with concern legislative measures being considered by the government that could have “far-reaching effects” and that would require derogations from its human rights obligations. During the questioning by the Committee, the UK reportedly invoked Article 103 of the UN Charter to argue that its obligations under Security Council Resolution 1373 took precedence over its obligations to the UN Human Right Committee.⁸⁴ The Committee clearly noted that: “The State party should ensure that any measures it undertakes in this regard [pursuant to Security Council resolution 1373 (2001)], are in full compliance with the provisions of the Covenant, including, when applicable, the provisions on derogation contained in article 4 of the Covenant.”⁸⁵ A similar position was taken by Sweden in a case before the UN Committee Against Torture, however the Committee only concluded that the author had not made out a case of violation of article 3 of the Convention against Torture, without addressing Sweden’s justifications under Resolution 1373.⁸⁶

Shortly after the adoption of Security Council Resolution 1373, a Counter-terrorism Committee was established to monitor the implementation of the resolution and to review States’ reports. The establishment of this special committee was foreseen in the resolution; however, the resolution did not mention States’ obligations to comply with international human rights and humanitarian law. The Committee has failed to address seriously States’ human rights obligations and even declined proposals by the High Commissioner for Human Rights to request States to include a human rights component when reporting on their implementation of resolution 1373.⁸⁷ Consequently, most States have refrained from including a human rights component in their reports to the Committee.

On 20 January 2003, the Security Council followed up on resolution 1373 and subsequent resolutions on countering terrorism, with a declaration that, for the first time since September 11, draws specific attention to human rights obligations within the fight against terrorism.⁸⁸ The declaration reminds that: “states must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, *in particular international human rights, refugee and humanitarian law*” [emphasis added]. However, there is still no formal mechanism to evaluate how States have or will comply with international human rights, refugee and humanitarian standards during their efforts to implement Security Council resolutions related to countering terrorism.⁸⁹

⁸⁴ The Human Rights Committee is the UN body in charge of monitoring states’ compliance with the International Covenant on Civil and Political Rights (ICCPR), which contains non-derogable and *jus cogens* obligations such as the prohibition against torture, cruel and inhumane or degrading treatment. See Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations of the Human Rights Committee: United Kingdom and Northern Ireland, 06/12/2001, U.N. Doc. CCPR/CO/73/UK; CCPR/CO/73/UKOT.

⁸⁵ *Idem.* para 6.

⁸⁶ Case no 199/2001: *Attia v Sweden* at UN Press Release, *Human Rights Committee and Committee Against Torture Rule On Complaints Of Violations From Individuals*, 5 December 2003 (<http://www.unhcr.ch/hurricane/hurricane.nsf/0/10B4B92B5D3AA93DC1256DF3005BAACE?opendocument>).

⁸⁷ Office of the High Commissioner for Human Rights, “Proposals for ‘further guidance’ for the submission of reports pursuant to paragraph 6 of the Security Council Resolution 1373 (2001): Compliance with International Human Rights Standards”, 2001. See IHF Report, *Supra* note 15.

⁸⁸ The declaration was adopted as an attachment to UN Security Council Resolution 1456 (2003) on 20 January 2003.

⁸⁹ The majority of States still make no reference to the compatibility of their counter-terrorist measures with their human rights obligations. Some States have recently referred to certain human rights. For example, Canada referred to constitutional guarantees and safeguards against unreasonable search/seizure (Canada S/2004/132, 20 April 2004) and Denmark referred to freedom of association (Denmark S/2004/119, 18 February 2004).

2.2. TORTURE AND ILL-TREATMENT UNDER INTERNATIONAL LAW

2.2.1. The Absolute Prohibition of Torture and Ill Treatment

Torture and cruel, inhuman or degrading treatment or punishment has been recognised around the world as one of the most serious crimes, and its prohibition as a fundamental standard of the international community.⁹⁰ Moreover, as a peremptory norm, the prohibition of torture is placed at the highest level of international law and takes precedent over conflicting rules of treaty law or customary international law.⁹¹

The prohibition on torture and cruel, inhuman or degrading treatment or punishment is set out in all the major international instruments dealing with civil and political rights, including: Article 5 of the Universal Declaration of Human Rights 1948; Article 7 of the International Covenant on Civil and Political Rights 1966; the 1984 UN Torture Convention; Article 3 of the European Convention of Human Rights; Article 5 of the American Convention of Human Rights; Article 5 of the African Charter on Human and People's Rights; and the Inter-American Convention to Prevent and Punish Torture. It is also prohibited by the four Geneva Conventions of 12 August 1949 and their two Additional Protocols and in national Constitutions and domestic legislation throughout the world.

The Convention Against Torture definition provides that torture is “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.” This definition has been held to constitute customary international law.⁹²

The definition of torture has been analysed by the European Court of Human Rights, that found that torture is deliberate inhuman treatment causing very serious and cruel suffering.⁹³ It also held that so-called “disorientation” or “sensory deprivation” techniques, such as “wall-standing”, hooding, subjection to continuous loud noise, sleep deprivation, and deprivation of food and drink combined, are prohibited by international law as “cruel, inhuman or degrading treatment”.⁹⁴ In the *Greek Case*, the Commission held that torture has a purpose, such as the obtaining of information or confessions or the infliction of punishment and it is generally an aggravated form of inhuman treatment.⁹⁵ Recent jurisprudence has taken this ‘purposive’ approach in the determination as to whether an act constitutes torture.⁹⁶ For example, the

⁹⁰ *Prosecutor v. Anto Furundzija*, infra.

⁹¹ Article 53 of the Vienna Convention on the Law of Treaties, 1969.

⁹² *Prosecutor v. Anto Furundzija*, infra, para 160.

⁹³ *Ireland v. United Kingdom*, Eur. Ct. H.R., Series A, No. 25, para. 167.

⁹⁴ Idem.

⁹⁵ *Greek Case*, 1969 Y.B. Eur. Conv. on H.R. 12, p. 186.

⁹⁶ See, for example, the International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Milorad Krnojelac*, 15 March 2002, IT-97-25-T, at para. 183, http://www.legal.apt.ch/MECHANISMS/International_Justice/International_Tribunals/ICTY/Jurisprudence/Krnojelac%2015%20March%202002.pdf.

International Criminal Tribunal for the Former Yugoslavia has held that "to the extent that the confinement of the victim can be shown to pursue one of the prohibited purpose of torture and to have caused the victim severe pain or suffering, the act of putting or keeping someone in solitary confinement may amount to torture".⁹⁷

The Inter-American Convention to Prevent and Punish Torture has defined torture more broadly than the UN Convention. It includes as torture "the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish".⁹⁸ Also, the Rome Statute of the International Criminal Court has slightly extended the definition in the UN Convention against Torture, in that it does not explicitly require the consent or acquiescence of a public official or any other person acting in an official capacity. It defines torture as: "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."⁹⁹

Several treaties and international texts provide that torture does "not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."¹⁰⁰ In 1992, the Human Rights Committee, in its General Comment, stated that the prohibition of torture and cruel, inhuman or degrading treatment or punishment "must extend to corporal punishment."¹⁰¹

2.2.2. Torture: A *Jus Cogens* Principle and Non-Derogable Right

There is a core group of rights from which there can never be derogation, even in times of war or during an emergency threatening the life of the nation, either because derogation from these rights is specifically prohibited by relevant human rights conventions or/and the rights at issue are peremptory norms of customary international law.

It is well-established under international law that the prohibition of torture has achieved the status of *jus cogens* - in other words that it is a 'peremptory' and non-derogable norm of general international law, which holds the highest hierarchical position among other norms and principles.¹⁰² In *Furundzija*,¹⁰³ the International Criminal Tribunal for the former Yugoslavia stated:

⁹⁷ *Krnjelac*, *ibid*, at para. 183.

⁹⁸ Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, *entered into force* Feb. 28, 1987, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992), Article 2.

⁹⁹ Article 7(2)(e) of the Rome Statute.

¹⁰⁰ Article 1, Convention against Torture; Article 2(2) of the Inter-American Convention to Prevent and Punish Torture, which provides that "The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article."

¹⁰¹ Human Rights Committee, General Comment 20, 1992, para. 5.

¹⁰² The concept of obligation *erga omnes* and *jus cogens* is found in the ICJ's advisory opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide*, 1951 ICJ Rep. 15 (May 28). The concept also finds support both in the ICJ's *South West Africa* cases (Preliminary Objections) (*Ethiopia v. South Africa; Liberia v. South Africa*), 1963 ICJ Rep. 319 (Dec. 21) as well as from the *Case of the Barcelona Traction, Light and Power Co. Ltd.* (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5) [Hereinafter *Barcelona Traction*]. It should be noted that the *Barcelona Traction* case concerned an issue of civil law. Article 53 Vienna Convention on the Law of Treaties define *jus cogens* norms as: "For the purposes of the present Convention, a peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" Article 53 Vienna Convention on the Law of Treaties.

¹⁰³ *Prosecutor v Furundzija* *infra*, paras 153-4.

“... because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules... Clearly the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.”

Under international law, violations of *jus cogens* norms are recognised to be of universal concern. As a result, every State has the obligation to investigate with a view to prosecuting the alleged perpetrators¹⁰⁴ irrespective of where the alleged offence took place.¹⁰⁵ In *Pinochet (No 3)*¹⁰⁶ the House of Lords held that the *jus cogens* nature of the international prohibition on torture justified the extension of domestic criminal jurisdiction over acts of torture wherever committed. Article 7.1 of the Convention against Torture provides: "The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

The prohibition against torture is non-derogable and therefore allows for no exception in times of war or public emergency. International humanitarian law explicitly prohibits torture and ill-treatment (in the four Geneva Conventions of 1949 and their two Protocols). States have recognised that even in times of war, certain practices must be prohibited even if some military advantage can be gained. Similarly, procedural rights designed to guarantee the protection from cruel, inhuman or degrading treatment or punishment are not subject to limitations or derogations.¹⁰⁷

2.2.3. The Absolute Obligation of Non-Refoulement under International Law

International law recognises an absolute prohibition against forcibly sending, transferring or returning a person to a country where he or she may be submitted to torture and cruel, inhuman or degrading treatment or punishment (*non-refoulement*) and requires the implementation of effective remedies to guarantee the protection of this right.¹⁰⁸ The principle of non-return or of *non-refoulement* has traditionally been associated with refugee law. The prohibition of the return of a refugee to “territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group” was first recognized in Article 33(1) of the 1951 UN Convention on the Status of

¹⁰⁴ United Nations War Crimes Commission for Yugoslavia, UN Doc. S/1994/674, annex, p.42 (1994); *Prosecutor v. Tadic*, IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2 1995).

¹⁰⁵ *Demjanjuk v Petrovsky* (1985) 603 F Supp 1468; 776 F 2d 571; *Case of the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* Separate Opinion of Judges Higgins, Kooijmans and Buergenthal - Judgment - [2002] ICJ 1 (14 February 2002) [Hereinafter Yerodia Case].

¹⁰⁶ Lord Browne-Wilkinson, *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet (No 3)* [1999] 2 WLR 827.

¹⁰⁷ See Part 3.4. Reparation: victims' rights to procedural and substantive remedies

¹⁰⁸ The nature (judicial, administrative or other) of the remedy should be in accordance with the nature of the right violated and the effectiveness of the remedy. In the case of grave human rights violations, which implicitly constitute a crime, like torture, there is unanimity in the jurisprudence on the judicial nature of effective remedies See REDRESS, *Reparation: A Sourcebook for Victims of Torture and other Violations of Human Rights and International Humanitarian Law*, March 2003, (Sourcebook on the Right to Reparation) available at <http://www.redress.org/publications/SourceBook.pdf>.

Refugees.¹⁰⁹ The scope of the principle of non-*refoulement* is now considered to apply to torture and cruel, inhuman or degrading treatment or punishment.¹¹⁰ However, the application of this principle under human rights law is broader in that it applies to all persons and not only to refugees.

This principle has now been affirmed in numerous international instruments, including: article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;¹¹¹ article 13 (4) of the Inter-American Convention to Prevent and Punish Torture;¹¹² article 22 (8), (general clause on non-*refoulement*) of the American Convention on Human Rights;¹¹³ article 8 of the Declaration on the Protection of All Persons from Enforced Disappearance;¹¹⁴ article 3 (1) of the Declaration on Territorial Asylum;¹¹⁵ and article II (3) of the Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa.¹¹⁶ For example, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states:

- “1.No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consisted pattern of gross, flagrant or mass violations of human rights.”

The jurisprudence that has developed within the European Human Rights system confirms the protection of persons against expulsion to a country where he or she is at risk of torture and cruel, inhuman or degrading treatment or punishment.¹¹⁷ The European Court of Human Rights has held that a State party to the Convention may itself be responsible for violating

¹⁰⁹ United Nations Convention Relating to the Status of Refugees, adopted 28 July 1951 and entry into force 22 April 1954, available at: http://www.unhcr.ch/cgi-bin/texis/vtx/home/+LwwBmeJAIS_www3wwwwwwwwwFqzvqXsK69s6mFqA72ZR0gRfZNhFqA72ZR0gRfZNTFqrpGdBngBzFqmRbZAFqA72ZR0gRfZNDzmxwwwwww1FghuNlg2/.opendoc.pdf

¹¹⁰ Sir Elihu Lauterpacht CBE QC and Daniel Bethlehem, The Scope and Content of the Principle of *Non-Refoulement* (Opinion), 20 July 2001, para. 132, available from the website of the UN High Commissioner for Refugees, Global Consultations, Second track, expert meetings, at <http://www.unhcr.ch>.

¹¹¹ United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entry into force 26 June 1987, available at: http://www.unhcr.ch/html/menu3/b/h_cat39.htm.

¹¹² Inter-American Convention to Prevent and Punish Torture, adopted on 9 December 1985, available at: <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/OASpage/humanrights.htm>.

¹¹³ American Convention on Human Rights, adopted on 22 November 1969, available at: <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/OASpage/humanrights.htm>.

¹¹⁴ United Nations Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly Resolution 47/133 of 18 December 1992, available at: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.47.133.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.47.133.En?OpenDocument).

¹¹⁵ Declaration on Territorial Asylum, adopted by General Assembly Resolution 2312 (XXII) of 14 December 1967, available at: http://www.unhcr.ch/html/menu3/b/o_asylum.htm.

¹¹⁶ Organisation of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, entry into force 20 June 1974, available at: <http://www1.umn.edu/humanrts/instree/z2arcon.htm>.

¹¹⁷ European Court of Human Rights, *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, Vol.161; *Nsona v. The Netherlands*, Judgment of 28 November 1996, 1996-V, no. 23; *Chahal v. The United Kingdom*, Judgment of 15 November 1996, 1996-V, no. 22; *Ahmed v. Austria*, Judgment of 7 December 1996, 1996-VI, no. 26; *Scott v. Spain* Judgment of 18 December 1996, 1996-VI, no. 27; *Boujlifa v. France*, Judgment of 21 October 1997, 1997-VI, no. 54; *D. V. The United Kingdom* 02 May 1997, 1997-III, no. 37; *Paez v. Sweden* Judgment of 30 October 1997, 1997-VII, no. 56.

the prohibition of torture if it sends a person to a State when there are substantial grounds to believe that they may suffer torture.¹¹⁸

The United Nations Human Rights Committee also considers that the prohibition against torture present in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) encompasses the prohibition against forcibly sending persons to countries where they may be subjected to torture or ill-treatment. In its General Comment 20 the UN Human Rights Committee stated that:

“In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. States parties should indicate in their reports what measures they have adopted to that end.”¹¹⁹

This principle is now widely regarded as an obligation under customary international law and has been the object of numerous resolutions and declarations within different United Nations bodies and organs and the actions of its mechanisms.¹²⁰

2.3. TORTURE WITHIN THE DISCOURSE OF TERRORISM: QUESTIONING ITS ABSOLUTE PROHIBITION?

2.3.1. National Security vs. Human Rights

The argument that there is a need to violate human rights while countering terrorism is fundamentally flawed. As explained by Mary Robinson, former UN High Commissioner for Human Rights, ensuring human rights and humanitarian law is the “only long term - guarantor of security.”¹²¹ States and the community of States may be said to be secure only when all of its constituent elements – its territories, its inhabitants, and its governments – are secure. Security of the inhabitants includes the inviolability of their human rights. In a State where human rights are insecure the State itself is insecure.¹²² In a world where human rights are insecure, the world itself is insecure. Therefore, any fight against terrorism that does not maintain scrupulous respect for human rights cannot achieve national security, but instead undermines it.

In his report “Protection of human rights and fundamental freedoms while countering terrorism,” the Secretary General of the United Nations recalled that “respect for human

¹¹⁸ *Loizidou v Turkey* Series A No 310 and *Soering* post; *idem*. See also *Lawless v Ireland* (No 3) (1961) and *Ireland v UK* (1978) 2 EHRR 25.

¹¹⁹ General Comment N° 20, 10/03/92, para. 9 at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument)

¹²⁰ General Assembly Resolutions: 8(x), OP©(ii), 12 February 1946, 52/132, pp. 12, 12 December 1997, 56/137, OP, 19 December 2001, 57/187, OP4, 18 December 2002 Commission on Human Rights Resolution on Torture and other, cruel inhuman or degrading treatment or punishment, <http://www.unhcr.info/resolution/E-CN4-2004-L61-asterix-0419.pdf>; the Special Rapporteur on Torture routinely intervenes in cases where there is serious risk of extradition or deportation to a State or territory where the person in question would reportedly be in danger of being subjected to torture, see Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38, E/CN.4/2003/68, 17 December 2002 para. 8.

¹²¹ *Supra* note 7.

¹²² *Supra* note 6.

rights should be seen as an essential part of an effective counter-terrorism strategy, not an impediment to it.¹²³ But, as explained in the section above, vague and imprecise definitions of terrorism allow States to *decide* when [dissident] acts are terrorist offences, and in the same way, allow States to *decide* what measures are justified to counter terror. States consistently claim that it is not sufficient to have the capacity to derogate from certain human rights obligations when declaring a state of emergency or when fighting in an armed conflict. It is usually argued that human rights (including non-derogable human rights such as torture)¹²⁴ interfere with the capacity of States to fight terrorism effectively. Whether it is self-defence or national security, States tend to 'justify' human rights violations as necessary for maintaining the security of their citizens and of the "entire world."

However, the absolute nature of the prohibition against torture and other forms of ill-treatment and the principle of *non-refoulement*, outlaw any balancing act between the interests of national security and that of an individual to be free from torture and ill-treatment. As explained by the UN Committee Against Torture: "The Committee recognises the need for close co-operation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of the individuals concerned".¹²⁵ The Committee issued a statement on 22 November 2001¹²⁶ where it reminded States parties to the UN Convention Against Torture, of the non-derogable nature of most of the obligations undertaken by them in ratifying the Convention. Specifically, in the case of *Paez v Sweden*, the Committee ruled out the possibility of a *balancing act* by stating that the fact that the applicant is a member of an alleged terrorist organisation is not a material consideration in cases under Article 3 (*non-refoulement*) of the Convention.¹²⁷

The jurisprudence of the European Court of Human Rights has similarly ruled out the possibility of a balancing act between interests of national security and the interest of the individual to be protected against torture or cruel, inhuman or degrading treatment and punishment. In *Chahal v United Kingdom*, the European Court considered the argument that there was an implied limitation to Article 3 of the European Convention to expel an individual on grounds of national security, even where there is a risk of ill-treatment.¹²⁸ In rejecting this argument, the Court upheld the absolute nature of the prohibition against torture and principle of *non-refoulement* by stating:

"The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation...The prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to

¹²³ Report of the Secretary General of the United Nations, "Protection of human rights and fundamental freedoms while countering terrorism" (A/58/266), 8 August 2003 (para. 55).

¹²⁴ See Part 2 of this Report, The Legal Framework.

¹²⁵ *Arana v France*, Committee against Torture, no. 63/1997, 05/06/2000, para. 11.5.

¹²⁶ CAT/C/XXVIII/Misc.7.

¹²⁷ *Paez v Sweden*, Committee against Torture, no. 39/1996, 28/04/1997, para. 14.5.

¹²⁸ *Chahal v United Kingdom*, supra note 117, para. 76.

another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion...In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees”.¹²⁹

Explicitly referring to the current fight against terrorism, the Human Rights Chamber for Bosnia and Herzegovina, which applies the European Convention on Human Rights, stated in *Boudellaa and Others*,¹³⁰ and subsequently in *Bemsayah*,¹³¹ that:

“[...] the Chamber fully acknowledges the seriousness and utter importance of the respondents Parties obligation, as set forth in the UN Security Council resolution 1373 to participate in the fight against terrorism. The Chamber notes, however, that it is absolutely necessary to respect human rights and the rule of law while fighting terrorism. The international fight against terrorism cannot except the respondent Parties from responsibility under the Agreement, should the Chamber find that the hand-over of the applicant to US forces was in violation of Article 1 of Protocol No. 6 to the Convention or Article 3 of the Convention (see *Boudellaa and Others* idid, paras. 236 to 267).”

It is clear therefore that the prohibition against torture and the principle of *non-refoulement* are absolute and admit no room for a balancing between the interests of national security and the interests of a person to be protected against torture, cruel, inhuman or degrading treatment or punishment.¹³² But despite this, post September 11, States and certain intergovernmental institutions have relied on ‘national security interests’ to suggest that an override of human rights protections including the prohibition against torture and cruel, inhuman, or degrading treatment and punishment may be warranted. For example, the European Commission Working Document, “The relationship between safeguarding internal security and complying with international protection obligations and instruments”¹³³ drew attention to European Court of Human Rights jurisprudence establishing the absolute and non-derogable prohibition against torture in Article 3 of the European Convention but went further by stating:

“Following the 11th September events, the European Court of Human Rights may in the future again have to rule on questions relating to the interpretation of Article 3, in particular on the question in how far there can be a “balancing act” between the protection needs of the individual, set off against the security interests of a state. In addition to their possible criminal prosecution it may also be necessary to harmonise the basic rights granted to this category of excludable but non-removable persons, and to assess

¹²⁹ Ibid. paras. 79 & 80.

¹³⁰ *Boudellaa and Others v Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina* (11 October 2002, case nos. CH/02/8679, CH/02/8689, CH/02/8690 AND CH/02/8691) paras. 236 to 267.

¹³¹ *Bemsayah against Bosnia and Herzegovina* (4 April 2003, case no. CH/02/9499) para 182.

¹³² Bruin, R. & Wouters, K., “Terrorism and the non-derogability of Non-refoulement”, International Journal of Refugee law Oxford University Press 2003, vol. 15, No. 1, pg. 5 at 21.

¹³³ COM/2001/0743 final available on line at http://66.102.11.104/smartapi/cgi/sqa_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52001DC0743.

the different means for dealing with these persons if they pose a security risk".¹³⁴

The above section of the Working Document suggests that in the view of the Commission, there may be room for such a "balancing act" despite the status of the prohibition of torture and cruel, inhuman or degrading treatment and punishment in international law.¹³⁵

Articles 14 and 17 of the final version of the Council of Europe Proposal for a Directive on minimum standards for the qualifications and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection,¹³⁶ which obliges States to not grant refugee status to undeserving applicants, omits the important qualification which appeared in previous drafts to the proposal, that such obligations are subject to international law and the European Convention on Human Rights.¹³⁷ Article 19(2) provides that without prejudice to Member States' obligation to respect the principle of *non-refoulement*, Member States are permitted to *refouler* a refugee "when there are reasonable grounds for considering him/her a danger to the security of the country in which he/she is; or having been convicted by a final judgment of a particular serious crime, he/she constitutes a danger to the community of that country".¹³⁸ As argued, the Proposal is further evidence of a policy to depart from the absolute standards against torture and ill-treatment and the principle of *non-refoulement*.¹³⁹

In the case of *Suresh v Canada*,¹⁴⁰ the Canadian Supreme Court considered whether expelling a suspected terrorist to a country where he/she faces the risk of torture violates the principle of fundamental justice in contravention of section 7 of the Canadian Charter of Fundamental Rights and Freedoms.¹⁴¹ From a domestic perspective, the Court appeared to accept that a balancing act exists between the interests of national security and that of the protection of the individual against torture.¹⁴² The Supreme Court then considered the same question in light of international standards and norms and confirmed the absolute prohibition of torture and the principle of *non-refoulement*.

"We conclude that the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the *Charter*".¹⁴³

Notwithstanding this latter conclusion, the Court left a small window open for the balancing test in exceptional circumstances:

¹³⁴ The document was finalised on 5 December 2001 and produced in response to a series of conclusions adopted by the European Council on Justice and Home Affairs on 20 September 2001 one of which was to "request the Commission examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments" (conclusion 29 SN 3926/6/01), COM (2001) 743 final, para. 2.3.1, pg. 16 and para. 2.4, pg.17 cited in Bruin & Wouters supra note 132.

¹³⁵ *Idem*.

¹³⁶ COM (2001) 510 final cited in Bruin & Wouters, supra note 132.

¹³⁷ Supra note 132, pg. 10.

¹³⁸ Article 19(2) proposal for a Council Directive on minimum standards for the qualifications and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection.

¹³⁹ Supra note 132, pg.11.

¹⁴⁰ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, <http://www.canlii.org/ca/cas/scc/2002/2002scc1.html> (hereinafter *Suresh Judgment*).

¹⁴¹ Section 7 of the Charter guarantees "[e]veryone . . . the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

¹⁴² *Suresh Judgment*, supra note 140, para 58.

¹⁴³ *Ibid.*, para. 75.

“Indeed, both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*”.¹⁴⁴

The Court did not indicate what constitutes “exceptional circumstances” to justify a departure from the absolute principle of *non-refoulement*. The Canadian decision represents a deviation from international standards that is unsupported by international law.

There are some arguments that Article 33(2) of the Refugee Convention permits a balancing act between the interests of national security and the protection of individuals against forms of persecution *other than torture, cruel, inhuman or degrading treatment or punishment*.¹⁴⁵ In part relying on General Comment 20 of the UN Human Rights Committee, some writers have argued that the principle of non-refoulement applies absolutely and without exception *only* in respect of individuals who face the risk of torture or cruel, inhuman or degrading treatment or punishment.¹⁴⁶ In other words, “if there is a risk of *other* forms of persecution a balancing act is possible”.¹⁴⁷

Although questionable, Article 33(2) has been interpreted as allowing States to expel or *refoule* a refugee on “provable grounds of national security” or if the refugee has been “convicted of a particularly serious crime and constitutes a provable danger to the community of the country of refuge, irrespective of the persecution the refugee might be subjected to, *unless the persecution can be qualified as torture or inhuman, degrading treatment or punishment. In those cases, deportation is not permitted* [emphasis added]”.¹⁴⁸

Such an interpretation calls for an examination into the nature of the risk that an individual faces in the event of expulsion or *refoulement* but what is irrefutable is that, **the prohibition against torture or cruel, inhuman or degrading treatment or punishment and the principle of *non-refoulement* to guarantee this right are absolute, admit of no exception or justification and leave no room for a balancing act.**

2.3.2. Questioning the Official Prohibition of Torture: The ‘Ticking Time Bomb Exception’

The “ticking time bomb” exception has been put forward as a justification for the use of torture and cruel, inhuman or degrading treatment or punishment in the interrogation of terrorist suspects. The argument that torture and other forms of ill-treatment can be used to extract information from a person who it is believed to have information relating to a bomb that is about to explode causing immeasurable damage to life and property is certainly controversial.¹⁴⁹ Without considering whether torture is an *effective* method to extract *reliable*

¹⁴⁴ Ibid., para. 76.

¹⁴⁵ Supra note 132, pg. 20. Article 33 (1) prohibits the expulsion or *refoulement* of a refugee “to frontiers of territories” where his/her life or freedom would be threatened on grounds of his/her race, religion, nationality and membership of a particular social group or political opinion. However a refugee is not entitled to this protection where there are reasonable grounds for regarding that he/she represents a danger to the security of the country in which he/she is, or who, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of that country.

¹⁴⁶ Lauterpacht and Bethlehem argue that Article 33(2) does not seem to exclude a balancing act, as described by Bruin and Wouters supra note 132 pg. 20.

¹⁴⁷ Supra note 132, pg. 20.

¹⁴⁸ Ibid., pg. 20.

¹⁴⁹ *Judgment concerning the legality of the general security service's interrogation methods*, Supreme Court of Israel, 06/09/1999, 38 I.I.M. 1471, paras. 34.

information,¹⁵⁰ the exception seems to conjure the “defence of necessity”, which excuses a person from criminal liability on the grounds that their actions were necessary to prevent greater harm to human life. The necessity defence is a utilitarian argument that involves the choice of acting out the lesser of two evils, or as is often cited, the ends justify the means.

The US recently referred to a case where a Guantanamo detainee was believed to hold crucial information that would prevent an imminent terrorist attack, which precipitated the use of more aggressive interrogation techniques than those already allowed by the administration.¹⁵¹ What is not clear, is whether in fact, any imminent danger existed or whether it was believed that the interrogation techniques already allowed were not sufficiently ‘effective’ and that abusive techniques would bring more results.¹⁵² Some academics such as Harvard law professor Alan Dershowitz, have added to the debate by advocating the use of warrants to regulate the use of torture in a “ticking bomb” scenario. The rationale being that official regulation would provide some form of accountability over the use of torture to prevent an “actual case of imminent mass terrorism”.¹⁵³

The Supreme Court of Israel considered the “ticking bomb” exception in a significant judgment regarding the interrogation methods employed by the Israeli General Security Service (GSS). The State of Israel did not deny that the impugned methods of interrogation were used, but instead argued that they did not constitute torture, cruel, inhuman or degrading treatment or punishment and/or that they were in any event, legal. With regards to this second contention, they relied on the necessity defence as entitling interrogators to use as a last resort “moderate physical pressure”.¹⁵⁴ In its judgment, the Supreme Court held that the defence of necessity cannot be relied upon as a source of authority to justify the use of torture or other prohibited means of interrogation: “Clearly, a legal statutory provision is necessary for the purpose of authorizing the government to instruct in the use of physical means during the course of an interrogation, beyond what is permitted by the ordinary “law of investigation”, and in order to provide the individual GSS investigator with the authority to employ these methods. The “necessity” defence cannot serve as a basis for this authority’.¹⁵⁵

The reasoning behind the Court’s conclusion lies in the nature of the “necessity defence” which as the Court described is based on an individual’s response to a given set of facts whereas the authorisation to resort to an unlawful or prohibited act must come from legislative sources.¹⁵⁶ The Court did acknowledge that the defence of necessity could, in appropriate circumstances, be raised as a defence in criminal prosecutions against an interrogator under domestic criminal law.¹⁵⁷ The Court also noted that the defence is most

¹⁵⁰ It is interesting to note that not even the Spanish Inquisition relied on information subtracted by torture. Confession obtained by torture were corroborated afterwards when the individual was not subject to torture. In other words, torture was not really implemented as a method of interrogations but rather as a method of social control. (*A Critical History of the Inquisition of Spain*, Juan Antonio Llorente/intro Gabriel Lovett [orig 1823, 1966]; 1994 BBC/A&E documentary “The Myth of the Spanish Inquisition”) Or as explained by Mark Bowden: “Drugs such as marijuana, alcohol and sodium pentothal can lower inhibitions, but they do not erase deep-seated convictions. And the more powerful the drug, the less reliable the testimony”. Bowden, *The Dark Art of Interrogation* (October 2003, at <http://www.theatlantic.com/issues/2003/10/Bowden.htm>).

¹⁵¹ Department of Defense background briefing, Di Rita, 20/05/2004. (<http://www.defenselink.mil/transcripts/2004/tr20040707-0981.html>)

¹⁵² Department of Defense Press release, “DOD provides details on interrogation process”, 22/06/2004.

¹⁵³ Dershowitz, A., “The torture warrant: A response to Professor Strauss”, 48 N.Y.L. Sch. L. Rev. 275 (2004).

¹⁵⁴ *Ibid.*, para. 15. The Landau Commission conducted an inquiry into the use of interrogation methods of the GSS and concluded that the GSS officers could be entitled to use a “moderate degree of physical pressure” under strict conditions where required by necessity, Supreme Court of Israel judgment, *supra* note 149, para. 16.

¹⁵⁵ Supreme Court of Israel judgment, *supra* note 149, para. 38.

¹⁵⁶ *Ibid.* para. 36.

¹⁵⁷ Article 34(1) Penal law provides for the defence as follows, “A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from

likely to be raised in the “ticking bomb” scenario where an act is imminent to prevent danger that is certain to materialise:

“The “necessity” exception is likely to arise in instances of “ticking time bombs”, and that the immediate need (“necessary in an immediate manner” for the preservation of human life) refers to the *imminent* nature of the *act* rather than that of the *danger*. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing its materialization. In other words, there exists a concrete level of imminent danger of the explosion's occurrence”.¹⁵⁸

In finding that certain interrogation methods were prohibited, the Israeli Supreme Court upheld the international standards prohibiting torture and other forms of ill-treatment: **“These prohibitions are “absolute”. There are no exceptions to them and there is no room for balancing”**.¹⁵⁹

PART 3. THE FACTUAL IMPLEMENTATION

3.1. TRANSFERS: FORCEFUL TRANSFER OF PERSONS SUSPECTED OF TERRORIST ACTS

3.1.1. Law Governing inter-State Transfers: Extraditions, Deportations and Non-Refoulement

Bilateral and multilateral agreements facilitate the legal transfer of individuals inter-State to face trial for criminal charges. Extradition agreements are necessary to ensure that accused persons who are not present in the jurisdiction where the offence took place or where the charges are laid will not escape the arm of the law. States cannot interfere in the territory of other States,¹⁶⁰ and hence, the legal transfer of individuals inter-State is highly regulated through extradition agreements to ensure respect for State sovereignty and to guarantee the rights of suspects in the process.

Extradition agreements are based on a mutual system of co-operation and recognition. However, the determination of whether an individual may be extradited to a foreign State is a judicial (and sometimes executive) process that entails a series of procedural safeguards to guarantee the protection of fundamental human rights. The principle of specialty limits the crimes for which an individual may be tried to the crimes for which he or she is extradited, unless the surrendering State consents otherwise. The principle of double criminality requires that the offence for which an individual is extradited is a crime in the jurisdiction of both the requesting and surrendering States. And finally, the political offence exception prevents the extradition of persons accused of crimes that are understood as political, e.g., committed as part of a political struggle (exercising their right to self-determination).

substantial danger of serious harm, imminent from the particular state of things [circumstances], at the requisite timing, and absent alternative means for avoiding the harm”.

¹⁵⁸ Supreme Court of Israel Judgment, supra note 149, paras. 34 & 35.

¹⁵⁹ Ibid., para. 23.

¹⁶⁰ See notes 207-210 and accompanying text.

Extradition can also be refused if the individual may face the death penalty in the requesting State, although the surrendering State may seek diplomatic assurances that the death penalty will not be imposed.¹⁶¹ States cannot extradite a person to a country where there are substantial grounds to believe that he or she may be submitted to torture or cruel, inhuman or degrading treatment or punishment (*non-refoulement*).

Deportations or expulsions are distinct from extraditions in that they involve a unilateral act by a State to expel an “undesired foreign national”.¹⁶² With deportation or expulsion, the emphasis is on the sending ‘from’ a particular country. This differs from extradition, where the emphasis is on the sending ‘to’ a particular country. The purpose of deportation or expulsion is therefore different from that of extradition but they are also subject to procedural safeguards, in particular, the obligation of *non-refoulement*.¹⁶³ The UN Human Rights Committee explained in its General Comment No. 15:¹⁶⁴

“The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment, and respect for family life arises.”

3.1.2. Procedural Guarantees for Inter-State Transfers of Individuals: Extraditions and Deportations

If States do not comply with the legal procedures that guarantee the minimum human rights protections, what occurs in fact is not an expulsion, deportation or extradition, but an *illegal transfer/removal*.

The UN Human Rights Committee asserted that Article 13 of the ICCPR [which refers to expulsion of aliens] is:

“...applicable at all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise. If such procedures entail arrest, the safeguards of the Covenant relating to deprivation of liberty (arts. 9 and 10) may also be applicable...if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to

¹⁶¹ See for example, *Soering Case* before the ECtHR supra note 117. See also Article 4(d) UN Model Treaty on Extradition, G.A. res. 45/116, annex, 45 U.N. GAOR Supp. (No. 49A) at 212, U.N. Doc. A/45/49 (1990). Although the death penalty and the death row phenomenon have been, in specific circumstances, considered torture and cruel, inhuman or degrading treatment or punishment (see for example, *Albert Wilson v. Philippines*, Human Rights Committee Communication No. 868/1999, U.N. Doc. CCPR/C/79/D/868/1999 (2003)); the death penalty is legal in some States and thus, can be prevented through inter-state agreements, just as the principle of speciality limits the crimes for which an individual may be tried to the crimes for which he or she is extradited, unless the surrendering State consents otherwise. This practice is very different from what some States are currently claiming when seeking diplomatic assurances to guarantee that the individual will not be tortured in the requesting State. Torture and ill-treatment are crimes under domestic and international laws, and therefore the use of torture is, in theory, not sanctioned by the State. Therefore, States cannot formally guarantee that the individual will not be tortured, when incidents of torture are “out of their control”. For more detail on the use of diplomatic assurances see HRW Report, “Empty Promises: Diplomatic Assurances No Safeguard against Torture”, April 2004 vol.16 No.4 (D) <http://www.hrw.org/reports/2004/un0404/diplomatic0404.pdf>.

¹⁶² Katz, A., “Extradition of a terrorist”, seminar paper presented at ISS Seminar: Terrorism in South Africa, 18 - 19/09/03, <http://www.iss.co.za/Seminars/terro19sep03/Extradition.pdf>.

¹⁶³ International law recognises an absolute prohibition against forcibly sending, transferring or returning a person to a country where he or she may be submitted to torture and cruel, inhuman or degrading treatment or punishment (*non-refoulement*). See Legal Framework Section, *infra*.

¹⁶⁴ Human Rights Committee, General Comment No. 15, *The position of aliens under the Covenant*, 27th session 1986.

be taken in accordance with article 13...[It] directly regulates only the procedure and not the substantive grounds for expulsion. However by allowing only those carried out “in pursuance of a decision reached in accordance with law”, its purpose is clearly to prevent arbitrary expulsion”.¹⁶⁵

This principle has been recognised by the European Court of Human Rights, which determined that legal procedures affect not only the validity of the transfer but also the legality of holding the individual under detention for the purpose of removal. In *Bozano v France*,¹⁶⁶ the French Minister of Interior ordered the deportation of Mr Bozano after the Indictment Division of the Limoges Court of Appeal had ruled against his extradition to Italy. He was deported to Switzerland where an extradition request from Italy awaited him. Mr Bozano’s lawyers appealed to French authorities but the Paris Tribunal de Grande Instance made an order stating that there were no grounds for hearing the case on an urgent application, even though the Limoges Administrative Court had declared the deportation order against the applicant invalid because the circumstances of the deportation demonstrated that the order’s purpose had not been to cause the applicant’s removal for reasons of a kind associated with deportation, but to effect an illegal extradition. Considering the facts as a whole, relating both to the indications of non-compliance with French law and, particularly, of “arbitrary” executive action, the European Court concluded that the applicant’s detention had not been lawful as required by article 5(1)(f). It was instead an element of a process designed to achieve a “disguised form of extradition” that could not be justified under that provision.

Protocols Four and Seven of the European Convention on Human Rights specifically recognise the absolute prohibition of expulsion of nationals (art 3 of the Fourth Protocol)¹⁶⁷ and the prohibition of *arbitrary* expulsion of aliens; in other terms, expulsions not based on “a decision reached in accordance with the law” (art 1 of the Seventh Protocol).

According to the “Explanatory Report on Protocol No. 7,” Article 1 of Protocol No. 7 on “Procedural safeguards relating to expulsion of aliens” was added to afford minimum guarantees to aliens in the event of expulsion from the territory of a Contracting Party. Its first paragraph provides that no alien may be expelled from the territory of the Contracting State except in pursuance of a decision reached “in accordance with the law.” This paragraph subsequently sets out three guarantees: a) the person concerned has the right to submit the reason against his expulsion; b) has the right to have his case reviewed and c) shall have the right to be represented before the competent authorities. According to Article 1, an alien should be entitled to exercise his/her rights under sub-paragraph (a), (b) and (c) before he is expelled from the country. However, where the expulsion is necessary in the interest of public order or when the reason of national security is invoked, paragraph 2 provides for an exception to the exercise of these specific rights [(a), (b) and (c)].

Although there is no jurisprudence that clarifies what the exception in Paragraph 2 entails, it is clear that transfers of individuals (whether expulsions, deportations or extraditions) need to be performed as part of legal proceedings. As explained by Bosnia and Herzegovina’s Human Rights Chamber in *Bensayah against Bosnia and Herzegovina*, a case involving the illegal surrender to US custody of a Yemeni terrorist suspect, the condition set out in Article

¹⁶⁵ Ibid.

¹⁶⁶ *Bozano v. France* (1986) 9 EHRR 297.

¹⁶⁷ Article 3 – Prohibition of expulsion of nationals:

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
2. No one shall be deprived of the right to enter the territory of the state of which he is a national.

1, paragraph 1, is to follow the requirements of a legal expulsion/transfer procedure. Thus, if the first requirement is not met, that is, the expulsion/transfer are made outside any legal proceeding, there is no need to examine whether the specific rights under Article 1 were not respected because of the exception contained in Paragraph 2:

“The Chamber finds that the respondent Parties have not followed the requirements of a legal expulsion procedure arising from the domestic law. They thereby violated the condition set out in Article 1, paragraph 1 of Protocol No. 7 to the Convention of a ‘decision reached in accordance with the law’. There is no need to examine whether in the applicant’s case such circumstances prevail as it allows the respondent Parties under paragraph 2 of Article 1 to rely on the permission to expel the applicant before he could exercise the procedural rights set out in Article 1, paragraph 1 (a), (b) and (c) of Protocol No. 7 to the Convention”.¹⁶⁸

Furthermore, as noted by this Chamber, Article 1 of the European Convention on Human Rights gives rise to a positive obligation to secure the rights and freedoms set out in the Convention in regard to all persons within their jurisdiction. Therefore before transferring an individual to the custody of the authorities of another State, the Contracting Parties are “obliged to obtain and examine information as to the legal basis of that custody,”¹⁶⁹ just as they would in extradition proceedings:

“The Chamber recalls that it is a well-established principle of the case law of the European Court of Human Rights that the extradition or expulsion of a person by a Contracting State may engage the responsibility of that State under the Convention... It would be against the general spirit of the Convention and of the Agreement for a Party to extradite or expel an individual to another State where there was a substantial risk of a violation of the Convention (see *Boudellaa and Others*, paras 257 to 279).”¹⁷⁰

Regarding the absolute right enshrined in Article 3 of the ECHR (protecting individuals from torture and other forms of ill-treatment), the Human Rights Chamber further stated: “[...] The international fight against terrorism cannot exempt the respondent Parties from responsibility under the Agreement, should the Chamber find that the hand-over of the applicant to US forces was in violation of Article 1 of Protocol No. 6 to the Convention or Article 3 of the Convention (see *Boudellaa and Others* *idid*, paras. 236 to 267).” As described earlier, State responsibility in relation to violations of Article 3 is absolute; it is expressed in unqualified terms, it cannot be derogated from in time of war or other public emergency, and it binds the State even outside its territorial jurisdiction.¹⁷¹

Similarly, the minimum procedural safeguards afforded by the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights in removal proceedings include the right to a fair and public hearing, access to a lawyer, and sufficient time to prepare a response and adduce evidence.¹⁷²

The prohibition against expulsion of a national is safeguarded by Article 22(5) of the American Convention. Article 22(6) provides that an alien lawfully in the territory may be expelled from it only pursuant to a decision reached in accordance with law. According to the

¹⁶⁸ *Bemsayah against Bosnia and Herzegovina*, supra note 131, para 126.

¹⁶⁹ *Bemsayah against Bosnia and Herzegovina*, supra note 131, paras. 168-169.

¹⁷⁰ *Ibid*, para 182.

¹⁷¹ See *Loizidou* note 118 and *Soering* note 353.

¹⁷² Article 8(1) American Convention, Article XVIII American Declaration.

Inter-American Commission on Human Rights, deportation, expulsion and extradition decisions must be made pursuant to and in accord with legal process, which conforms to the constitution, rule of law and international treaty obligations.¹⁷³ The Commission held in *The Haitian Centre for Human Rights et al. v. United States*,¹⁷⁴ that the US breached Article 27 of the American Declaration when it summarily interdicted and repatriated Haitian refugees to Haiti without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as "refugees." It further held that the US breached the prohibition on *non-refoulement* in its act of "interdicting Haitians on the high seas, placing them in vessels under their jurisdiction, returning them to Haiti, and leaving them exposed to acts of brutality by the Haitian military."¹⁷⁵ Supporting the European Court of Human Rights' decision in *Chahal v United Kingdom*, the Inter-American Commission stated:

"The fact that a person is suspected of or deemed to have some relation to terrorism does not modify the obligation of the State to refrain from return where substantial grounds of a real risk of inhuman treatment are at issue".¹⁷⁶

Procedural guarantees that protect individuals from torture and ill-treatment, such as the right to challenge a decision of expulsion to a country where the person may face torture or cruel, inhuman or degrading treatment or punishment or to challenge a detention by way of a *habeas corpus* or *amparo* review, are not subject to any limitations or derogations. Under international law, procedural remedies guaranteeing non-derogable rights cannot be limited or derogated.¹⁷⁷ As explained by the UN Human Rights Committee: "It is inherent in the protection of rights explicitly recognized as non-derogable... that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights [...]."¹⁷⁸

3.1.3. The Use of 'Diplomatic Assurances' and/or 'National Security' to Circumvent the Non-Refoulement Obligation

As has been explained, the use of extraditions and deportations or expulsions to effect the transfer of persons must comply with the obligation not to render, transfer, send or return a person where there are substantial grounds for believing that he or she would be in danger of being subjected to torture and other forms of ill-treatment (*non-refoulement*). Although this norm is non-derogable and admits of no exceptions, States— as part of the 'war against terrorism' — are regularly extraditing and deporting persons suspected of terrorism without complying with minimum procedural safeguards, including the absolute obligation of *non-refoulement*.

Extradition

¹⁷³ IACHR, report Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para 402. <http://www.cidh.org/Terrorism/Eng/toc.htm>.

¹⁷⁴ Case 10.675, Report No. 51/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), para. 163.

¹⁷⁵ *Ibid.*, para. 171.

¹⁷⁶ IACHR report on Canada (2000), para. 154.

¹⁷⁷ See note 354 and accompanying text.

¹⁷⁸ See Human Rights Watch, "Empty Promises": Diplomatic Assurances No Safeguard against Torture, April 2004, Vol 16 N°4. (D) (HRW Report) at <http://hrw.org/reports/2004/un0404/>. General Comment N° 29, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 15; See also, Advisory Opinion OC-9/87_of 6 October 1987. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 25(8) American Convention on Human Rights. Series A No. 9.

Since the attacks of 11 September there has been increased use of diplomatic assurances in order to justify the extradition of persons towards countries known to systematically or routinely engage in the practice of torture. Sending States have sought assurances from the requesting States that the individuals to be extradited will not face torture or cruel, inhuman or degrading treatment or punishment and very occasionally agree on a monitoring mechanism, usually involving visits by diplomatic representatives to the person who was extradited.¹⁷⁹ States claim that by securing diplomatic assurances, they comply with the absolute obligation of *non-refoulement*.

In the case of *K K Mohamed*, the South African Constitutional Court found that Mohamed's transfer to the United States without securing a diplomatic assurance that he would not be sentenced to death violated his constitutional right to life, the right to have his human dignity respected and *his right not to be subjected to cruel, inhuman or degrading punishment*.¹⁸⁰ Mohamed was wanted for his alleged involvement in the terrorist bombing of the United States embassies in Nairobi and Dar Es Salaam in 1998. He was Tanzanian and fled to South Africa shortly after the bombing where he sought asylum, allegedly under false pretences. After a warrant for his arrest was issued by the Federal District Court of New York, Mohamed was arrested at a refugee reception office in Cape Town and after his interrogation by South African immigration officials and the FBI, he was flown to the United States.

There is some doubt whether Mohammed's transfer was effected as a deportation procedure or as a "disguised extradition".¹⁸¹ The South African Constitutional Court did not deal with the question of the illegality or unconstitutionality of his removal but rather concerned itself with the fact that diplomatic assurances were not obtained that he would not be sentenced to death in the United States in the same way as his co-conspirators, who were transferred to the United States from Germany, on assurance that they would not face the death penalty or be tried outside US territorial jurisdiction.

While assurances may be acceptable in certain cases,¹⁸² it is difficult if not impossible to justify their use in cases of expulsions of persons toward countries that systematically or routinely practice torture. The use of assurances in such cases would imply that the sending State believes that while the receiving State routinely engages in grave human rights violations and serious crimes under international law, they will definitely refrain from or have the capacity to prevent such acts in the one particular case. This is inherently contradictory. On the other hand, monitoring mechanisms can, at best, function on a very limited basis as countries that engage in the practice of torture usually restrict access of detainees to lawyers, doctors and other outside persons. In addition, any monitoring mechanism would normally function for only a limited time period, subsequently exposing the extradited person to torture and ill-treatment. In a number of cases diplomatic assurances have not been complied with or appear to have been ineffective.¹⁸³

¹⁷⁹ See HRW report, *supra* note 161.

¹⁸⁰ *Mohamed and Another v president of the Republic of South Africa and Others* 2001 (3) SA 893 (CC).

¹⁸¹ *Supra* note 162.

¹⁸² See declaration of the Special Rapporteur on Torture in his 2002 interim report to the General Assembly, where he called on States not to extradite anyone "unless the government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity." Interim Report of the Special Rapporteur on Torture, Theo van Boven, to the General Assembly, July 2002, A/57/173.

¹⁸³ See for example the case of *Shamayev and 12 others* where Georgian authorities detained 13 Chechens who were subject to an extradition request from Russia on grounds of being suspected of militant activities. Despite an interim ruling of the European Court that the men should not be extradited until their case was determined, five men were extradited. The European Court subsequently declared their cases admissible and established a fact-finding mission to Georgia and Russia. Russia issued diplomatic assurances after their extradition however, it denied access to a European Court delegation to see the five detainees, European Court of Human Rights, *Shamayev and 12 others v. Georgia and Russia*, Application N° 36378/02 4

An appeal is pending before the Grand Chamber of the European Court of Human Rights in *Mamatkulov & Askarov v Turkey* concerning the extradition of Uzbek nationals from Turkey to Uzbekistan suspected of terrorist activities.¹⁸⁴ The Court's First Chamber relied on diplomatic assurances given by Uzbekistan that the applicants would not be subjected to torture or sentenced to the death penalty in support of its decision that their extradition would not violate article 3 of the European Convention on Human Rights. This decision was made despite documented evidence of the practice of systematic torture by Uzbek authorities, including evidence documented by the U.N. Special Rapporteur on Torture,¹⁸⁵ and despite proof of systematic torture against Muslims and members of the Erk political opposition party of which the applicants were members.¹⁸⁶ The appellant is seeking to prove that the nature of the prohibition against sending any person to a country where he or she would be at risk of torture or other forms ill-treatment is absolute, despite the nature of their alleged crime and the offer of diplomatic assurances from a requesting government.¹⁸⁷

Other decisions by national courts on the adequacy of diplomatic assurances to protect person from torture and other forms of ill-treatment have been mixed. In the case of *Metin Kaplan*, a German court refused a request by Turkey to extradite Kaplan, the leader of a banned Islamist fundamentalist group.¹⁸⁸ The German court determined that the evidence on which the extradition warrant was based had been procured by the torture in detention of a group of Kaplan's followers. The court held that diplomatic assurances from the Turkish government (that Kaplan's treatment and prosecution would conform to Turkey's human rights obligations) would not provide Kaplan with "sufficient protection" against such violations. Expressing concern about information extracted by torture and the independence of the Turkish State Security Court, the court stated in *Kaplan* that:

“...Such formal guarantees in an extradition proceeding can only provide sufficient protection in favour of the persecuted person if their correct implementation through the institutions of the requesting state—in this case the independent Turkish judiciary—can reliably be expected. The latter is not the case here.”

In November 2001, the Court of Appeal in Vienna ordered the extradition to Egypt of Mohamed Bilasi-Ashri, who had been sentenced *in absentia* in Egypt for alleged involvement in an Islamic extremist group.¹⁸⁹ The court considered Bilasi-Ashri's claim that he would be at risk for torture or ill-treatment and would not be given a fair trial upon return, but concluded that “Egypt was not a country where serious large scale violations of human rights could be considered an institutionalised everyday practice ...[t]hus there was no general obstacle to extradition.”¹⁹⁰ The court also determined that Bilasi-Ashri's pending asylum

October 2002; another example is the case of Ahmed Agiza and Mohammed al-Zairi who were returned by Sweden to Egypt following diplomatic assurances. On their return they were held for five weeks in incommunicado detention and, in spite of later visits by Swedish diplomatic representatives it was later alleged that they had been tortured.

¹⁸⁴ ECtHR Appl Nos 46827/99 & 4695/99. *Mamatkulov and Askarov v. Turkey*.

¹⁸⁵ Report of the Special Rapporteur on Torture, Mission to Uzbekistan, E/CN.4/2003/68/add.2, 3 February 2003 [online] [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/29d0f1eaf87cf3eac1256ce9005a0170/\\$FILE/G0310766.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/29d0f1eaf87cf3eac1256ce9005a0170/$FILE/G0310766.doc) (retrieved 26 March 2004).

¹⁸⁶ The Court had available to it materials on repression of independent Muslims and ERK party members in Uzbekistan documenting abuse and concern by Amnesty International and the United Nations. See HRW Report, *supra*.

¹⁸⁷ *Idem*.

¹⁸⁸ *Kaplan* 4 Aus (a) 308/02-147.203-204.03111. 27/05/03.

¹⁸⁹ Peter Finn, “Europeans Tossing Terror Suspects Out the Door,” *Washington Post*, January 29, 2002, page A1.

¹⁹⁰ See relevant parts of the Austrian court decision in the European Court of Human Rights decision *Bilasi-Ashri v. Austria*, Application No. 3314/02, November 26, 2002, section A.5.

application did not preclude his extradition.¹⁹¹ Despite the surprising finding that Bilasi-Ashri's fear of torture was unfounded,¹⁹² the Court of Appeal in its ruling conditioned his extradition upon receiving diplomatic assurances from the Egyptian authorities that Bilasi-Ashri's conviction *in absentia* would be declared null and void, that he would be retried before an ordinary (civilian) criminal court and would not be persecuted or suffer restrictions upon his personal freedom. The Austrian Federal Minister of Justice approved the extradition, subject to the conditions set forth in the Court of Appeal decision, and added the condition that Bilasi-Ashri be permitted to leave Egyptian territory within forty-five days in the case of acquittal. Austrian authorities subsequently requested permission from the Egyptian government to visit Bilasi-Ashri upon Austria's request after his return to Egypt.

In March 2002, the United Nations High Commissioner for Refugees requested that Austria grant Bilasi-Ashri refugee status on the basis that he had a well-founded fear of persecution if returned. In March and April 2002, the European Court of Human Rights requested that Austria not return Bilasi-Ashri until the Court reviewed his case. (Bilasi-Ashri had originally lodged his petition with the court in June 2000, but was subsequently detained pending extradition). The Egyptian authorities finally rejected the conditions laid out in the extradition order and Bilasi-Ashri was released from detention in Austria in August 2002.

The Bow Street Magistrate's court in the UK rejected a request from Russia to extradite two men suspected of having committed crimes in Chechnya.¹⁹³ Despite diplomatic assurances from Russia that the men would not be tortured, the court determined that *Mr. Zakaev* faced substantial risk of torture upon his return and relied on evidence given that a witness statement implicating Zakaev was extracted by torture.

The above cases show that the judiciary has a crucial role to play in ensuring that safeguards are adequate for the protection of persons who are extradited. They may only play this role if persons subject to an extradition order are provided with the opportunity of contesting the extradition. However, as has been revealed in the case of *K K Mohamed*, deportations have been used as 'disguised extraditions' to secure the transfer of individuals suspected of terrorist offences. Another example concerns the case of Muhammad Saad Iqbal Madni, of dual Pakistani/Egyptian nationality, who was apprehended in Indonesia around January 2002 and flown on board a United States aircraft to Egypt without charges and without a court hearing.¹⁹⁴ Prior to his apprehension the US Central Intelligence Agency urged Indonesian authorities to apprehend Iqbal Madni under suspicion of terrorist activities and shortly thereafter, Egyptian authorities requested his extradition. Indonesian officials referred to "visa violations" as a justification for his transfer however the extradition request appeared to be a mere formality to enable the Indonesian authorities to comply with US

¹⁹¹ "Where an extradition request concerns an asylum seeker, the requested State will not be in a position to establish whether extradition is lawful unless the question of refugee status is clarified. The determination of whether or not the person concerned has a well-founded fear of persecution must therefore precede the decision on extradition. This does not of itself require suspension of the extradition procedure. It does mean, however, that the decision of the extradition should only be made after the final determination on refugee status, even if extradition and asylum proceedings are conducted in parallel." Sibylle Kapferer, *The Interface between Extradition and Asylum*, UNHCR, op. cit., para. 29.

¹⁹² The Committee against Torture has expressed concerns *inter alia*, of numerous and consistent reports of torture and ill-treatment including deaths in custody of detainees by law enforcement officials in Egypt; the "**widespread evidence of torture and ill-treatment in administrative premises under the control of the State Security Investigation Department**;" the continued use of administrative detention and that victims of torture and ill-treatment have no access to judicial recourse for complaints against law enforcement officials, Conclusions and recommendations of the Committee against Torture: Egypt 23/12/2002, CAT/C/CR/29/4, para. 5; also concluding observations: Egypt 17/05/1999, A/54/44, para. 4.

¹⁹³ *The government of the Russian Federation v. Akhmed Zakaev*, Bow Street Magistrates' Court, Decision of Hon. T. Workman, November 13, 2003 [online] <http://www.tjetjenien.org/Bowstreetmag.htm> (retrieved March 26, 2004).

¹⁹⁴ Rajiv Chandrasekaran and Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*. The Washington Post, 11 March 2002, pg. A01.

requests to render the suspect,¹⁹⁵ and it does not appear that any opportunity was provided to Iqbal Madni to challenge his extradition in a court of law.

Deportations or expulsions

The New Zealand government instituted anti-terrorist measures in response to its obligations under Security Council Resolution 1373, which include legislative changes and other practices involving the expulsion of asylum seekers suspected of terrorist activities to their country of origin. The UN Human Rights Committee concluded that despite assurances sought by New Zealand that human rights would be respected, without monitoring mechanisms these practices could pose a risk to the personal safety and lives of those persons expelled.¹⁹⁶

Under New Zealand immigration legislation, an asylum seeker who is assessed as a threat and for whom a security risk certificate has been issued may be detained.¹⁹⁷ Such a procedure might potentially lead to a breach of article 3 of the Convention against Torture (*non-refoulement*) as found by the UN Committee Against Torture, “in that it enables the authorities to remove or deport a person deemed to constitute a threat to national security, with no obligation to give detailed reasons or to disclose classified information to the concerned person, limited possibilities of effective appeal, and the fact that the Minister of Immigration has to decide within three working days whether to remove or deport the concerned person.”¹⁹⁸

In *Chahal v United Kingdom* the European Court of Human Rights determined that the decision to deport a Sikh activist to India would violate article 3 of the ECHR prohibiting torture.¹⁹⁹ Despite assurances by the government of India, the court was not satisfied that Mr. Chahal’s safety was guaranteed because violations of human rights were a “recalcitrant and enduring problem” in the Punjab and other areas of India.

States have explained their practice of deporting/expulsing terrorist suspects in the context of Security Council Resolution 1373. Sweden for example, expelled two asylum seekers of Egyptian nationality to Egypt in December 2001 in breach of its obligation of *non-refoulement* and justified its policy under Resolution 1373.²⁰⁰ Their asylum claims were rejected on the basis of their alleged involvement in terrorist activities. The Swedish government relied on diplomatic assurances provided by Egypt that the men would not be tortured nor sentenced to death and that Agiza, who was sentenced *in absentia* by a military court, would receive a re-trial. It was also agreed that Swedish authorities could monitor the trials and visit the men in detention. Upon their return to Egypt, the men were held in *incommunicado* detention for five weeks. Human Rights Watch raised concerns about the monitoring process given that none of the visits by the Swedish diplomatic representatives were carried out in private and Swedish officials appeared to lack the expertise in assessing for signs of torture.²⁰¹ Al-Zari was released after almost two years in detention without trial and Agiza remains in detention awaiting trial by a military court.

¹⁹⁵ Ibid.

¹⁹⁶ UN Human Rights Committee concluding observations on New Zealand, 07 August 2002, CCPR/CO/75/NZL.

¹⁹⁷ Section 1140 Pt IVA Immigration Act 1987.

¹⁹⁸ UN Committee against Torture conclusion and recommendations, New Zealand, CAT/C/CR/32/4, 19 May 2004 <http://www.unhchr.ch/html/menu2/6/cat/cobs/32-nz.doc>.

¹⁹⁹ ECtHR 70/1995/576/662, 15 November 1996.

²⁰⁰ HRW Report, supra note 161. Swedish response to the Committee against Torture in *Attia v Sweden* CAT/C/31/d/199/2002, 24 November 2003 para 4.4.

²⁰¹ HRW Report, supra note 161.

The Swedish government also sought to deport Agiza's wife, Attia and their five children. Attia complained to the Committee against Torture that she would be detained and tortured upon her return to Egypt because of her connection to her husband.²⁰² Relying on the responses of the Swedish representatives who had visited Agiza in detention, the Committee determined that the deportation would not constitute a violation of Attia's right to be free from torture. The Committee also took into account that Attia was not charged with any offence and an extradition order had not been sought for her return.

3.1.4. Unlawful Renditions: Forceful inter-State Transfer of Individuals Outside Legal Procedures

Over 3000 individuals have been subjected to forceful inter-State transfers to detention facilities in known or undisclosed locations since the "war against terrorism" started and the method by which their transfer has been effected has often involved unlawful means.²⁰³ Over 600 individuals captured in Afghanistan have been transferred to Guantanamo Bay, Cuba, 300 are held at the US airbase at Bagram, Afghanistan and others held at Charleston, US.²⁰⁴ Other persons who had no involvement in the war in Afghanistan but were caught in the greater global 'war against terrorism' and suspected for their involvement in terrorist acts have been detained and transferred to undisclosed locations or to States where they are likely to face torture and cruel, inhuman or degrading treatment or punishment as well as other serious violations of human rights. Those falling within this group have been transferred under a policy described as "renditions" or "extraordinary renditions."

As has been described earlier, transfers of persons inter-State are carried out through extraditions, deportations or expulsions and must comply with legal and procedural safeguards. The notion of "renditions" involves the transfer of persons inter-state through means that are not recognised by law; in other words, forceful transfers not involving extradition, expulsion or deportation procedures. Referring to such transfers as "renditions" ascribes a degree of formality or "quasi-legal respectability,"²⁰⁵ however the use of the term should not detract from the illegal or irregular means by which the transfers are executed. States resort to renditions when there are no extradition agreements between States or to circumvent the procedural requirements of legal extraditions.

Originally, the US implemented a policy of "renditions" to secure the presence of individuals to stand trial for criminal charges. Although in 1980, the US Department of Justice Office of Legal Counsel issued an opinion that "irregular renditions" were a violation of customary international law because it would be an invasion of sovereignty for one country to carry out law enforcement activities in another without that country's consent,²⁰⁶ the opinion was repudiated in 1989.²⁰⁷ During the early 1990s, the practice involved the abduction of persons in other countries to stand trial in the US.²⁰⁸ The Supreme Court, while upholding court jurisdiction over a Mexican national brought to the United States via 'rendition', nevertheless noted that such renditions were potentially "in violation of general international law

²⁰² Supra note 86.

²⁰³ Priest, D & Gellman, B "US decries abuse but defends interrogations" Washington Post 26/12/2002 A01; President Bush State of the Union Address <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>.

²⁰⁴ ICRC website "US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC" 14/05/2004. www.icrc.org/Web/eng/sitengO.nsf/wpList74/73596F146DAB1A08C1256E9400496F48.

²⁰⁵ Fitzpatrick, J "Rendition and transfer in the war against terrorism: Guantanamo and beyond" 25 Loy. L.A. Int'l & comp. L. Rev. 457.

²⁰⁶ Extraterritorial Apprehension by the FBI, 4B. Op. Off. Legal Counsel 543 (1980).

²⁰⁷ Override International Law in Extraterritorial Law Activities, 13 Op. Off. Legal Counsel 163 (1989).

²⁰⁸ Examples include *United States v Yunis*, 924 F.2d 1086 (C.C. Cir. 1991) and *United States v Alvarez-Machain*, 504 U.S. 655,657 (1992).

principles.”²⁰⁹ The Permanent Council of the Organisation of the American States asked the Inter-American Juridical Committee to review the *Alvarez-Machain* decision, and the Committee found that the “kidnapping of [Dr. Alvarez-Machain] constitutes a serious violation of international public law, because it constitutes a violation of Mexican territorial sovereignty.”²¹⁰

The practice of renditions in the current “war against terrorism” is no longer carried out for the purpose of securing individuals’ presence for criminal trials; in most cases these individuals are not charged with any criminal offence and they are often transferred to third States where there is a substantial likelihood that they will be tortured. In some cases, the transfers are to unknown destinations where persons are held in incommunicado detention for indefinite and/or prolonged periods.

Between 1993 and 1999, the United States ‘rendered’ suspected terrorists to the US from Nigeria, the Philippines Kenya and South Africa.²¹¹ In 1998, Tallat Fouad Qassem, leader of an Egyptian Islamic extremist organization was detained in Croatia whilst traveling to Bosnia from Denmark.²¹² Qassem, who had been granted political asylum by Denmark, faced the risk of the death penalty if returned to Egypt, as he had previously been sentenced *in absentia* in Egypt by a military tribunal. He was reportedly questioned on board a US ship off the coast of Croatia before being sent to Egypt.

After September 11, the practice of renditions has become more widespread and individuals have been rendered to countries where torture is known to be systematic, including Egypt and Jordan, and where it appears that torture will be used to extract information and confession regarding terrorist activities and associations.²¹³

In September 2002, Maher Arar, a dual Canadian/Syrian national, was detained at JFK airport in New York, whilst he was on transit to Canada.²¹⁴ He was held for nearly two weeks incommunicado in US custody while under interrogation by US officials. He was then flown to Jordan and then to Syria, where he spent ten months in detention and was apparently repeatedly tortured. The US government claims to have relied on Syrian diplomatic assurances, but at the time of his rendition, he was not charged with any offence nor was he subject to any legal process in the US or elsewhere. No explanation has been given for his illegal rendition to Syria.

After his release, Mr Arar filed a complaint in the New York District Court alleging that his removal was carried out under the US government’s “extraordinary renditions” programme because the methods of interrogation used in Syria to obtain information from him would be considered unlawful in the United States.²¹⁵ He further alleged that the questions posed by Syrian security officers were similar to the questions he was asked while in US custody, and that information was passed between the US and Syrian officials as a result of the interrogations.²¹⁶ The Canadian government has established a commission to inquire into

²⁰⁹ *Idem*.

²¹⁰ Inter-American Juridical committee, “Legal Opinion Regarding the Decision of the Supreme Court of the United States of America”. C.J.I./RES/II/15/91.

²¹¹ *Supra* note 194.

²¹² *Ibid*.

²¹³ *Supra* note 203.

²¹⁴ Amnesty International report “USA – The threat of a bad example – undermining international standards as “was on terror” detentions continue” section on “Secret detentions and secret transfers” 15/08/2003. <http://web.amnesty.org/library/Index/EngAMR511142003>.

²¹⁵ Complaint of Maher Arar, Ararv Ashdroft et al. , US District Court of New York, http://www.ccr-ny.org/v2/legal/September_11th/docs/Ararcomplaint.pdf, para 1.

²¹⁶ *Ibid*., para 54 – 58.

the role of Canadian officials in relation to Mr Arar's unlawful transfer from the US to Syria. It has been alleged that Canadian officials provided intelligence information to the US and that, contrary to their obligations under international law, they did not seek to protect their national from such the unlawful transfer.²¹⁷

Mohammed Haydar Zammar, a Syrian born German national was detained in Morocco while on a personal visit, apparently on the basis of his membership in a Muslim brotherhood organisation. He was interrogated by US officials in Morocco before he was rendered to Syria where he is reportedly being held at the Far Falastin detention centre. No extradition procedures were involved in this rendition to Syria nor was he charged with any offence.²¹⁸

In January 2002, five Algerians and a Yemeni were taken by US forces in Bosnia and flown to a US detention centre in Guantanamo Bay in contravention of an injunction by the Bosnian Human Rights Chamber that they remain in the country until their cases were determined.²¹⁹ The Chamber declared the hand-over to the US illegal and in breach of the obligations of the government of Bosnia and Herzegovina under the European Convention of Human Rights and the Dayton Peace Agreement.²²⁰

A student from Yemen, Jamil Qasim Saeed, suspected for his involvement in the attack on the USS Cole, was rendered from Pakistan to Jordan, where he was handed-over to US authorities without extradition or deportation procedures.²²¹ Driss bin Lakoul, a Moroccan citizen, was detained in Syria while on his way to Afghanistan. He was first detained at the Far Falastin detention centre, which is run by the Syrian military intelligence and where torture is known to be carried out. He was subsequently removed to an unknown location in Syria for three months after which he was transferred to Morocco where he was detained for a further five months.²²²

On 24 June 2003 five men were arrested in Malawi by Malawi intelligence officers together with US agents, on suspicion of being members of al-Qaeda.²²³ Ibrahim Habaci and Arif Ulusam of Turkish nationality, Faha al Bahli, a Saudi national, Mahmud Sardar Issa a Sudanese national and Khalifa Abdi Hassan of Kenya were initially detained in an undisclosed location without access to lawyers. The men were supposed to appear before the High Court 48 hours after their detention, however they were removed to an undisclosed location for interrogation. Over a month later, the men were reported to have been rendered to Zimbabwe and were released a month later in Sudan.

On 13 July 2003, Pakistani authorities rendered Adil al-Jazeera, an Algerian national and suspected al-Qaeda member. He was detained in Peshawar and held incommunicado for a month while subjected to interrogation by Pakistani authorities before being rendered to an undisclosed location into US custody.²²⁴

Other persons reportedly detained in undisclosed locations include Khalid Shaikh Khalid Shaikh Mohammed, Abu Zabaydah arrested in Pakistan in March 2002, Abd al-Rahim al-

²¹⁷ See *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* (<http://www.ararcommission.ca/eng/>).

²¹⁸ Finn, "Al Qaeda recruiter reportedly tortured" Washington Post, 31/01/03 A14.

²¹⁹ Supra note 214.

²²⁰ See *Boudellaa and Others v Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina and Bemsayah against Bosnia and Herzegovina*, supra notes 130 and 131.

²²¹ Supra note 194.

²²² Supra note 218.

²²³ Supra note 214.

²²⁴ Ibid.

Nashiri a Saudi national arrested in November 2002, Ramzi bin al-Shibh a Yemeni national arrested in Pakistan September 2002 and Sayf al-Islam al-Masri arrested in October 2002 in Georgia. Ibn al-Shaykh al-Libi, a Libyan national, was detained by US military on January 2002 in Afghanistan. The current whereabouts of these individuals is unknown.²²⁵

3.2. DETENTIONS

States have a positive obligation to ensure that no one is deprived of their liberty in an “arbitrary fashion”. For a detention to be lawful, there is a positive obligation on the State to ensure that detainees have access to relevant procedural safeguards.²²⁶ States must also provide for an effective means to challenge the legality of the detention.²²⁷ Equally, there is a positive obligation on the State to protect the right to life and to ensure that individuals are protected against, torture, cruel and inhuman or degrading treatment or punishment.

These obligations apply to all detainees regardless of status and nationality. Similar protections under international humanitarian law apply during armed conflicts.²²⁸ This section analyses how the legality and conditions of detention as well as interrogation techniques applied (officially and unofficially) in the current ‘war against terrorism’ jeopardise the absolute prohibition against torture and cruel, inhuman or degrading treatment or punishment.

3.2.1. Conditions of detention and treatment during interrogations

In November 2001, President Bush declared that the attacks carried out by international terrorists against the United States and its citizens were of such a scale as to create a state

²²⁵ Ibid.

²²⁶ This applies also to administrative detention, which is a detention without charge or trial, authorized by administrative order rather than by judicial decree. It is allowed under international law, but, because of the serious injury to due process rights inherent in this measure and the obvious danger of abuse, international law has placed rigid restrictions on its application. According to the UN Human Rights Committee, preventive detention is²²⁶ allowed provided that it is not arbitrary, i.e. that it conforms to international minimum standards; is based on procedures established by law; the detainee is informed at the time of arrest of the reasons for detention; and the legality of the detention is subject to judicial review. (Communication No. 560/1993, CCPR/C/59/D/560/1993, *Hammel v Madagascar*, Communication No. 155/1983, CCPR/C/29/D/155/1983; at paras 18.2 and 20; see also *Torres v Finland*, Communication No. 291/1988, CCPR/C/38/D/291/1988; *Vuolanne v Finland*, Communication No. 265/1987, CPR/C/35/D/265/1987, *Portorreal v Dominican Republic*, Communication No. 188/1984, CCPR/C/31/D/188/1984). See also *Habeas Corpus in Emergency Situations* (Arts. 27(2) and 7(6) of the American Convention on Human Rights, Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H. R. (Ser. A) No. 8 (1987)).

²²⁷ According to the Human Right Committee, “Court review of the lawfulness of detention under article 9(4), which must include the possibility of ordering release, [should not be] limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release ‘if the detention is not lawful’, article 9, paragraph 4, required that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant.” (Communication No. 560/1993, CCPR/C/59/D/560/1993)

²²⁸ Administrative detention is also subject to international humanitarian law, specifically the Fourth Geneva Convention. Article 78 states, “If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.” But according to the Convention Commentary “such measures can only be ordered for real and imperative reasons of security.” Furthermore, Article 6 of the Convention stipulates that article 78 is among those articles the application of which “shall cease one year after the general close of military operations.” Again, according to the Commentary “as hostilities have ceased, stringent measures against the civilian population will no longer be justified.... The provisions which concern situations connected with military operations ... will no longer apply. The same applies to the clauses relating to internment.” Article 49 of the Fourth Geneva Convention forbids “individual or mass forcible transfers, as well as deportations of protected persons from the occupied territory to the territory of the Occupying Power.” (Jean S. Pictet, *Commentary on IV Geneva Convention Relating to the Protection of Civilian Persons in Times of War*, (1958)). See also note 358 and accompanying text

of armed conflict requiring a military response.²²⁹ A state of emergency was declared in the United States and a military response ordered to identify and detain suspected terrorists and their supporters, “for the effective conduct of military operations and prevention of terrorist attacks”. “*Those detained would be treated humanely and tried by military commissions, which due to security concerns, the President determined would not apply criminal procedural standards recognised in the United States district courts*”.²³⁰

Since this declaration, over 3,000 individuals have been detained at Guantanamo Bay, Diego Garcia, detention centres in Afghanistan, Iraq and other secret, undisclosed detention centres. Other States have also detained persons suspected of terrorist acts within their jurisdiction. Detainees have been held for over two years at Guantanamo Bay, and until very recently, were denied the opportunity to have their legal status determined. They were denied access to lawyers and a small number continue to be held in solitary confinement. The Inter-American Commission on Human Rights considered that the conditions at Guantanamo Bay were such that the detainees are held at the unfettered discretion of the United States government. The Commission issued precautionary measures requesting the government to take measures to have the legal status of the detainees determined so that they are afforded the legal protections commensurate with their status, which standards the Commission held “may in no case fall below the minimum standards of non-derogable rights.”²³¹

There is no uncertainty as to the international obligations, standards and protections that apply to detainees even when their legal status remains unclarified. These include international customary norms that detainees are to be treated humanely and non-derogable human rights, in particular the prohibition against torture and cruel, inhuman or degrading treatment or punishment.

The US government has relied on the extra-territorial location of Guantanamo Bay, Diego Garcia, Abu Ghraib and other overseas locations so as to place its activities and conduct of US forces in control of the custody, detention and interrogation of detainees outside of US legal processes. However, the US Supreme Court has ruled that it still has jurisdiction over persons detained within the plenary and exclusive jurisdiction of the US.²³²

By contrast, the US government considered Guantanamo Bay within its special maritime and territorial jurisdiction for the purposes of its federal laws prohibiting the use of torture so that the Torture Act (18 U.S.C. section 2340), which applies only to offences that occur outside the US, is excluded from operation there.²³³ This was the view expressed by a working group established in January 2003 consisting of US officials including legal counsel and intelligence officials.²³⁴

3.2.2. Human Rights Safeguards against Torture and Cruel, Inhuman or Degrading Treatment and Punishment during Detention

²²⁹ Military Order of President Bush on the detention, treatment, and trial of certain non-citizens in the War against Terrorism, 13 November 2001.

²³⁰ *Ibid.*, para (f).

²³¹ *Precautionary measures in Guantanamo Bay, Cuba*, Inter-American Commission on Human Rights, 13 March 2002.

²³² *Rasul v Bush*, 215 f.2d 55 (D.D.C. 2002), *infra*.

²³³ Draft Working Group Report on detainee interrogations in the global war on terrorism: Assessment of legal, historical, policy, and operational considerations, 6 March 2003. This classified document was leaked to the press.

²³⁴ Department of Defense briefing, 20 May 2004. <http://www.globalsecurity.org/military/library/news/2004/05/mil-040520-dod02.htm>.

Arrest and pre-trial detention

The right to *habeas corpus*, the right to have access to a lawyer and the right to have access to the outside world are all safeguards that ensure the humane treatment of detainees.²³⁵ Article 9(3) of the International Covenant on Civil and Political Rights (ICCPR) safeguards the right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or judicial authority and to a trial within a reasonable time. Article 9(4) ensures the right to *habeas corpus* and the *Basic principles on the role of lawyers* ensures the right of detainees to have access to a lawyer no later than 48 hours after the time of arrest or detention.²³⁶

In its remarks on the fifth periodic report of the United Kingdom, the United Nations Human Rights Committee noted that provisions of the Terrorism Act 2000 permitting the detention of persons for more than 48 hours without access to a lawyer lacked justification.²³⁷ The right to *habeas corpus* constitutes a core legal safeguard for any person arrested.²³⁸ Furthermore, the United Nations Commission on Human Rights resolved that prolonged *incommunicado* detention “may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment.”²³⁹ Hence, prompt judicial intervention, including the right to habeas corpus, seeks to prevent a breach of the absolute prohibition on torture.

Conditions of detention

Article 10 of the ICCPR requires that all persons detained be treated with humanity and with respect for their inherent dignity. While not specifically mentioned in Article 4(2) of the ICCPR as a right from which no derogation is permitted, the Human Rights Committee has expressed the view that the rights guaranteed in Article 10 constitute norms of general international law that are not subject to derogation.²⁴⁰

The Human Rights Committee found that prolonged solitary confinement may constitute a violation of the right to be free from torture.²⁴¹ The Inter-American Court of Human Rights held that prolonged isolation and deprivation of communication constitutes cruel and inhuman treatment, harmful to the psychological and moral integrity of the person in violation of Article 5 of the American Convention on Human Rights.²⁴²

Jurisprudence from the European Court of Human Rights confirms that conditions of detention must be compatible with the prohibition against torture so as “not [to] subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention ... complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason...”²⁴³

²³⁵ Report of the Special Rapporteur to the General Assembly on the question of torture and other cruel, inhumane or degrading treatment or punishment, A57/173, 02 July 2002.

²³⁶ Basic Principles on the Role of Lawyers, principles 5 - 8. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990).

²³⁷ Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland. 06/12/2001, CCPR/CO/73/UK;CCPR/CO/73/UKOT, para 19.

²³⁸ *Brannigan and McBride v United Kingdom*, European Court of Human Rights judgment (Merits and justification), 26/05/1993, paras 63, 64.

²³⁹ Commission on Human Rights resolution 1997/38, para 5.

²⁴⁰ UN Human Rights Committee No. 29, CCPR/C/21/Rev.1/Add.11, para. 13 (2001).

²⁴¹ UN Human Rights Committee No. 20, CCPR/C/79/Add.93, para 20 (1998).

²⁴² *Velasquez Rodriguez Case*, I/A Court H.R., Judgment 28/07/1988, para 156.

²⁴³ *Ocalan v Turkey*, ECHR, 12/03/2003, paras 231 – 232.

The Inter-American Court of Human Rights has similarly held that “Any use of force that is not strictly necessary to ensure proper behaviour on the part of the detainee constitutes an assault on the dignity of the person, in violation of Article 5 of the American Convention. The exigencies of the investigation and the undeniable difficulties encountered in the anti-terrorist struggle must not be allowed to restrict the protection of a person’s right to physical integrity.”²⁴⁴

The Human Rights Committee has found that to be held in solitary confinement in a cell measuring two metres by two, permitted only to see daylight for no more than ten minutes a day, constitutes torture or cruel, inhuman or degrading treatment or punishment.²⁴⁵ Similarly, the Inter-American Court of Human Rights considered that arbitrary *incommunicado* detention in a damp cell measuring 15 square metres shared with 16 other detainees without proper hygiene facilities amounted to cruel, inhuman and degrading treatment.²⁴⁶

Treatment during interrogation

Interrogation practices are subject to the safeguards of humane treatment and the absolute prohibition against torture. The Human Rights Committee determined that handcuffing, hooding, shaking and sleep deprivation used alone or in combination violate the prohibition against torture and cruel, inhuman or degrading treatment or punishment.²⁴⁷

In its report on *Terrorism and Human Rights*, the Inter-American Commission concluded, “all methods of interrogation that may constitute torture or other cruel, inhuman or degrading treatment are strictly prohibited”.²⁴⁸ Such methods could include severe beatings, stress positions, rape, sexual aggression, electric shocks, suffocation, burns and other subtle forms of treatment such as exposure to light and noise, sleep deprivation, diet manipulation, total isolation and sensory deprivation.²⁴⁹

The UN Special Rapporteur on Torture has referred to the act of prolonged shackling as an example of torture²⁵⁰ and that prolonged sleep deprivation can amount to torture.²⁵¹

The UN Committee against Torture has found that being restrained in painful conditions, hooded, being exposed to loud music for prolonged periods and prolonged sleep deprivation when used in combination with other forms of cruel, inhuman and degrading treatment may amount to torture.²⁵²

²⁴⁴ Loayza Tamayo Case, I/A Court H.R., Judgment, 17/09/1997, para. 57.

²⁴⁵ *Polay Campos v Peru*, Case No. 577/1994, Views adopted 06/11/1997, paras. 8.4, 8.6 and 8.7.

²⁴⁶ *Suarez Rosero Case*, I/A Court H.R., Judgment 12/11/1997, paras. 90 – 91. See also the United Nations *Standard Minimum Rules for the Treatment of Prisoners* that set international standards of humanity for the conditions of detention.

²⁴⁷ UN Human Rights Committee CCPR/C/79/Add.93, paras. 19,21 (1998).

²⁴⁸ Inter-American Commission on Human Rights: *Report on Terrorism and Human Rights*, (IAHC report), OEA/Ser.LV/II.116 <http://www.cihs.oas.org/Terrorism/Eng/toc.htm>.

²⁴⁹ *Ibid.*, paras. 211-12.

²⁵⁰ Report of the Special Rapporteur on Torture pursuant to Commission on Human Rights Resolution 1997/38 (Yemen para 200) UN Doc E/Cn.4/1998/38, pursuant to CHR resolution 1995/37 (China para 104) E/Cn.4/1996/35/Add.1.

²⁵¹ Report of the Special Rapporteur on Torture (Yemen para 200) E/CN.4/1998/38, (China, para 104) E/CN.4/1996/35/Add.1.

²⁵² Committee against Torture: Concluding observations concerning Israel (1997) A/52/44, para 257. See, also, Report by the Association of the Bar of the City of New York, Committee on international human rights, Committee on military affairs and justice: Human rights standards applicable to the US interrogation of detainees.

The European Court of Human Rights considered the use of “disorientation” or “sensory deprivation” techniques in the case of *Ireland v United Kingdom*.²⁵³ Five techniques including wall-standing where detainees are forced to remain in “stress positions” for extended periods, hooding, being subjected to noise, sleep deprivation and diet manipulation, were considered by the Court to constitute inhuman treatment in violation of Article 3 of the European Convention on Human Rights. The Court found that ill treatment “must attain a minimum level of severity” in order to be considered torture or inhuman or degrading treatment or punishment.²⁵⁴ That assessment involves a consideration of each individual case, taking into account the duration of ill treatment, its physical or mental effects, and in some cases, the sex, age and state of health of the victim. In coming to the conclusion that the five techniques constituted inhuman treatment, the Court said that the techniques “were applied in combination, with premeditation and for hours at a stretch; ... caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. ... The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.”²⁵⁵

The Israeli Supreme Court ruled that the following interrogation methods were prohibited: shaking, waiting in the “*Shabach*” position (involves the detainee being seated on a low chair, tilted forward towards the ground, both hands tied with one arm placed in side the gap behind the chair and the other arm over the back of the chair, head covered in a sack covering to his shoulder while loud music is played), “frog crouch” (involves a person crouching on his toes for over five minute intervals), excessive tightening of cuffs and sleep deprivation.²⁵⁶

Article 15 of the Convention against Torture safeguards against the use of any statement that is extracted as a result of torture. Such a statement cannot be used as evidence in any proceedings, except against the person that is accused of torture. The importance of this provision, as a safeguard to guarantee the prohibition of torture and ill-treatment as well as in the context of fair trials will be disused below.²⁵⁷

3.2.3. International Humanitarian Law Safeguards against Torture and Cruel, Inhuman or Degrading Treatment or Punishment during Detention

The conditions of detention and the treatment and interrogation of detainees during an armed conflict is subject to international humanitarian law. Common article 3 of the four Geneva Conventions of 12 August 1949, which is enforceable as a matter of international customary law,²⁵⁸ prohibits torture, cruel treatment, and outrages upon personal dignity, in particular humiliating and degrading treatment. The general right of humane treatment for prisoners of war is provided for in Articles 13 and 14 of the Third Geneva Convention

²⁵³ *Ireland v United Kingdom*, European Court of Human Rights, Judgment of October 9, 1979, Series A Nº 25.

²⁵⁴ *Ibid.*, para 162.

²⁵⁵ *Ibid.* para 167.

²⁵⁶ *Supra* note 149.

²⁵⁷ See notes 431-433 and accompanying text.

²⁵⁸ The customary nature of common Article 3 of the Geneva Conventions has been affirmed by the International Court of Justice in the *Nicaragua* case (*ICJ Reports* 1986, at 218) and, more recently, by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadic* case, para. 98 ff (ICTY, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, *Tadic*, para. 134). In its decision, the Appeals Chamber also held that many of the provisions of Protocol II can be regarded as customary law (*ibidem*, para. 117 ff.). See also ICTY, Judgment, 10 Dec. 1998, *Furundzija*, para. 153 (Torture); ICTR, Judgment, 2 Sept. 1998, *Akayesu*, paras. 495 (Genocide) and 608 (Common Art 3 Geneva Conventions); ICTR, Judgment, 21 May 1999, *Kayishema and Ruzindana*, para. 88 (Genocide).

Relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention).

The fundamental guarantees set out in Article 75 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) ensure that at a minimum, persons receive humane treatment. Article 75 also prohibits “at any time and in any place whatsoever ... torture of all kinds, whether physical or mental, humiliating and degrading treatment and threats to commit such acts”.

Humane treatment for civilians in occupied territory is safeguarded in Article 27 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, whilst torture and any other measures of brutality is prohibited whether applied by civilian or military agents (Article 32). Civilians detained are to be treated humanely (Article 5).

The Geneva Conventions contain specific requirements concerning the conditions of internment, including accommodation, hygiene, clothing, religious practice and access to medical services. Interrogation is strictly limited to giving the name, rank, date of birth and army identification number. Article 17 of the Fourth Geneva Convention prohibits the use of physical or mental torture, or any other form of coercion to secure information from prisoners of war. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

3.2.4. Conditions of Detention and Treatment during Interrogation

The apparent systematic and widespread use of torture and cruel, inhuman or degrading treatment or punishment against detainees is not limited to those held within a particular detention regime. Allegations have been consistently made by detainees held in detention centres in Afghanistan, Guantanamo Bay and Iraq based on accounts of those who have been released.²⁵⁹ The conditions of treatment of those terrorist suspects who remain in detention is unknown. The allegations of ill treatment apply to the overall conditions of confinement and are not restricted to interrogation techniques.

Recent reports of ill treatment arising from detention centres in Iraq raise new concerns since the US government has determined that the Geneva Conventions apply to its occupation of Iraq, precluding any doubts regarding the applicability of international humanitarian law to the detention and interrogation of detainees. The Taguba report mentioned below suggests that most of the detainees are “Iraqi criminals” and not “terrorist suspects”, yet recent reports reveal that the conditions of their detention and treatment during interrogation constitute serious breaches of international human rights and humanitarian law.²⁶⁰

Conditions during arrest, transfer, pre-detention and detention

Afghanistan

²⁵⁹ Official reasons given for the release of detainees from Guantanamo Bay includes lack of intelligence value and that the released detainees do not pose a threat to security. United States Department of Defense News Release “Detainee transfer completed”, 02 April 2004.

²⁶⁰ Taguba report, section on “IO comments on MG Miller’s assessment”, para. 1, *infra*.

Many terror suspects that were captured in Afghanistan have been detained at Kandahar and Bagram airbases under US custody before being transferred to Guantanamo Bay, Cuba.

Conditions of capture: US military personnel have reportedly subjected captured detainees to intimidation tactics. These terror suspects were reportedly beaten, bound, confined in tiny rooms, blindfolded and thrown against walls, subjected to loud noises and deprived of sleep.²⁶¹

Transfer to Kandahar: Those who have been released from Guantanamo Bay have provided accounts that upon capture in Afghanistan they were bound, hooded, blindfolded, hauled from the neck; some were kicked and dropped off the plane.²⁶² A Pakistani fighter interviewed by the organization Human Rights Watch said that “we were all beaten, without exception”.²⁶³

Conditions at Kandahar airbase: The Pakistani national, Abdul Razaq said his hands were tied for two months. Sleeping quarters are said to have consisted of canvas canopies where detainees slept in groups on bare earth, surrounded by wire under constant surveillance. Detainees were only provided with a single blanket each, despite the freezing conditions. There was a ‘no talking’ rule for the first 20 days. According to another Pakistani national, Mohammed Saghir, who was also detained at the airbase, detainees were not allowed to sleep for more than an hour at a time.²⁶⁴ Men would apparently be beaten and kicked if they tried to talk or sleep,²⁶⁵ and occasionally they were forced to lie outside on the frozen ground.

Conditions at Bagram airbase: A detention facility was established in the US airbase at Bagram, Afghanistan in late 2001. Reports from released detainees reveal that the conditions at Bagram were harsher than the conditions at Guantanamo Bay. With the exception of visits by the International Committee of the Red Cross, the detainees are reportedly held *incommunicado*. Detainees have indicated that they were held in groups in a cell for several weeks, stripped to their underclothes.²⁶⁶ They were also said to have been deprived of their sleep by bright lights shining outside their cells for 24 hours and by US military personnel who kept banging their batons on the metal cell walls.²⁶⁷

According to Alif Khan who was released from Guantanamo Bay, the men were continuously chained and hooded and their eyes were taped. Guards standing in front and behind him (one with a pointed Kalashnikov gun) forced him to kneel with his hands above his head for hours, and any attempt to move from this position would increase the number of hours he was forced to stay in this position.²⁶⁸

As punishment, the detainees were reportedly forced to hold their shackled hands above a door for two hour intervals.²⁶⁹

²⁶¹ Supra note 203.

²⁶² Meek, J “People the law forgot” Guardian newspaper 03 December 2003, pg.5.

²⁶³ Human Rights Watch report “Enduring Freedom: Abuses by US forces in Afghanistan”, March 2004, <http://hrw.org/reports/2004/afghanistan0304/index.htm>, section on “Mistreatment in Detention”.

²⁶⁴ Meek supra note 262 pg 5.

²⁶⁵ Based on interviews with HRW and released detainees supra notes 262, 263.

²⁶⁶ Supra note 263.

²⁶⁷ HRW report supra note 263 and Panorama, interview with Sayed Abasin, Transcript of “Inside Guantanamo” BBC Panorama programme, 05/10/2003 <http://news.bbc.co.uk/1/shared/spl/hi/programmes/panorama/transcripts/insideGuantanamo.txt>.

²⁶⁸ Ibid., Panorama, interview broadcasted on 05 October 2003 with Alif Khan.

²⁶⁹ HRW interview with Ahmed Khan, Zumat, Paktia, 10 March 2003. HRW report supra note 263.

Two deaths are known to have occurred in US custody at Bagram airbase. Mullah Habibullah, aged approximately 30 years, died on 3 December 2002 of “blunt force injuries to lower extremities complicating coronary artery disease”.²⁷⁰ Dilawar, aged 22, died on 10 December 2002. His death was treated as a homicide caused by “pulmonary embolism due to blunt force injury to the legs.”²⁷¹ The US have apparently refused to release details of its investigations into these deaths including that of a third Afghan who died at a detention site near Asadabad, Kunar province.²⁷²

Guantanamo Bay: Guantanamo Bay is regarded as a holding camp for the purposes of prolonged interrogation of detainees. A US soldier stationed at Guantanamo Bay described that the purpose of Guantanamo Bay was to detain and to extract information from the detainees.²⁷³ What little is known of the conditions of detention and interrogation techniques used at Guantanamo Bay has been gleaned from accounts of released detainees. 134 detainees have been released unconditionally from Guantanamo and 12 have been released into continued detention (7 Russians, 4 Saudis and 1 Spaniard).²⁷⁴ The intelligence value of those held at Guantanamo Bay must be open to question given that charges have only been laid against three of the detainees and the stated views of certain US officials that those detained there are of mid to low level security risk.²⁷⁵

MG Miller, then Commander of the Joint Task Force at Guantanamo Bay, apparently made certain recommendations for operational procedures at Abu Ghraib detention center in Iraq that are said to be based on the experience at Guantanamo Bay.²⁷⁶ Recent revelations of torture and cruel, inhuman or degrading treatment and punishment at Abu Ghraib provide an indication of the likely conditions of detention at Guantanamo Bay. MG Miller recommended that the detention guard force be dedicated and trained for the setting of conditions for the successful interrogation and exploitation of detainees.²⁷⁷ According to his assessment, the function of detention operations is to “provide a safe, secure, and humane environment that supports the expeditious collection of intelligence”.²⁷⁸

Conditions of transfer to Guantanamo Bay: Prior to their transfer to Guantanamo Bay, detainees’ beards were reportedly shaved off, an act which is considered humiliating for Muslim men.²⁷⁹ Hands and feet were apparently bound, cuffed and taped. Detainees were said to be blindfolded, gagged and ears taped. On board the airplane to Guantanamo Bay, detainees were chained to hand rests and restrained to their seats by straps across their bodies, and they were sedated and rendered unconscious during the flight.²⁸⁰ Once at their destination, they were reportedly thrown off the plane while bound, gagged and blindfolded.

²⁷⁰ Gall, Carlotta “US military investigating death of Afghan in custody”, New York Times, 04 March 2003 cited in HRW report supra note 263 footnote 85.

²⁷¹ Ibid.

²⁷² HRW report supra note 263.

²⁷³ Panorama interview with Sgt Keefer, supra note 267. Also supra note 262, pg 7.

²⁷⁴ Figures as of February 2004, Department of Defense news release “ Detainee transfer completed”. Also “Tajiks released from Guantanamo”, BBC news online 13 April 2004.

²⁷⁵ The three charged are Ali Hamza Ahmed Sulayman al Bahlul (Yemeni), Ibrahim Ahmed Mahmoud al Qosi (Sudanese) and David Hicks (Australian). They will apparently be tried by military commissions. Department of Defense news releases “Two Guantanamo detainees charged”, 24 February 2004 and “Guantanamo detainee charged”, 10 June 2004.

²⁷⁶ Taguba report, section entitled “IO comments on MG Miller’s assessment” para 1 & 2.

²⁷⁷ Taguba report, section on Assessment of DOD counter-terrorism interrogation and detention operations in Iraq. Infra.

²⁷⁸ Ibid.

²⁷⁹ Supra note 262, pg. 5.

²⁸⁰ Panorama interview of Alif Khan, supra note 267.

Conditions at Guantanamo Bay: There was a 'no talking' rule in the first one and a half months of detention. During that time, there was reportedly little tolerance for religious practice. Attempts to pray resulted in the beatings and gagging.²⁸¹

The sleeping quarters at Camp X-Ray (Guantanamo Bay) consisted of 2x3m wire mesh cages, which exposed the men to the heat and afforded virtually no privacy. Their hands, feet and waist were handcuffed, restricting virtually all movement. According to a Swedish report that was prepared after an official visit to Guantanamo Bay, "One of the guards keeps a hand on the back of the detainee's neck the whole time, bending the detainee's head forward so that he is looking at the ground the whole time he is being moved".²⁸² In April 2002 the detainees were moved to Camp Delta.

Complaints were made that the cells in Camp Delta were too small to accommodate religious practice.²⁸³ The cells with solid walls were smaller (1.8x2.4m) than those at Camp X-ray. Lights were reportedly kept on all the time and the men were not allowed to speak to detainees in other blocks. One released detainee who suffered from knee problems was reportedly not allowed to exercise and was locked in his cell for five days when he tried to do so.²⁸⁴

Camp Echo is said to be a secret super- maximum security facility which holds a small number of detainees in solitary confinement in tiny cells with a military police officer permanently guarding each cell. Detainees held here include Moazzem Begg, Feroz Abbasi and David Hicks.²⁸⁵

As of October 2003, there were 32 suicide attempts at Guantanamo Bay.²⁸⁶ The prolonged and indefinite conditions of detention reportedly contributed to the deteriorating mental health of the detainees. Most had been detained at Guantanamo for over two years. Until recently, detainees were provided with no opportunity to clarify their legal status. With the exception of visits by the ICRC, the men are held *incommunicado*.²⁸⁷

Iraq (US control facilities)

Detention facilities in Iraq under US control include Abu Ghraib Prison, Camp Bucca, Camp Ashraf and Camp Cropper. The facilities hold both Iraqi common criminals and persons suspected as terrorists for interrogation purposes. Unlike Guantanamo Bay, the facilities are not solely created to detain persons apprehended in the war on terrorism.²⁸⁸ Notwithstanding that certain persons detained in Iraq detention facilities have nothing to do with terrorism, similar approaches to those used at Guantanamo Bay appear to have been applied.²⁸⁹

²⁸¹ Supra note 262, pg 5

²⁸² Ibid., pg 6.

²⁸³ Panorama programme, supra note 267.

²⁸⁴ Ibid.

²⁸⁵ Rose, D, "Revealed: the full story of the Guantanamo Britons", The Observer, 14 March 2004.

²⁸⁶ Panorama programme supra note 267.

²⁸⁷ ICRC "US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC", 14 May 2004. <http://www.icrc.org/Web/Eng/siteeng0.nsf/wpList74/73596F146DAB1A08C1256E9400469F48>.

²⁸⁸ Art 15-6 Investigation of the 800th Military Police Brigade, (Taguba report) <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html#Fnother2.2> section entitled "IO comments on MG miller's assessment", para 1. MG Taguba, Deputy Commanding General Support was requested in January 2004 to investigate "allegations of detainee abuse at Abu Ghraib Prison."

²⁸⁹ Report of ICRC, section 1, Treatment during arrest. See above section under Guantanamo. MG Miller, then Commander of the Joint Task Force at Guantanamo Bay, apparently made certain recommendations for operational procedures at Abu Ghraib detention center in Iraq that are said to be based on the experience at Guantanamo Bay. The Taguba report stated there was a

Treatment during arrest, transfer and initial custody: Arrests appear to have been carried out in a “fairly consistent pattern” whereby those arrested were taken from their homes after dark, handcuffed in flexi-cuffs and hooded.²⁹⁰ The ICRC received allegations of pushing, insults, punching, kicking, aiming and striking with rifles. Military intelligence officials estimated that between 70% and 90% of arrests were made in error.²⁹¹

In September 2003, Coalition forces arrested nine men.²⁹² During their arrest, they were apparently made to kneel in prayer position and the back of their necks was stamped by soldiers if they tried to lift their heads. They were reportedly severely beaten when taken to an initial holding place at an office in Al-Hakimiya. One man died following his ill treatment, his death certificate read “Cardio-respiratory arrest – asphyxia” and two other men were hospitalised with severe injuries which were considered medically consistent with their accounts of being beaten.²⁹³ An investigation is underway in to the mentioned death of the detainee.

The ICRC received two accounts of men who were tied or cuffed, hooded and made to lie or sit on hot surfaces during their transfer causing severe burns, which in one case, required three months hospitalisation.²⁹⁴

Conditions of detention: Details of the conditions in which detainees were held are set out under the section of the ICRC report on interrogation techniques.²⁹⁵ The treatment received by the detainees during their detention was apparently created to produce an environment conducive for interrogation. Allegations of ill treatment and in some cases torture are part of the detainees’ overall treatment during their detention in addition to the severe ill-treatment they were subjected to during interrogation sessions.²⁹⁶

The information on the conditions of detention and treatment during interrogation has only come to light due to photographs released to the public and subsequent leaked ICRC documents and a military investigation conducted by MG Taguba. The reports reveal detailed findings of ill treatment and in some cases torture. The most severe instances of ill treatment are said to have occurred in the interrogation facilities at Abu Ghraib.

The Red Cross report presented details of cases of ill treatment carried out by Coalition Forces between March and November 2003. The report follows earlier reports in April of ill treatment used during the interrogation of detainees at Umm Qasr, which led to the cessation of the use of hoods and flexi-cuffs during interrogation. In May 2003, details of

strong argument that the intelligence value of detainees held at Guantanamo was different to that of detainees held at Abu Ghraib and other detention facilities in Iraq. Taguba report, *Ibid.*, section entitled “IO comments on MG Miller’s assessment” para 1 & 2.

²⁹⁰ Report of the International Committee of the Red Cross (ICRC report) on the treatment by the coalition forces of prisoners of war and other protected persons by the Geneva Conventions in Iraq during arrest, internment and interrogation, February 2004, section 1, entitled “Treatment during arrest”. The confidential report was handed by the ICRC to the Coalition forces, Mr Paul Bremer and Lt. Gen Ricardo Sanchez in February 2004 and after portions of it had been leaked, it was subsequently released with the ICRC’s consent to the public.

²⁹¹ *Ibid.*, para 7.

²⁹² ICRC report, *supra* note 290, section 2, “Treatment during transfer and initial custody”.

²⁹³ *Ibid.* According to the ICRC report, Commander of the Coalition Forces Basrah informed the father of the deceased that an investigation had been launched.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*, section 3 entitled “Treatment during interrogation”.

²⁹⁶ *Ibid.*, paras. 24 & 59.

over 200 allegations of ill treatment and in July of 50 allegations of ill treatment were also brought to the attention of the Coalition Forces.²⁹⁷

In January 2004, Major General Taguba, Deputy Commanding General for Support, was requested by the Commander of the Coalition Forces, under the direction of the Chief of Staff US Command to investigate the 800th Military Police Brigade detention and internment operations. His report followed two earlier investigations by MG Miller, Commander Joint Task Force Guantanamo Bay in September 2003 and MG Ryder's report in November 2003.²⁹⁸

According to the ICRC report, "high value detainees" have been held in solitary confinement at Baghdad International Airport.²⁹⁹ Over a hundred detainees have been held under such conditions since June 2003 in dark cells *incommunicado* for up to five months, without charges. The detainees are also reportedly subjected to interrogation during the period of solitary confinement and the conditions of their detention appear to be motivated by security reasons and for interrogation purposes.

Hossam Shaltout, a Canadian civilian who was in Iraq as part of a group called *Rights and Freedom International*, has filed suit with the US Army Claims Office for his false imprisonment, torture and injury at Camp Bucca. He claims US troops arrested him in April 2003, detained him for three days in an armoured personnel carrier, took him to Camp Bucca where he was beaten with a rifle, shackled and chained for long periods in solitary confinement.³⁰⁰ He claims that at Camp Bucca, he saw other Iraqis tortured more severely than he.

Secret detention centres and disappearances: Detainees have also reportedly been held in secret detention centres out of reach of American legal processes.³⁰¹ Little is known about the number and fate of those sent to secret detention centres or their whereabouts. Those who appear to be high risk security suspects such as Khalid Shaikh Mohammed, considered the mastermind of the September 11 plot, and Abu Zubaydah, apparently a senior member of the al-Qaeda network are said to be held in secret undisclosed locations along with others mentioned in the section of this report on renditions.³⁰²

The disappearance of Yemeni, 'Abd a-Salam al-Hiyla, after a business trip to Egypt in September 2002 is an example. His family still do not know of his whereabouts and have received conflicting information that he is in Guantanamo Bay or Egypt or put on a "special American plane that took him to Azerbaijan".³⁰³ According to a report by Amnesty International, concerns have been raised that the Yemeni government has not actively pursued their case with the Egyptian or US authorities.³⁰⁴

Iraq (UK controlled facilities)

²⁹⁷ Ibid., section entitled "Previous actions taken by the ICRC in 2003 on the issue of treatment", paras. 32 – 34.

²⁹⁸ Taguba report, supra note 288, section entitled "Background".

²⁹⁹ ICRC report, section 4.2 "High value detainees", Baghdad international Airport, supra note 290.

³⁰⁰ Brazier, J "LA immigrant files suit, claiming false jailing, torture in Iraq", 03 May 2004.

³⁰¹ Supra note 203.

³⁰² Supra note 214.

³⁰³ Amnesty International report "The Gulf and the Arabian Peninsula: human Rights fall victim to the "war on terror". Ai Index: MDE 04/002/2004, 22 June 2004.

³⁰⁴ Idem.

According to the ICRC report on the treatment in Iraq of POWs and other protected persons by the Geneva Conventions,³⁰⁵ prisoners in Umm Qasr camp and its successor, Camp Bucca (which has been most of the time under the control of British forces) were being mistreated; particularly handcuffed and hooded during arrest, detention and interrogations: "*Hooding appeared to be motivated by security concerns as well as to be part of standard intimidation techniques used by military intelligence personnel to frighten inmates into cooperating*".³⁰⁶

The response of the UK government regarding the allegations of ill-treatment of detainees and particularly, regarding the practice of hooding, has been somehow ambiguous. It seems that the position of the British government is that hooding is forbidden during interrogations (as the judgment of the European Court of Human Rights in *Ireland v. United Kingdom* clearly establishes) but that hooding 'outside' interrogations is acceptable when there is a "strong military reason".³⁰⁷ On the other hand, the Secretary of Defence in the House of Commons (June 28) claimed that the government was not aware of any incidents in which UK interrogators "are alleged to have used hooding as an interrogation technique".³⁰⁸ But according to the Intelligence and Security Committee Annual Report 2003 – 2004 (published in June 2004), the Prime Minister admitted that, in a few cases, UK intelligence personnel had conducted interviews with detainees in a manner not consistent with the principles laid down in the Geneva Convention.

The UK High Court of Justice will be hearing a case in end July 2004 brought by the relatives of 13 Iraqi prisoners, who were allegedly killed and some ill-treated by British troops in Iraq, and who are challenging the government's refusal to hold independent inquiries to investigate the incidents (*Mazin Jumaa Gatteh Al Skeini & Others v. Secretary of State for Defence*).³⁰⁹ The position of the UK government is that the obligation to conduct an effective investigation under the European Convention of Human Rights does not apply to UK troops in Iraq.³¹⁰

The first of the complainants listed is Hazim Jum'aa Gatteh Al-Skeni, who was shot dead when British soldiers opened fire in response to shots at a funeral ceremony. The case also includes the claim of family members of Baha Mousa, a 28 year old married father-of-two, who was a hotel receptionist that died after allegedly being beaten by British troops following his arrest together with eight other men at a hotel in Basra. Witness statements supporting this claim include allegations of hooding, kicking, punching, restraining movements; keeping in confined spaces; beating in genital area; beating beneath the ribs; and throwing freezing water. His case was one of those highlighted in the Red Cross report on the treatment of prisoners in Iraq:

"One allegation collected by the ICRC concerned the arrest of nine men by the CF in a hotel in Basrah on 13 September 2003. Following their arrest, the nine men were made to kneel, face and hands against the ground, as if in a prayer position. The soldiers stamped on the back of the neck of those raising their head. They confiscated their money without issuing a receipt.

³⁰⁵ Priest and Gellman, Wall Street Journal article based on a response by national security officials to the journalists. *Supra* note 290.

³⁰⁶ *Idem*, para 30.

³⁰⁷ House of Lords, Written Answers: Wednesday 1 July 2004.

³⁰⁸ House of Commons, Written Answers: Monday 28 June 2004.

³⁰⁹ High Court of Justice Queen's Bench Division, Administrative Court Co/2242/04

³¹⁰ The armed forces minister, Adam Ingram, told MPs the government did not believe that the human rights convention applied to British soldiers in Iraq. He said: "The best judgement that I have is that the ECHR does not apply." *The Guardian*, May 11, 2004 at: <http://www.globalpolicy.org/intljustice/general/2004/0511win.htm>.

The suspects were taken to Al-Hakimiya, a former office previously used by the *mukhabarat* in Basrah and then beaten severely by CF personnel. One of the arrestees died following the ill-treatment (##### aged 28, married, father of two children). Prior to his death, his co-arrestees heard him screaming and asking for assistance.”³¹¹

Conditions during Interrogations

Interrogations in Afghanistan

The use of ‘stress and duress’ techniques in the war on terror first came to light in December 2002.³¹² Accounts of detainees who were released from Bagram Air Base and interviews with the US military staff detailed below in this section, reveal that such techniques were used against detainees held at Bagram.

Techniques that have been reportedly used include keeping detainees “standing or kneeling for hours, in black hoods or spray-painted goggles ... held in awkward, painful positions and deprived of sleep with 24-hour bombardment of lights”.³¹³ “False Flag” operations have also been used, which involve creating conditions to deceive a detainee into thinking that he is in a country known for its brutal reputation.³¹⁴ “Softening up” techniques that were reportedly used include beating and confining detainees in tiny rooms while bound and blindfolded and throwing them against walls and subjecting them to loud noises. US officials have defended the use of violence on the basis of national security, that the circumstances demand it as “just and necessary”.³¹⁵

Two released detainees, Saif-ur Rahman and Abdul Qayyum gave accounts of their ill treatment during their detention and interrogation at Bagram.³¹⁶ Both men complained of sleep deprivation, being forced to stand for long periods of time, being subjected to humiliating and abusive taunts from women soldiers. When captured at Jalalabad, Rahman was ordered to strip naked in his cell in freezing conditions and had a bucket of ice water thrown at him. During interrogations, two American soldiers with two dogs reportedly ordered him to lie naked on the floor with a chair placed on his hands and feet. He was apparently threatened with being sent to Guantanamo Bay if he failed to cooperate. For the first twenty days, he was said to be permanently handcuffed with the cuffs only slightly loosened during mealtimes.³¹⁷

US military spokesman, Roger King denied allegations of detainees being stripped naked. He indicated, however, that detainees may be forced to stand for prolonged periods of time and subjected to sleep deprivation and stated that such techniques were defensible as they did not amount to torture.³¹⁸

³¹¹ Supra note 290, para 13.

³¹² Supra note 203.

³¹³ Ibid.

³¹⁴ Ibid.

³¹⁵ Supra note 203.

³¹⁶ Gannon, K “Prisoners released from Bagram say forced to strip naked, deprived of sleep, ordered to stand for hours” AP, 14/03/2003.

³¹⁷ Ibid.

³¹⁸ Ibid.

Ruhal Ahmed, a released British detainee claims British investigators from MI5 interrogated him in Afghanistan. He was made to kneel on the ground, one officer stood on the back of his legs and another held a gun to his head.³¹⁹

Interrogations at Guantanamo Bay

What is known about the interrogation methods used at Guantanamo Bay is from the accounts provided by released detainees. It appears from these accounts that detainees are repeatedly interrogated and none of the interrogations are conducted in the presence of legal representatives.³²⁰ The interrogations at Guantanamo Bay are apparently based on a system of rewards for good behaviour and withdrawal of privileges for “non-compliance”.³²¹

Released detainees, Shafiq Rasul and Asif Iqbal indicated that they were chained to the floor for prolonged periods, “short shackled” (forced to squat for prolonged periods with their hands chained to the floor for the duration of the interrogation sometimes lasting up to 12 hours) and left in freezing conditions because the air conditioning system was turned up high. They also referred to the use of strobe lighting and loud music, use of dogs, and denial of food during interrogations.³²² They also recalled that other detainees were left naked, chained to the floor and women were brought into the room to provoke and molest them.³²³

Interrogations in Iraq

US officials refer to the treatment of detainees during interrogations at Abu Ghraib and Camp Bucca as “abuse” despite the findings of the Taguba report, which concluded that such treatment constituted “egregious acts” amounting to “grave breaches of international law”.³²⁴

The Taguba report found that Military Intelligence and other US government Agency’s interrogators created the above conditions specifically to facilitate the interrogation of

³¹⁹ Supra note 285.

³²⁰ Supra note 262, pg 7.

³²¹ Panorama programme interview with Senator Joyn Cornyn who was allowed to watch an interrogation session, supra note 267.

³²² Open letter to President Bush and Senate Armed Services Committee by Shafiq Rasul and Asif Iqbal represented by Centre for Constitutional Rights, 13 May 2004. <http://www.ccr-ny.org/v2/reports/docs/ltr%20to%20Sentate%2012may04c2.pdf>.

³²³ Ibid.

³²⁴ See Taguba report, “Conclusion” supra note 288. The Treatment of detainees found by the Taguba report to have taken place between October and December 2003 at Abu Ghraib include:

“Punching, slapping, and kicking detainees; jumping on their naked feet; Videotaping and photographing naked male and female detainees; Forcibly arranging detainees in various sexually explicit positions for photographing;

Forcing detainees to remove their clothing and keeping them naked for several days at a time; Forcing naked male detainees to wear women’s underwear; Forcing groups of male detainees to masturbate themselves while being photographed and videotaped; Arranging naked male detainees in a pile and then jumping on them;

Positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture; Writing “I am a Rapist” (sic) on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked;

Placing a dog chain or strap around a naked detainee’s neck and having a female Soldier pose for a picture; A male MP guard having sex with a female detainee; Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee; Taking photographs of dead Iraqi detainees; Breaking chemical lights and pouring the phosphoric liquid on detainees;

Threatening detainees with a charged 9mm pistol; Pouring cold water on naked detainees; Beating detainees with a broom handle and a chair; Threatening male detainees with rape; Allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; Sodomizing a detainee with a chemical light and perhaps a broom stick. Using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.” (Taguba report Part I, paras 6 and 8.)

witnesses.³²⁵ In addition, the report found that detainees were kicked and beaten by military personnel at Camp Bucca in May 2003.³²⁶

The ICRC found that the ill treatment of detainees during interrogation was not systematic except for those suspected of security offences or considered to have “intelligence value”.³²⁷ It found that “in those cases, persons deprived of their liberty supervised by the military intelligence were subjected to a variety of ill-treatments ranging from insults and humiliation to both physical and psychological coercion that in some cases might amount to torture in order to force them to cooperate with their interrogators”. Interrogation methods used such as holding a detainee in an unlit cell, naked for prolonged periods was considered part of the standard operating procedures or process of the military intelligence, as confirmed by military intelligence officers.³²⁸

The ICRC’s report made similar findings of ill-treatment during interrogation between March and November 2003.³²⁹ The interrogation methods were used in the military intelligence section of Abu Ghraib. Interrogation methods used at Umm Qasr and Camp Buca include being handcuffed, hooded, kicked, hit by rifle butts, threats of transfer to Guantanamo Bay, death or indefinite internment.³³⁰

Treatment by Iraqi police: The ICRC received reports of ill-treatment by Iraqi police, which included threats to send persons arrested to the coalition forces unless bribes were given.³³¹ Persons have been handcuffed, hooded, verbally abused, beaten and kicked during arrest and transportation. During interrogation, allegations of ill treatment include being handcuffed, kicked, given electric shocks and being burned with cigarettes. One report alleged that a detainee was subjected to a mock execution with a pistol aimed at his head. Another alleged

³²⁵ Taguba report, Part I, para 10 supra note 288.

³²⁶ Taguba report, Ibid., Part I, para 13.

³²⁷ ICRC report, section 3, Treatment during interrogation, supra note 290.

³²⁸ Ibid.

³²⁹ The interrogations methods included:

“Hooding for several hours or up to 2 to 4 consecutive days and sometimes in conjunction with beatings;

Handcuffing with flexi-cuffs;

Beatings with hard objects (including pistols and rifles), slapping, punching, kicking with knees or feet on various parts of the body (legs, sides, lower back, groin);

Pressing the face into the ground with boots;

Threats (of ill-treatment, reprisals against family members, imminent execution or transfer to Guantanamo);

Being stripped naked for several days while held in solitary confinement in a completely dark and empty cell;

Being held in solitary confinement combined with threats (to intern the individual indefinitely, to arrest other family members, to transfer the individual to Guantanamo), insufficient sleep, food or water deprivation, minimal access to showers (twice a week), denial of access to open air and prohibition of contacts with other persons deprived of their liberty;

Being paraded naked outside cells in front of other persons deprived of their liberty, and guards, sometimes hooded or with women's underwear over their head;

Being made to stand naked against the wall of the cell with arms raised or with women's underwear over their head for prolonged periods while being laughed at by guards, including female guards, and sometimes photographed in this position;

Being handcuffed to the bars of their cell door in humiliating (i.e. naked or in underwear) and/or uncomfortable positions repeatedly over several days, for several hours each time;

Exposed while hooded to loud noise or music, prolonged exposure while hooded to the sun over several hours, in temperatures of 50 degrees Celsius (122 degrees Fahrenheit) or higher;

Being forced to remain for prolonged periods in stress positions such as squatting or standing with or without the arms lifted.” ICRC report, section 3.1 Methods of ill treatment, supra note 290.

³³⁰ ICRC report, section 3.3 Umm Qasr and Camp Bucca, supra note 290.

³³¹ ICRC report, Ibid., section 3.5 Allegations of ill treatment by Iraqi police.

that his mother was brought into the police station and threatened with mistreatment unless he cooperated. Another threat was made that a detainee's wife would be brought in and raped.

Conditions at detention facilities and interrogation techniques in cases of renditions

The Case of Maher Arar

Mr Arar was detained at JFK airport in New York on 26 September 2002. For the first of his nine days in US custody he was placed in solitary confinement in a small cell without a bed whilst the lights remained on all night.³³² He was later removed to the Metropolitan Detention Centre, given an orange jumpsuit to wear and placed in solitary confinement in a small cell. He was held *incommunicado* for the first 5 days having been denied contact with his family or a lawyer. His first meal was served to him after almost two days. Mr Arar was chained and shackled during transfers from his cell to places for interrogation. A week after his detention on 3 October, an officer from the Canadian Consulate visited Mr. Arar as a result of his family's request.³³³

Mr Arar was interrogated repeatedly for up to six hours each time by the FBI, immigration officials and Immigration and Naturalisation Services (INS) officials.³³⁴ FBI officers swore and yelled at him during the two five hour interrogation sessions.³³⁵ During the six hour interrogation with INS officials, Mr Arar agreed to answer questions only after he was falsely told that his lawyer would not be present at the interrogation.³³⁶

Mr Arar was flown to Jordan and rendered to Jordanian authorities on 9 October 2002.³³⁷ He was beaten and interrogated in Jordan before he was handed over to Syrian authorities on or about 9 October 2002.³³⁸ In Syria, he was placed in a small underground cell, 6 feet long, seven feet high and three feet wide, which was damp, cold and unsanitary with very little light.³³⁹ He was allowed to bathe in cold water once a week, not allowed to exercise and lost approximately 40 pounds. For the rest of the period, Mr Arar was detained in a Syrian prison, on another occasion he was placed in solitary confinement where the screams of other detainees being tortured could be heard.³⁴⁰

He was interrogated for up to 18 hours a day by Syrian security officers and beaten regularly with their fists and with two-inch thick electric cables,³⁴¹ and the security officers threatened to expose him to other forms of torture.³⁴²

³³² Complaint of Arar supra note 215.

³³³ Complaint of Arar, paras 29 – 49.

³³³ Complaint of Arar, paras 29, 31.

³³³ Ibid, para 44. Ibid., para. 39 & 40.

³³⁴ Ibid., paras 29 – 49.

³³⁵ Ibid., paras 29, 31.

³³⁶ Ibid., para 44.

³³⁷ Ibid., para. 49f.

³³⁸ Ibid, para 50.

³³⁹ Ibid., para 58, 59.

³⁴⁰ Ibid. para 63.

³⁴¹ Ibid. para 51 & 52.

³⁴² Ibid., para 52.

Other cases of rendition

Far' Falastin Detention centre in Damascus, Syria is known to be another place where suspected terrorists are rendered and detained. The conditions there reportedly consist of tiny, lightless cells, three feet long, three feet wide and six feet high where the cries of tortured inmates are easily heard.³⁴³ Driss bin Lakoul was reportedly beaten on the soles of his feet by cable wires when he was held at this detention centre.³⁴⁴

3.3. REPARATION: VICTIMS' RIGHTS TO PROCEDURAL AND SUBSTANTIVE REMEDIES

Under international law, there is a well-established right entitling torture victims to effective remedies and adequate reparations. However, as will be described, current State practices in the 'war on terrorism' impinge and impede upon the unequivocal right to reparation for victims of serious human rights violations (including torture and other forms of ill-treatment), including their right of access to justice.

This section will analyse the fair trial safeguards against torture, as well as the risk of disappearances and arbitrary detention. It will examine how the denial of fundamental protections and guarantees of due process to those captured and detained in the 'war on terrorism', the use of military commissions to try those held at Guantanamo Bay, the denial of access to lawyers and the practices and justifications relied on for the use of torture and other forms of ill-treatment wholly undermine the right to reparation enshrined in international law for victims of torture and cruel, inhuman or degrading treatment and punishment, and other serious violations of human rights.

3.3.1. The Right to a Remedy and Reparations for Victims of Torture and Cruel, Inhuman or Degrading Treatment or Punishment

The right to reparation for victims of torture and cruel, inhuman or degrading treatment and punishment is well-established. As determined by the Permanent Court of International Justice and upheld since by international jurisprudence: it is a fundamental principle of general international law that the breach of an international obligation entails the duty to afford reparation.³⁴⁵ The responsibility of States to provide reparation arises when there is a breach of an international obligation—whatever its origin—including a breach of an obligation under international human rights or humanitarian law. As highlighted by Professor Theo van Boven, former Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms:

"the issue of State responsibility comes into play when a State is in breach of the obligation to respect internationally recognised human

³⁴³ Supra note 211.

³⁴⁴ Ibid.

³⁴⁵ See: Permanent Court of Arbitration, *Chorzow Factory Case* (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.), Merits 1986 ICJ Report, 14, 114 (June 27); *Corfu Channel Case*; (UK v. Albania); *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184; *Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif*, C.I.J., Recueil, 1950, p. 228. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: Every internationally wrongful act of a State entails the international responsibility of that State. (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001 ("ILC draft Articles on State Responsibility")).

rights. Such obligation has its legal basis in international agreements...and/or in customary international law, in particular those norms of customary international law which have a peremptory character (jus cogens)."³⁴⁶

As explained earlier in this report, the prohibition against torture in international law has obtained the status of a *jus cogens* norm, and therefore, if breached, a new obligation to afford reparation arises under customary international law (irrespective of treaty obligations). "*Reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*".³⁴⁷ According to the UN Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law,³⁴⁸ the forms that reparation may take include: restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition.

At the same time, international human rights law requires States to provide effective remedies under domestic law to guarantee adequate reparations to victims of human rights violations. This principle is incorporated in every international human rights instrument.³⁴⁹ In fact, the right to a remedy for a violation of a human right protected under any of the international instruments is itself a right expressly guaranteed by the same and has been recognised as non-derogable.³⁵⁰ For example, procedural safeguards against torture and other forms of ill-treatment, like the right of access to a lawyer while in detention, are not subject to limitations or derogation.

Accordingly, there is an independent and continuing obligation to provide at all times effective domestic remedies: during peace or war, and when declaring a state of emergency. Human rights instruments guarantee both, the procedural right to an effective access to a fair hearing (through judicial and/or non-judicial remedies)³⁵¹ and the substantive right to reparations (such as restitution, compensation and rehabilitation).³⁵² The nature of the procedural remedies (judicial, administrative or other) should be in accordance with the substantive rights violated and the effectiveness of the remedy in granting appropriate relief

³⁴⁶ United Nations document E/CN.4/Sub.2/1993/8; 2nd July 1993, par. 41.

³⁴⁷ Permanent Court of Arbitration, *Chorzow Factory Case* (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17.

³⁴⁸ Annex, E/CN.4/2000/62. The revised version of 15 August 2003 can be found at <http://www.unhchr.ch/html/menu2/revisedrestitution.doc>

³⁴⁹ At the Universal level it is possible to find among others: the Universal Declaration of Human Rights (Art. 8), the International Covenant on Civil and Political Rights (art. 2.), the International Convention on the Elimination of All Forms of Racial Discrimination (art 6), the Convention against Torture and other Cruel Inhuman and Degrading Treatment, (art. 13) Declaration on the Protection of all Persons from Enforced Disappearance (art 19), General Assembly resolution 47/133 of 18 December 1992 (Arts. 9 and 13), the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 4 and 16), at the regional level it is important to highlight. The European Convention on Human Rights (art 13) The Charter of Fundamental Rights of the European Union (art. 47); the Inter-American Convention on Human Rights (arts 24 and 25); American Declaration of the Rights and Duties of Man (art XVIII), Inter-American Convention on Forced Disappearance of persons (art X), Inter-American Convention to Prevent and Punish Torture (Art. 8) and the African Charter of Human and Peoples' Rights (art. 3 and 7) and the Arab Charter on Human Rights (Art. 9).

³⁵⁰ See, for example, General Comment 29 on States of Emergency (Art. 4) if the UN Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 31 August 2001, at para. 14: "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective."

³⁵¹ Some instruments explicitly call for the development of judicial remedies for the rights they guarantee; the African Charter of Human and Peoples' Rights for example, provides that all remedies should be judicial. See Art. 7 of the African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

³⁵² See Jeremy McBride, "Access to Justice and Human Rights Treaties" (1998) 17 Civil Justice Q.235.

for such violations.³⁵³ In the case of serious human rights violations, like torture and other forms of ill-treatment, remedies need to be *judicial*.³⁵⁴

3.3.2. Limiting the Right to Reparation: Torture and Counter-terrorism

As noted previously, States' measures to combat terrorism should be conducted in accordance with established international standards. Such measures are not to be implemented in a vacuum solely within domestic legislative authority (or no legislative authority at all) but must also be conducted within the framework of applicable international law. Recent US government policies reveal a blatant disregard of international law norms. For example, Counsel to the US President controversially interpreted the 'war against terrorism' as a new paradigm that "renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions" affording privileges to prisoners of war.³⁵⁵ Such an interpretation undermines the rule of law and is contrary to international law. The norms contained in the Geneva Conventions "that limit the questioning of enemy prisoners" by prohibiting the use of torture and other forms of ill-treatment are part of customary international law (and therefore binding upon States irrespective of any treaty obligations).

Any person captured or arrested and detained, whether or not as part of the 'war on terrorism', is protected by international human rights law and where applicable, also by international humanitarian law. The potential situations that bear upon States' obligations in responding to terrorist acts include:

- Times of peace where international human rights are fully applicable;
- States of emergency where international human rights apply subject to any permissible derogations to the extent strictly required by the exigencies of the situation;
- Armed conflict where both, international humanitarian laws and international human rights apply but where human rights obligations may have to be interpreted in light of humanitarian laws as the applicable *lex specialis*.³⁵⁶

The 'war on terrorism' extended beyond the armed conflict in Afghanistan to include the detention of persons suspected of terrorist activity unconnected to an armed conflict and rendered to US or other States' custody. The 'war on terror' extended even further in March 2003, when the US declared a war against Iraq, and together with a Coalition of other countries, successfully occupied its territory.³⁵⁷ Accordingly, those persons who are detained

³⁵³ Article 13 requires "the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief" although State have some discretion as to how to comply (para 69) *D v. United Kingdom*³⁵³ App. No. 30240/96 Judgment of 2 May 1997 (referring to *Soering v. United Kingdom* App. No. 14038/88 Judgment of 7 July 1989 and *Vilvarajah v. United Kingdom* App. No. 13163/87 Judgment of 30 October 1991). The HRC commented on Finland's report (CCPR/C/95/Add.6) re the obligation under Art 2(b) of the ICCPR that "while noting that a recent reform of the Penal Code makes punishable the violation of several rights and freedoms, including those protected by articles 21 and 22 of the Covenant, the Committee is concerned that criminal law may not alone be appropriate to determine appropriate remedies for violations of certain rights and freedoms (Concluding Observations of the Human Rights Committee, Finland: 08/04/98).

³⁵⁴ The nature (judicial, administrative or other) of the remedy should be in accordance with the nature of the right violated and the effectiveness of the remedy. In the case of grave human rights violations, which implicitly constitute a crime, like torture, there is unanimity in the jurisprudence on the judicial nature of effective remedies. See REDRESS Sourcebook on the Right to Reparation, supra.

³⁵⁵ Draft memorandum from Counsel to the President, Gonzales to the President, 25/01/2002, pg.2.

³⁵⁶ The International Court of Justice decided in the Nuclear Weapons Advisory Opinion, that international humanitarian law acts as *lex specialis* to determine whether there has been an arbitrary deprivation of the right to life. *Legality of the Threat to Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ REP. 226 (July 8).

³⁵⁷ Coalition forces included troops from the US, the United Kingdom, Australia and Poland. Other countries joined the Coalition to assist in the maintenance of peace in the region during the occupation.

outside the zones of armed conflict are subject to the protections under international human rights and domestic criminal laws. Those captured in the armed conflicts in Afghanistan and Iraq are subject to the protections under international human rights and humanitarian law.³⁵⁸

Safeguards and procedural remedies against torture and ill-treatment

Determining the legal status of detainees: due process remedies

Persons detained in the 'war on terrorism' are regularly denied their due process rights under human rights and humanitarian law. In particular, the US government sought to place persons detained in the 'war on terror' in a legal black hole, effectively denying them all due process guarantees, however, some of the measures implemented by the government have been declared unconstitutional by the Supreme Court.³⁵⁹

In regard to those captured in Afghanistan and held at Guantanamo Bay, the US government argued that the Geneva Conventions do not apply to al-Qaeda members since they are a non-State actor and are not a High Contracting Party under common article 2 of the 1949 Geneva Conventions.³⁶⁰ The government also stated that although the Geneva Conventions apply to Taliban members because Afghanistan is a signatory to the Geneva Conventions, they however, do not qualify as Prisoners of War (POWs).³⁶¹ It is worth noting that, in a dissenting opinion, two Supreme Court justices considered that Hamdi, who was captured during the Afghanistan conflict, was entitled to be treated as a POW based on US government's account that he was "taken bearing arms on the Taliban side" and would therefore qualify as a POW under Article 4 of the third Geneva Convention.³⁶²

While it is clear that al-Qaeda is not a High Contracting Party to the Geneva Conventions, it is not clear whether rules of international humanitarian law that are part of customary law would be applicable to al-Qaeda members if, as it has been claimed by the US, they are fighting an armed conflict (in such case, both the US and al-Qaeda are bound to comply with the laws of war that have become customary international law).³⁶³ If, on the other hand, al-Qaeda members are considered criminals and not combatants in an armed conflict, detainees should be treated in accordance with international human rights law as any other criminal suspect. However, there is no 'in between' option to keep persons outside the reach and protection of the law. As Theodore Roosevelt once said: "*No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right, not asked as a favor.*"³⁶⁴

The importance of custom in international humanitarian law is reinforced in the Martens Clause, which provides that even where a State party has denounced the treaty, customary obligations remain binding on parties to the conflict "*by virtue of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and*

³⁵⁸ Kellenberger, J., "Protecting life and dignity: "No war is above international law", FT newspaper, 19/05/2004; ICRC fact sheet, "International humanitarian law and terrorism: Q & A", 05 May 2004.

³⁵⁹ See *Rasul et al v Bush* note 388 and accompanying text.

³⁶⁰ US Office of Press Secretary Fact Sheet, 07 February 2002; Memo from Baybee, J to Gonzales, R., Counsel to the President, 22 January 2002.

³⁶¹ Ibid.

³⁶² *Hamdi et al. v Rumsfeld et al.*, Part III C dissenting opinions of Scouter and Ginsburg. See note 370.

³⁶³ See references to Martens Clause below, *infra* note 365.

³⁶⁴ Center for Constitutional Rights, "*Enemy Combatants: A Case of the Rule of Men, Not Law*" (8 June 04 at <http://www.ccr-ny.org>).

the dictates of the public conscience".³⁶⁵ Interestingly, the US afforded prisoner of war (POW) status to Chinese soldiers captured during the Korean War even though the People's Republic of China was not a party to the Geneva Conventions. It also provided status to many captured guerrilla fighters during the Vietnam war and, during the 1991 Gulf war, the US military convened special tribunals, as required by the Geneva Conventions, to determine the legal status of more than one thousand captured Iraqis.³⁶⁶

The Third Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, provides that captured combatants are to be treated as POWs until a "competent tribunal" determines otherwise.³⁶⁷ Under these standards, the detainees who were former Taliban soldiers would almost certainly qualify as POWs, while many of the detainees who were members of al-Qaeda would probably not. Under Article 4(A)(1) of the Third Geneva Convention, POW status is granted to "[m]embers of the armed forces of a Party to the conflict", therefore, Taliban soldiers as well as al-Qaeda members (or any other person) who belong to a militia "forming part of" the Taliban/Afghani forces should have been eligible for POW status. Al-Qaeda members (or any other persons) fighting *outside* the Taliban structures, would need to meet the following conditions in order to be considered as POWs—having a responsible chain of command, wearing a distinctive sing, carrying arms openly, and respecting the laws and customs of war.³⁶⁸

It is clear that the arbitrary determination that those fighting in Afghanistan for the Taliban forces do not qualify as POWs goes against the requirements set in Article 5 of the Third Geneva Convention, and generally against the object and purpose of the Convention. POW status is given to combatants that are fighting in an armed conflict (they are not criminals nor have they committed any illegal act by virtue of fighting in a conflict), combatants should only be detained while the war is taking place and released after the cessation of hostilities. The US general determination undermines the requirement for a case-by-case assessment by a competent tribunal to determine the legal status of prisoners. It also goes against the presumption that detainees are to be treated as POWs until such time as their status is determined. Contrary to this essential safeguard, the determination has been made by the US Executive against the detainees as a whole.

There is no justification for overriding essential guarantees of due process established in international humanitarian law. Common Article 1 to the four Geneva Conventions provides that the High Contracting Parties shall respect the conventions in all circumstances. However, the US government seems to rely on the President's constitutional power to interpret treaties, "He could interpret Geneva III, in light of the known facts concerning the operation of Taliban forces during the Afghanistan conflict, to find that all of the Taliban forces do not fall within the legal definition of prisoners of war as defined by article 4. A presidential determination of this nature would eliminate any legal "doubt" as to the prisoners' status, as a matter of domestic law, and would therefore obviate the need for article 5 tribunals".³⁶⁹ Two US Supreme Court Justices found that reliance on the President's "categorical pronouncement" in denying POW treatment to a detainee, Yasser Esam Hamdi, was at odds with US military regulation which incorporated due process guarantees in Article 5 of the Third Geneva Convention. Their dissenting opinion notes that "there is reason to

³⁶⁵ Preamble to Hague Convention II on land war 1899; Article 63 of the First Geneva Convention; Article 62 of the Second Geneva Convention ; Article 142 of the Third Geneva Convention and Article 158 the Fourth Geneva Convention.

³⁶⁶ HRW, *Human Rights, the Bush Administration, and the Fight against Terrorism: the Need for a Positive Vision* (2002) available at www.hrw.org.

³⁶⁷ Art 5 of the Third Geneva Convention of 1949.

³⁶⁸ Art 4(A)(2) of the Third Geneva Convention.

³⁶⁹ Memorandum from Bybee, J., Assistant Attorney General, US department of Justice to Gonzales, A., Counsel to the President., 22/01/2002, pg.31.

question whether the United States is acting in accordance with the law of war it claims as authority”.³⁷⁰

As noted above, international law obligations that are customary and non-derogable remain binding notwithstanding presidential authorisation to the contrary.³⁷¹ The suggestion that presidential authority can override customary law because it is not federal law and thus not binding upon the executive was expressed in a memo by the Assistant Attorney General of the US Department of Justice. Relying on a controversial interpretation of the *Paquete Habana* case, the memo stated, “Under clear Supreme Court precedent, any presidential decision in the current conflict concerning the detention and trial of al-Qaeda or Taliban militia prisoners would constitute a “controlling” Executive act that would immediately and completely override any customary international law norms”.³⁷² The memo expressed concerns of threat to sovereignty by mentioning that to allow “federal courts to rely upon international law to restrict the President’s discretion ... would raise deep structural problems” and “directly infringe upon the President’s discretion as the Commander in chief and Chief Executive”.³⁷³

The controversial comments require further consideration that is not possible within the context of this report. However there is a general consensus that States’ counter-terrorism responses must be carried out within the framework of international standards and that no conduct is above the law. As noted by one scholar: “under international law, an Executive act could not override any established rule of general (worldwide) custom that is widely accepted as non derogable, such as the rule against torture and the rules prohibiting conduct that would amount to grave breaches under the Geneva Conventions”.³⁷⁴

The policy behind the US government’s approach to the treatment of detainees appears to be motivated out of the desire to protect its own forces against potential prosecution for war crimes. The US Assistant Attorney General advised: “If the President were to find that Taliban prisoners did not constitute POWs under article 4, they would no longer be persons protected by the Convention. Thus, their treatment could not give rise to a grave breach under article 130, nor constitute a violation of the WCA [War Crimes Act, 18 U.S.C. 2441]”.³⁷⁵ This statement ignores the fact that torture is a crime under customary international law, whether committed during war or peacetime, and that when committed in a widespread or systematic (officially sanctioned) manner, it constitutes a crime against humanity.³⁷⁶

There is no doubt that the arbitrary denial of POW status to persons captured during the armed conflict in Afghanistan is contrary to US obligations under the Geneva Conventions and contrary to the US tradition to comply expansively with requirements under international humanitarian law. But more remarkable is that the Executive’s intention was to deny *any* legal status to persons captured in the armed conflict in Afghanistan, as well as those detained outside the armed conflict (that are deemed suspects of terrorism by the US government). The government argued that “enemy combatants”, a term that has no basis either in international or domestic US law, had no right to due process protections typically

³⁷⁰ Hamdi et al. v Rumsfeld et al., No. 03-6696. Argued April 28, 2004--Decided 28 June 2004, dissenting opinions of Justices Souter and Ginsburg, Part III C. (For further discussion of this case, see *infra* section on right to habeas corpus).

³⁷¹ *Supra* note 369, pg. 31.

³⁷² *Ibid.*, pg.35.

³⁷³ *Ibid.* Pg. 36.

³⁷⁴ Kirgis, F, “Distinctions between international and U.S. Foreign relations law issues regarding treatment of suspected terrorists”, ASIL Insights, June 2004.

³⁷⁵ *Supra* note 369, pg. 31.

³⁷⁶ See for example, Article 7 of the 1998 Statute of the International Criminal Court (U.N. Doc. A/CONF.183/9).

afforded to persons under US and international law.³⁷⁷ As will be discussed in the following section, a recent decision by the US Supreme Court held that “enemy combatants” in US custody do have some due process protections.³⁷⁸

On the other hand, as mentioned before, the US government has determined that the Geneva Conventions *do* apply to its occupation of Iraq; precluding any doubts regarding the applicability of international humanitarian law standards to detainees. However, since there is no clear division between the ‘war on terror’ and the occupation in Iraq, it is not obvious when the US would arrest or detain persons in connection with the ‘war on terrorism’, and thus falling into the category of “enemy combatants”, and when the US would recognise insurgents/combatants as POWs. Is it not clear either, how the US differentiates between these two ‘categories’ and that of common criminals.³⁷⁹

Challenging Detentions: *habeas corpus* remedies

Article 118 of the Third Geneva Convention provides that POWs shall be released and repatriated without delay at the cessation of hostilities. As noted by the International Committee of the Red Cross (ICRC), the international armed conflict in Afghanistan ceased when a new government was established in June 2002 and as such, those captured and detained prior to June 2002 should be released. However, none of the detainees held in Afghanistan have been released, nor other detainees ‘captured’ in the greater ‘war against terrorism’.

Personal liberty and security are fundamental human rights and include the freedom from arbitrary arrest or detention.³⁸⁰ One of the most important safeguards against arbitrary arrest and detention is the right of a detainee to be brought promptly before a judge to challenge the lawfulness of his detention, often referred to as *habeas corpus*.³⁸¹ This right is also an important safeguard against torture and other forms of ill-treatment, since the *habeas corpus* hearing is usually the first opportunity for detainees to complain about their treatment before an independent authority.

The right to *habeas corpus* is an essential relief for persons who have been detained unlawfully. As explained by the UN Human Rights Committee, in its General Comment No. 8, the safeguards against arbitrary detention are: that such detention must be carried out according to procedures established by law, information of the reasons for the arrest must be given, the person arrested or detained must be brought promptly before a judge, there must be an opportunity to challenge the lawfulness of his detention and be entitled to compensation in the event of an unlawful detention.³⁸²

The European Court of Human Rights commented upon the importance of safeguards against arbitrary detention by stating that, “Judicial control of interferences by the executive is an essential feature of the guarantee embodied in Article 5 § 3, [of the European Convention] which is intended to minimise the risk of arbitrariness and to secure the rule of

³⁷⁷ Note 364.

³⁷⁸ Note 388.

³⁷⁹ The report by Taguba only talks about detainees in Iraq as “terrorist suspects” or “Iraqi criminals”, there is no reference to POWs, note 288 and also the US policy on the conditions of detention in Iraq assimilate those conditions at Guantanamo Bay.

³⁸⁰ ICCPR, article 9(1); ECHR, article 5(1); ACHR, article 7(3); Concluding Document of Vienna – The Third Follow-Up Meeting (OSCE Vienna document), 19 January 1989, para. 23.1.

³⁸¹ ICCPR, article 9(3); ECHR, article 5(4); ACHR, article 7(6); Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (OSCE Copenhagen document), 29 June 1990, para. 5.15; OSCE Moscow document, para. 23.1(iv).

³⁸² UN Human Rights Committee, General Comment No.8, para. 4 (1982).

law, “one of the fundamental principles of a democratic society ..., which is expressly referred to in the Preamble to the Convention” (see the above-mentioned *Brogan and Others* judgment, p. 32, § 58, and the above-mentioned *Aksoy* judgment, p. 2282, § 76).³⁸³ In *Orhan v Turkey*, the Court underlined the obligations upon the State to take measures to safeguard against the risk of disappearances and to conduct “prompt effective investigation” into allegations of arbitrary detention and disappearances.³⁸⁴

The Inter-American Court of Human Rights stressed that the right to *habeas corpus* is vital in preventing disappearances and to protect against torture or other cruel, inhuman or degrading treatment or punishment such that its total or partial suspension threatens the right to life and to humane treatment.³⁸⁵

These safeguards have been held to apply to preventive detention on grounds of public security in immigration and administrative detention cases.³⁸⁶ The UN Human Rights Committee reinforced the obligation on States to ensure the right to an effective remedy where trials have been conducted without due process, “the Committee considers that the pardon does not provide full redress to the victims of trials conducted without regard for due process of law”.³⁸⁷

In a landmark decision, the Supreme Court of the United States recognised that United States courts have jurisdiction to determine *habeas* petitions concerning the lawfulness of detention of foreign nationals who have been captured abroad in relation to hostilities and detained at Guantanamo Bay.³⁸⁸ The decision clears the way for detainees to challenge the lawfulness of their detention before US courts. The outcome of two Supreme Court decisions, *Rasul et al. v Bush et al.* and *Hamdi et. al v Rumsfeld et al.* are considered below.

Rasul et al. v Bush et al.

The Supreme Court heard appeals on three petitions for writs of *habeas corpus* that were dismissed for want of jurisdiction by the District Court. The three writs related to two Australians who each filed a petition and to twelve Kuwaiti nationals, all of whom are currently held at Guantanamo Bay.³⁸⁹ All petitioners allege that they have never been a combatant against the US and have never engaged in terrorist acts.³⁹⁰

The Australians, Hicks and Habib, sought in their petitions, release from custody, access to counsel, freedom from interrogations and other relief. The twelve Kuwaitis sought to be informed of the charges against them, access to family and counsel and access to courts or other impartial tribunals.

³⁸³ *Sakik and Others v Turkey*, EctHR, 26/11/1997, para. 44.

³⁸⁴ *Orhan v Turkey*, EctHR, 18/06/2002, para. 369.

³⁸⁵ Inter-American Court Human Rights, Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations*, 30 January 1987, paras 35-36, 40.

³⁸⁶ Report of Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/57/173, 02 July 2002, para.17.

³⁸⁷ UN Human Rights Committee concluding observations, Peru, CCPR/C/79/Add.72, para. 10 (1996).

³⁸⁸ *Rasul et al v Bush et al. and Al Odah et al. v United States et al.*, Supreme Court of United States, 28 June 2004.

³⁸⁹ The Australians are Mamdouh Habib and David Hicks. Writs of certiorari were also granted by the Supreme Court to Safiq Rasul and Asif Iqbal but the two petitioners were released from custody, *Shafiq Rasul et al v Bush et al.* The twelve Kuwaitis are presented on one complaint, *Al Odah et al. v US et al.*

³⁹⁰ *Rasul et. al. v Bush et al.* supra note 388, pg. 2.

The District Court dismissed their petitions for want of jurisdiction relying on the decision in *Johnson v Eisentrager* that aliens detained outside the sovereign territory of the United States may not invoke a *habeas corpus* petition.³⁹¹

The Supreme Court dealt with the “narrow” question of whether US courts lacked jurisdiction to consider *habeas* petitions of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay.³⁹²

Federal District Courts are vested with the power to hear petitions within their respective jurisdictions by any person who claims to be held in custody in violation of the Constitution or laws or treaties of the United States, section 2241, (the Habeas Statute).³⁹³ Citing various cases confirming the importance of *habeas* petitions, the Supreme Court endorsed the statement that “at its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest”.³⁹⁴ The Court further noted that consistent with its historical purpose, the Courts have heard *habeas* petitions in a wide variety of cases in war and peacetime.³⁹⁵

In the lease agreement over Guantanamo Bay, the US recognised the ultimate sovereignty of Cuba whilst it exercised complete jurisdiction and control over and within the area. Thus the issue before the Court in light of the jurisdictional limitation in the Habeas Statute was whether the Statute confers power on courts to determine the legality of executive detention of aliens held in territory over which the US has “plenary and exclusive jurisdiction” but not sovereignty.³⁹⁶

The Supreme Court drew two significant distinctions between the facts of the petitions and those in the *Eisentrager* decision. It found that the petitioners in the present case were not nationals of countries at war with the US, they deny being engaged in acts of aggression against the US, they have never been afforded access to any tribunal, they have not been charged with any offences and have been imprisoned for over two years in territory over which the US has exclusive jurisdiction and control.³⁹⁷

The second significant distinction is that the Court in *Eisentrager* considered the petitioners’ constitutional right to *habeas corpus* and paid less attention to their statutory rights.³⁹⁸ In light of subsequent decisions concerning petitioners’ statutory rights to *habeas corpus*, the Supreme Court held that the *Eisentrager* decision did not preclude the exercise of courts’ power to hear *habeas* petitions under the habeas statute.³⁹⁹

³⁹¹ *Johnson v Eisentrager*, 339 U.S. 763 (1950).

³⁹² *Rasul v Bush*, supra note 388, pg.1.

³⁹³ 28 U.S.C. section 2241(a), (c)(3).

³⁹⁴ *Rasul v Bush* judgment, supra note 388, pg.5, cited from *INS v St. Cyr*, 533 U.S. 289, 301 (2001).

³⁹⁵ Referring to the case of *Ex parte Milligan*, 4 Wall. 2 (1866), a *habeas* petition by an American citizen who plotted an attack on military installations during the civil war; *Ex parte Quirin*, a petition by an enemy alien convicted of war crimes during war and held in the US and *In re Yamashita*.

³⁹⁶ *Rasul v Bush* judgment, supra note 388, pg. 6.

³⁹⁷ *Ibid.*, pg. 8. The facts of *Eisentrager* concerned the US court’s power to determine the *habeas* petitions by 21 German citizens, captured by US forces in China, convicted of war crimes by US military commission in China and imprisoned in occupied Germany. The Court held it lacked jurisdiction to hear the petitioners writ and found the Germans were: (a) enemy aliens, (b) never been or resided in the US (c) captured outside US territory and held in military custody as POW (d) tried and convicted by US military commission outside the US (e) for war crimes committed outside the US and (f) were imprisoned outside the US.

³⁹⁸ *Ibid.* pg. 8.

³⁹⁹ Referring to the cases of *Ahrens v Clark*, 335 U.S. 188 and *Braden v 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, (1973). Pg. 6 –11 *Rasul v Bush* judgment, supra note 388.

The Supreme Court stated that the Habeas Statute applies to persons detained within the plenary and exclusive jurisdiction of the US, and that the Statute drew “no distinction between Americans and aliens held in federal custody, ... Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under section 2241 ... Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus”.⁴⁰⁰

The petitioners also contended that they had been held in federal custody “in violation of the Constitution or laws or treaties of the United States” in that they had been held in Executive detention for over two years, without access to counsel, without being charged and therefore the District Court’s jurisdiction is without question. In response, the Supreme Court held that section 2241 of the Habeas Statute confers nothing more than the jurisdiction to hear *habeas corpus* challenges by those detained at Guantanamo Bay.

The Court also held that the District Court had jurisdiction to hear the *Al Odah* petition under 28 U.S.C. section 1331, the federal question jurisdiction statute and section 1350 of the Alien Tort Statute.

Hamdi et. al v Rumsfeld et al.

The Supreme Court considered the *habeas* petition of Hamdi, a US citizen who has been detained initially at Guantanamo Bay since January 2002 and presently held at a US naval in Charleston, South Carolina.⁴⁰¹ Hamdi was apprehended during the hostilities in Afghanistan by the Northern Alliance and handed over to US custody. The US contended that Hamdi could be held indefinitely without charges because he is considered an ‘enemy combatant’. In the petition filed by his father, his status as an enemy combatant was contested, stating that he was not involved in the hostilities but instead was a relief worker in Afghanistan. Hamdi’s further argued that his detention without charge, and lack of access to a tribunal or lawyer violated his constitutional rights. The issues that required determination by the Court were whether Hamdi’s detention was lawfully authorised, whether as an enemy combatant he could be detained indefinitely without charges and the scope and standard of due process to be afforded to an enemy combatant detained in US territory.

The Supreme Court was satisfied that Hamdi’s detention was lawfully authorised by Congress through its resolution, “Authorisation for Use of Military Force” (AUMF).⁴⁰² The Court found that the AUMF authorises the detention of individuals who are engaged in hostilities in Afghanistan against the US, “There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organisation known to have supported the al-Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF”. The Court was careful to restrict its findings to the limited category of individuals it considered the AUMF was intended to target.

Although the term ‘enemy combatant’ used by the US remains unclear, the Court defined the term to include individuals who are “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in armed conflict against the United States”.⁴⁰³

⁴⁰⁰ Ibid., pgs. 12 & 13.

⁴⁰¹ *Hamdi v Rumsfeld*, supra note 370.

⁴⁰² Ibid., Part II. The AUMF authorises the President to use all necessary and appropriate force against nations, organisations or persons he determines planned, authorised, committed or aided in the September 11 , al Qaeda terrorist attacks.

⁴⁰³ Ibid.

The Court noted that the indefinite detention for the purpose of interrogation is not authorised. However citing Article 118 of the Third Geneva Convention, an individual falling within the term ‘enemy combatant’ as defined by the Court can be detained for the duration of the hostilities.⁴⁰⁴ The Court further held that the fact that an individual is a US citizen is not a bar to him/her being detained as an ‘enemy combatant’ and noted that active hostilities were still ongoing in Afghanistan.⁴⁰⁵

The Court noted that the writ of *habeas corpus* was available to every individual detained in the US unless the writ is suspended and this applies to citizens detained as enemy combatants.⁴⁰⁶ The Court stated, “as critical as the government’s interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat”.⁴⁰⁷

The core elements of due process afforded to individuals who challenge their classification as ‘enemy combatants’ includes being notified of the factual basis for their classification and having a fair opportunity to rebut the government’s factual assertions concerning their status before a neutral decision maker.⁴⁰⁸ The right to notice and opportunity to be heard must be given at a meaningful time and manner. As to the standard of due process, the Court accepted that hearsay evidence may be accepted and a presumption in favour of the government’s evidence is present provided there is an opportunity to rebut the presumption.⁴⁰⁹

While this decision of the Supreme Court is welcome, several issues still remain unresolved. The Court was prepared to apply provisions of the Geneva Conventions to ‘enemy combatants’ relating to repatriation. However it did not express under what conditions ‘enemy combatants’ are to be detained for the duration of the ‘war on terrorism’, which the US government has conceded, is “unlikely to end with a formal cease-fire”. Subject to detainees’ right to file *habeas* petitions, the situation could amount to detainees being held for a prolonged or indefinite period until the end of hostilities.

It is worth noting that Justices Scouter and Ginsburg, in their dissenting opinion, in part considered that the AUMF does not authorise the detention of citizens. One of the arguments considered by the Justices was that the AUMF, which authorises the use of military force, also authorised the US Commander in Chief and military to conduct its campaign in accordance with the laws of war. The US argues that the detention of enemy combatants accords with the customary laws of war and hence is authorised by the AUMF.⁴¹⁰ However these Justices found that the US had not made out its claim that it had acted in accordance with the laws of war because by holding Hamdi in *incommunicado* detention they were not treating him as a prisoner of war and such treatment is a violation of the Geneva Conventions. The Justices considered that Hamdi was entitled to be treated as

⁴⁰⁴ Ibid. The Court cited Article 118 GC III provides that prisoners of war shall be released and repatriated without delay after cessation of active hostilities.

⁴⁰⁵ Ibid. The Court relied on the case of *ex parte Quirin* stating “noting in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities”. 317 U.S. at 20.

⁴⁰⁶ Ibid, Part III A.

⁴⁰⁷ Ibid., Part III C 1.

⁴⁰⁸ Ibid., Part III C 3.

⁴⁰⁹ Ibid. The Court in coming to this conclusion sought to strike a balance between an individual’s constitutional rights and the governments’ concern that those who fight in hostilities ought not be released to rejoin the hostilities and the practical considerations in having a full hearing whilst hostilities are ongoing, Part III C 1&2.

⁴¹⁰ Citing *ex parte Quirin*.

a prisoner of war because on US government's account that he was "taken bearing arms on the Taliban side" and would qualify as a POW under Article 4 of the third Geneva Convention.⁴¹¹

Gherebi

The US Court of Appeal decided that the US District Court has jurisdiction to hear a *habeas corpus* petition by a Guantanamo detainee, Gherebi. It emphasised the role of the judiciary in controlling the detention of detainees. It found that the US government's position raised serious concerns under international law stating that, "we simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement. We hold that no lawful policy or precedent supports such a counter-intuitive and undemocratic procedure".⁴¹²

Padilla

Jose Padilla, a US citizen who was not involved in the war in Afghanistan, was arrested under a witness warrant at Chicago airport in May 2002. He has been declared an enemy combatant by order of the US President and detained in the United States without criminal charges and denied access to a lawyer from June 2002 until March 2004.⁴¹³ Despite a ruling by the Court of Appeal that his detention was unlawful, he presently remains in detention at Charleston naval base. The Court of Appeal found that his detention was unauthorised by congressional authority and could not be grounded in the President's inherent constitutional power.⁴¹⁴ The Supreme Court dismissed his *habeas petition* on technical grounds and he has re-filed a petition before the District Court of South Carolina.⁴¹⁵

Padilla is confined in semi-isolation and allowed supervised irregular visits with his lawyers.⁴¹⁶ Padilla's case is an example of arbitrary detention by the US government contrary to judicial authority that his detention is unlawful.

The right to a fair trial: military commissions, access to lawyers and the use of statements extracted through means of torture

Under international humanitarian law, a POW may be tried by a military court or civil court where the laws of the detaining power expressly permit a member of the armed force to be tried in a civil court for the offence alleged to have been committed by the POW.⁴¹⁷ The court which tries the POW, must be independent and impartial. Investigations are to be carried out promptly and a POW shall not be confined while awaiting trial unless the interests of national security so require and in any event, such confinement shall not exceed three months.⁴¹⁸ A POW is entitled to legal representation by a competent advocate of his/her choice. Legal

⁴¹¹ Judgment of *Hamdi v Bush*, supra note 362, Part III C dissenting opinions of Scouter and Ginsburg.

⁴¹² *Gherebi v Bush, Rumsfeld*, US Ct of Appls, 9th Cir D.C. no. CV-03-01267-AHM, 18 December 2003 pg. 8,9.

⁴¹³ Petition for writ of habeas corpus *Padilla v Hanft*, filed 02 July 2004.

⁴¹⁴ *Padilla, A., Newman as next friend, Rumsfeld*, 18 December 2003, pg. 4, 5.

⁴¹⁵ *Rumsfeld, v. Padilla et al.* Supreme Court Case No 03-1027, 28 June 2004.

⁴¹⁶ Thomasson, D, "In legal limbo?" Commentary, Washington Times, 13 June 2004; The Supreme Court.

⁴¹⁷ Article 84 GC III.

⁴¹⁸ Article 103 GC III.

counsel should be able to freely visit the accused and interview him in private.⁴¹⁹ Details of the charges should be communicated to the accused in good time before the trial, and defence counsel should have at least two weeks before the trial to prepare and call witnesses. A right of appeal is provided for in Article 106 of the Third Geneva Convention. Finally, common Art 3 of the Geneva Conventions, enforceable as a matter of international customary law,⁴²⁰ includes also the critically important due process protection: the prohibition of passing sentences without previous judgments pronounced by a regularly constituted court affording all indispensable *judicial guarantees*.⁴²¹

Access to a fair trial is a fundamental human right of paramount importance.⁴²² The minimum guarantees for fair trial includes the presumption of innocence,⁴²³ the right to have prompt access to counsel and to mount an adequate defence,⁴²⁴ the right of a defendant not to be compelled to testify against himself (the rule against self-incrimination),⁴²⁵ and the right to appeal any sentence to a higher court or tribunal.⁴²⁶ There is a general obligation that defendants be tried in public to allow press and public access to proceedings.⁴²⁷

Detainees enjoy the absolute protection from torture, cruel, inhuman and degrading treatment and punishment afforded to all persons.⁴²⁸ The prohibition against torture and cruel, inhuman and degrading treatment and punishment cannot be derogated from under any circumstances.⁴²⁹ Moreover, there is an explicit requirement in human rights law that persons in detention are treated with humanity and the inherent dignity of the human person.⁴³⁰

Inadmissibility of statements extracted by torture

An additional safeguard against torture and other forms of ill-treatment, and to protect the right to a fair trial, is the inadmissibility of statements extracted by torture or other forms of ill-treatment: this safeguard enforces the obligation of States to prevent acts of torture and ill-treatment while questioning at the same time the reliability of statement extracted torture and ill-treatment. Article 15 of the UN the Convention Against Torture provides: "Each State Party

⁴¹⁹ Article 105 GC III.

⁴²⁰ The customary nature of common Article 3 of the Geneva Conventions has been affirmed by the International Court of Justice in the *Nicaragua* case (*ICJ Reports* 1986, at 218) and, more recently, by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadic* case, para. 98 ff (ICTY, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, *Tadic*, para. 134). In its decision, the Appeals Chamber also held that many of the provisions of Protocol II can be regarded as customary law (*ibidem*, para. 117 ff.). See also ICTY, Judgment, 10 Dec. 1998, *Furundzija*, para. 153 (Torture); ICTY, Judgment, 2 Sept. 1998, *Akayesu*, paras. 495 (Genocide) and 608 (Common Art 3 Geneva Conventions); ICTY, Judgment, 21 May 1999, *Kayishema and Ruzindana*, para. 88 (Genocide).

⁴²¹ Art 3 I(d) Geneva Conventions (see footnote 4).

⁴²² ICCPR, article 14(1); ECHR, article 6(1); ACHR, article 8(1).

⁴²³ ICCPR, article 14(2); ECHR, article 6(2); ACHR, article 8(2).

⁴²⁴ ICCPR, article 14(3)(b); ECHR, article 6(3)(b)&(c); ACHR, article 8(c) & (d). The obligation for the state to provide a lawyer where the defendant cannot afford one is limited to circumstances where the "interests of justice so require" [ICCPR, article 14(3)(d); ECHR, article 6(3)(d)]. The ACHR is the exception in granting an "inalienable right to be assisted by counsel provided by the state" [ACHR, article 8(2)(d)]. In the *John Murray* case, the European Court of Human Rights ruled that the UK police in Northern Ireland had breached article 6 (1) & (3)(c) by denying a terrorist suspect access to his lawyer for 48 hours [European Court of Human Rights, *Murray (John), v. United Kingdom*, Judgment of 8 February 1996, Reports 1996-1.] The obligation to provide prompt access to counsel has also been emphasized by the UN Human Rights Committee and in principle 8 of the (non-binding) United Nations Basic Principles on the Role of Lawyers.

⁴²⁵ ICCPR, article 14(3)(g); ACHR, article 8(2)(g).

⁴²⁶ ICCPR, article 14(5); ECHR Protocol 7, article 2; ACHR, article 8(2)(h).

⁴²⁷ ICCPR, article 14(1); ECHR, article 6(1); ACHR, article 8(5).

⁴²⁸ ICCPR, article 7; ECHR, article 3; ACHR, article 5(2).

⁴²⁹ ICCPR, article 4(2); ECHR, article 15(2); ACHR, article 27(2).

⁴³⁰ ICCPR, article 10; ACHR, article 5(2); OSCE Vienna document, para. 23.2; OSCE Moscow document, para. 23.

shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”

The inadmissibility of statements extracted by torture is not only a safeguard against torture and ill-treatment, but is also considered a guarantee for fair trial. As described by Lord Hoffman in *Montgomery v HM Advocate*⁴³¹:

“...an accused who is convicted on evidence obtained from him by torture has not had a fair trial. But the breach of Article 6(1) lies not in the use of torture (which is separately, a breach of Article 3) but in the reception of evidence by the court for the purposes of determining the charge. If the evidence had been rejected, there would still have been a breach of Article 3 but not a breach of Article 6(1)”

Despite these clear safeguards and international standards, the United Kingdom Special Immigration Appeals Commission (SIAC) that hears appeals against the detention of persons under the UK Anti-terrorism, Crime and Security Act 2001, determined (in the course of an open judgment on 29 October 2003) that statements extracted from a third party through means of torture may be admissible in proceedings before it and that the circumstances in which a statement was obtained goes to the weight of the evidence, not its admissibility.⁴³² The decision is currently under appeal. The UK government endorsed SIAC’s judicial opinion reflecting a policy, which undermines the legal safeguard in Article 15 of the Convention against Torture and clearly defeats the object and purpose of the Convention.

It is important to note that the Commission, when considering the legality of the admissibility of statements extracted by torture, took into account the effect of the derogation made by the UK to Article 5 of the European Court of Human Rights: “the terms of the derogation and the nature of the public emergency to which it relates are important because of contentions on behalf of the Appellants that their activities...fell outside the scope of the derogation and that emergency”. In other words, according to the Commission, evidence extracted by torture may be used in the trials of individuals that are accused of activities that fall within the *scope of the derogation and that emergency*.

The detrimental impact of this decision on the prohibition against torture and ill-treatment is even greater if one takes into account the questionable legality and legitimacy of the derogation made by the UK.⁴³³ On 12 November 2001 Home Secretary David Blunkett announced that the UK would officially declare a ‘state of emergency’ thus permitting it to derogate from certain provisions of the European Convention on Human Rights. Blunkett assured the public that the declaration was a legal technicality—*necessary to ensure that certain anti-terrorism measures that contravene the ECHR could be implemented*—and not a response to any possible imminent terrorist threat. In a statement to parliament on 15 October announcing the broad outlines of the emergency anti-terrorism measures, Blunkett

⁴³¹ 2 WLR 779 [2001] cited in *Adjouaou and A,B,C and D (Appellants) and Secretary of State for the Home Department (Respondent)*.

⁴³² *SIAC – Adjouaou and A,B,C and D (Appellants) and Secretary of State for the Home Department (Respondent)*, appeal nos. SC/1/2002, SC/6/2002, SC/7/2002, SC/9/2002, SC/10/2002, 29 October 2003. “Justice perverted under the anti-terrorism, Crime and Security Act 2001”, AI Index: EUR 45/029/2003, 11/12/2003. Baroness Scotland’s reply to Lord Judd’s question, parliamentary Question & Answer, 26 June 2004.

⁴³³ As pointed out by the International Helsinki Federation, “it is highly questionable whether the situation in the UK meets the conditions for a state of emergency set out in the ICCPR and ECHR. Statements by government officials also suggest that the UK may have derogated for convenience sake”. IHF Report. Supra 15.

stated that “[t]here is no immediate intelligence pointing to a specific threat to the United Kingdom”⁴³⁴.

The comments by the Home Secretary raise serious concern that the derogation does not comply with the requirements of derogations, including in particular that the emergency be strictly required by the exigencies of the situation. But the decision by the SIAC disregarding important international safeguards against torture raises even further concerns regarding the commitment of the UK to abide by principles of international law while countering terrorism.

Military Jurisdiction

The use of military tribunals for the prosecution of civilians or for the prosecution of crimes committed against civilians has been widely criticised by the UN Human Rights Committee, European and Inter-American Commission and Court of Human Rights.⁴³⁵ As stated by the Inter-American Commission, military tribunals are part of the executive and as such do not satisfy the requirement of an independent and impartial court for the trial of civilians.⁴³⁶

In the prosecution of military personnel, military tribunals can in principle constitute an independent and impartial tribunal provided that the offences within its jurisdiction are truly related to military service and the minimum guarantees of fair trial are respected.⁴³⁷ However military tribunals may not be used to prosecute human rights violations that are unrelated to functions assigned by law to the military forces.⁴³⁸

The military order by US President Bush specified that military commissions would be used to try those whom the President determines as subject to the military order.⁴³⁹ The US government has determined six persons as persons subject to the military order and of them, three have been charged.⁴⁴⁰ The military commissions are composed of military personnel who are empowered to sentence persons to life imprisonment or death and any review against conviction or sentence is carried out by the President or Secretary of State.

The determination that persons are subject to the military order is made by the executive for whom an individual has no right of review in violation of human rights standards and safeguards against arbitrary detention. The military commission fails to satisfy the minimum fair trial guarantees and could not possibly satisfy the standards of an independent and impartial court competent to hear criminal charges against persons suspected of terrorist acts. The UK Attorney General recently spoke against the use of military commissions to try those held at Guantanamo Bay and considered the use of them unacceptable.⁴⁴¹

The charges laid against the three accused range from conspiracy to commit war crimes, attempted murder and aiding the enemy.⁴⁴² In relation to one of the three charged, David

⁴³⁴ Human Rights Watch, *Commentary on the Anti-Terrorism, Crime and Security Bill 2001 the Anti-Terrorism, Crime and Security Bill 2001*, 16 November 2001 at <http://www.hrw.org/backgrounder/eca/UKleg1106.htm>.

⁴³⁵ See International Commission of Jurists, *Military jurisdiction and international law: military courts and gross human rights violations, vol. 1* (http://www.icj.org/publi.php3?lang=en&id_article=3389)

⁴³⁶ IAH report, supra note 248, para. 231. UN Digest of jurisprudence, terrorism and human rights, section E2, Military and other special courts.

⁴³⁷ IAH report Ibid., para. 232.

⁴³⁸ Ibid.

⁴³⁹ Military Order of 13 November 2001. Those considered subject to the military order include members of al-Qaeda and those who engaged in, aided or abetted, or conspired to commit acts of terrorism. Sec.2.

⁴⁴⁰ See note 275.

⁴⁴¹ “UK alarm over Guantanamo trials”, BBC news http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk_politics/3837823.stm, 25 June 2004.

⁴⁴² Charges laid against David Hicks, Ibid.

Hicks, the US government has stated that if convicted, the prosecution will not seek the death penalty.⁴⁴³ Given the findings of the Inter-American Court that only offences that are truly related to military service should be determined by a military tribunal, the context in which the detainees have been captured in the “war against terrorism” brings into question the legality and appropriateness of military commissions to try offences committed by persons suspected of terrorism.

Detainees right of access to a lawyer

Most detainees at Guantanamo Bay and others detained in the ‘war on terrorism’ and held in US custody have been denied regular if any access to lawyers. Initial reports of detainees’ limited access to lawyers reveal that contacts with lawyers have been sporadic and monitored in contravention of human rights and humanitarian law standards to have free and private access to a client.⁴⁴⁴ A US military lawyer representing one of the persons charged has not seen his client for two months because of delays in obtaining security clearance for an interpreter.⁴⁴⁵ Denial of access to lawyers to those in detention is a violation of fundamental fair trial guarantees. Furthermore, access to lawyers is a safeguard against torture and ill treatment during detention. As the Inter-American Commission stated “Where detention is not ordered or properly supervised by a competent judicial authority, where the detainee may not fully understand the reason for the detention or have access to legal counsel, and where the detainee’s family may not be able to locate him or her promptly, there is a clear risk, not just to the legal rights of the detainee, but also to his or her personal integrity”.⁴⁴⁶

3.3.3. Absence of Valid Justifications for Torture under International Law

Recent memos released by the US government provide an insight into the policies and justifications that the government seems to rely upon for the detention and for the treatment of detainees during interrogations. Article 2(2) of the Convention against Torture specifies that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture or cruel, inhuman or degrading treatment or punishment. Article 2(3) of the Convention against Torture states that an order from a superior officer or a public authority may not be invoked as a justification for torture. As noted previously, these articles reflect well-established principles of international law.

Justifying torture and other forms of ill-treatment directly affects the victims’ right to reparation. Not only will the legal avenues to obtain redress be closed but the right to be recognised as a victim/survivor of an atrocious and wrongful act will also be denied (the right to satisfaction). Furthermore, justifying torture and other forms of ill-treatment is also contrary to the States’ obligation under international law to afford guarantees of non-repetition to the victims and their families.⁴⁴⁷

⁴⁴³ US Department of Defense, news release “Guantanamo detainee charged”, note 266.

⁴⁴⁴ Supra note 416.

⁴⁴⁵ James, I., “Lawyers unable to meet Guantanamo client”, AP, 23 June 2004.

⁴⁴⁶ Inter-American Commission on Human Rights fifth report on the situation of human rights in Guatemala, OEA/SER.L/V/II.111 doc 21 rev., 06/04/2001, chap. VII, para 37.

⁴⁴⁷ See REDRESS, Sourcebook on the Right to Reparation, supra.

Various defences and justifications for the use of interrogation techniques that are prohibited under international law as forms of ill-treatment or torture⁴⁴⁸ were considered in two memos by the Staff Judge Advocate and subsequently in further detail by a Working Group convened by the Department of Defence. Both memos considered the lawfulness of the use of different interrogation techniques predominantly based on domestic law whilst taking into account international standards as a matter of policy. In its conclusion, the Working Group noted that some techniques recommended for use “were more aggressive than those appropriate for POWs and constitutes a significant departure from traditional US military norms”⁴⁴⁹.

The US considers itself bound by the terms of the Torture Convention to the extent as defined in its understanding and reservations to the Convention. As discussed in the section of this report on Conditions of detention, most of the interrogation techniques have been found to constitute torture or cruel, inhuman or degrading treatment and punishment by UN human rights monitoring bodies including the Committee against Torture and in the jurisprudence of the European and Inter-American Courts. As noted, “conduct going beyond the bounds of the US understanding or reservation would be a breach of the convention. A breach of a treaty is a violation of international law, notwithstanding anything in domestic law that purports to justify the breach”⁴⁵⁰.

Similarly, the US does not consider itself bound by the provisions of the Geneva Conventions concerning the interrogation of detainees because of the President’s determination.⁴⁵¹ The US has maintained that the International Covenant on Civil and Political Rights has no application on operations outside US jurisdiction.⁴⁵² As expressed by a scholar, “as the case of the Convention against Torture, a breach of a Geneva Convention or of the Covenant on Civil and Political Rights would be a violation of international law even if the president or his delegate authorizes the offending act pursuant to the President’s power as the Commander-in-Chief of US armed forces”⁴⁵³.

The justifications relied upon by the US government for the use of interrogation techniques that could amount to torture and other forms of ill-treatment lie in controversial interpretations of legal doctrines including the Commander-in Chief Authority, necessity and self-defence. Other defences suggested include superior orders and the use of force in military law enforcement.

The Commander-in Chief Authority is perhaps the most controversial of the suggested justifications in that it rests on the complete, unfettered discretion and authority of the President as the Commander-in Chief in the conduct of operations of the war against terrorism. The suggestion is that domestic legislation and even Congress cannot interfere

⁴⁴⁸ Some of the interrogation techniques that were approved by the US government and considered lawful by the administration under US federal law include yelling, use of deception techniques, where the interrogator identifies himself to be from a country known for its harsh reputation in the treatment of detainees. Category II techniques requiring the permission of the Officer in Charge include the use of stress positions such as standing for up to four hours, use of falsified documents, confinement in isolation for up to thirty days, light deprivation, use of auditory stimuli, hooding during transportation and questioning, interrogation for up to twenty hours, removal of comfort items including religious items, removal of clothing, forced shaving of facial hair, use of dogs to induce stress. Category III techniques, which required approval by the Commanding General included exposure to cold weather or water and use of physical contact such as grabbing and poking. (Department of Defence Memorandum to Commander, Joint Task Force 170, 11/10/2002, Doc JTF-J2.)

⁴⁴⁹ Working Group Report on Detainee interrogations in the global war on terrorism: Assessment of Legal, historical, policy, and operational considerations”, 04 April 2003, pg. 69.

⁴⁵⁰ Supra note 374.

⁴⁵¹ US Staff Judge Advocate memorandum, JTF 170-Sja, 11/10/2002, pg. 1, Working group memo note 449, pg. 4.

⁴⁵² Working group memo, note 449, pg. 6.

⁴⁵³ Supra note 374.

with the President's inherent constitutional authority to conduct military operations including the detention and interrogation of enemy combatants.⁴⁵⁴

The memo implies that interrogation methods that would violate the prohibition against torture could be considered lawful, if authorised by the US President exercising his power as Commander-in Chief. The advice was given within the context of domestic legal and policy considerations without consideration of international legal standards.⁴⁵⁵ Just how far the President can use his authority in this way is likely to be limited by Congress and the judiciary at some level in a democratic State. In the recent Supreme Court decision concerning detainees' right to *habeas corpus*, the Court noted that "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens".⁴⁵⁶ There is no shortage of legal opinion that emphasises that in a democratic State the President does not have unfettered authority.⁴⁵⁷

Although the US government considers Guantanamo Bay within its special maritime and territorial jurisdiction thus excluding provisions of its federal Torture Act (18 U.S.C. section 2340), the said Act applies to the conduct of US forces outside the US for example in Afghanistan and Iraq.⁴⁵⁸ The defences that the US administration relies upon in response to potential criminal prosecutions for violations of its federal laws are discussed below.

The necessity or "choice of evils" defence could, as suggested by the Working Group memo, be invoked as a defence for the use of torture. Described as a justification for the use of harm to avoid greater harm, the memo mentions that in the context of the 'war against terrorism', certain circumstances might *support* such a defence, such as where intelligence indicates that a detainee may have information that could prevent a greater act of violence and harm than that which occurred on 11 September.⁴⁵⁹ The underlying purpose of the defence is one of public policy. However the memo acknowledged that the defence could not be invoked where legislation has made a determination of values such as in the Convention against Torture which defines "torture" as any act ... intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession,". Commenting upon the definition, the memo advises, "One could argue that such a definition represented an attempt to indicate that the good of obtaining information – no matter what the circumstances – could not justify an act of torture. In other words, necessity would not be a defence".⁴⁶⁰

The Israeli Supreme Court ruled that the necessity defence cannot be relied upon as a source of authority to justify the use of torture during interrogations.⁴⁶¹ However, the Court

⁴⁵⁴ The US argument is expressed in the following terms "A construction of 2340A [federal Act prohibiting torture] that applied the provision to regulate the President's authority as commander-in-Chief to determine the interrogation and treatment of enemy combatants would raise serious constitutional questions... Accordingly, we would construe Section 2340A to avoid this constitutional difficulty, and conclude that it does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority. Any effort by congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President...Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategy or tactical decisions on the battlefield... Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States". Work group memo note 449, pg 21, 24.

⁴⁵⁵ Work group memo note 449, pg. 20 – 24.

⁴⁵⁶ *Hamdi et al. v Rumsfeld et al.*, note 370, majority opinion, part D.

⁴⁵⁷ Note 374.

⁴⁵⁸ Working group memo note 449, pgs 7 & 8.

⁴⁵⁹ *Ibid.*, pg. 25 – 26.

⁴⁶⁰ *Ibid.* The memo goes on to suggest that no determination of values is evident in its Federal Torture Statute, section 2340 and because CAT article 2(2) has not been incorporated into domestic law, the defence is still available.

⁴⁶¹ See notes 153-159 and accompanying text.

also ruled that the “ticking bomb” scenario could be raised in the necessity defence to individual criminal prosecutions brought against interrogators.⁴⁶²

Self-defence was also raised as a possible defence to an act of torture under its Federal Statute. The use of force to prevent harm to another person is defensible however, as an interrogator is unlikely to have to resort to the use of force to prevent harm done to him, “an enemy combatant in detention does not himself present a threat of harm”.⁴⁶³ The memo alludes to contentious propositions that stretch the boundaries of self-defence to include acting in self-defence against an attack against the nation and acting in self-defence because the detainee being interrogated has aided or promoted a terrorist plot and is part of a mechanism that is considered a threat.⁴⁶⁴ Such propositions are untested before the courts and notwithstanding their contentious nature, Article 2(2) of the Convention against Torture stipulates that there is no justification for the use of torture or cruel, inhuman or degrading treatment and punishment.

The defence of acting in good faith is also raised as a justification for the use of torture under US Federal legislation where a specific intent to bring about the harm done is considered an element of the offence. A US Judge advocate has interpreted the US’ Eighth amendment to mean that a violation occurs only if an act was carried out maliciously or sadistically for the very purpose of causing harm.⁴⁶⁵ An act done in good faith, in legitimate governmental interest such as grounds of national security is considered a defence according to the memo from the Staff Judge Advocate.⁴⁶⁶

Article 2340 of the US Federal Torture Statute is defined by the Working Group in the following terms, “a defendant has committed torture when he intentionally inflicts severe physical pain or suffering with specific intent of causing prolonged mental harm”.⁴⁶⁷ To fall within this definition, the level of pain must reach such high intensity that the pain is difficult for a person to endure; the administration of drugs can only amount to torture if the effect is “to penetrate to the core of an individual’s ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality”.⁴⁶⁸

The memo suggests that if a person can show that he/she has acted in good faith that his conduct would not amount to any of the acts prohibited by the Statute, he/she may have a complete defence to the charge.⁴⁶⁹ Professional literature, advice of experts and past practice could, it is suggested, be relied upon to support a defence that a person acted in good faith.⁴⁷⁰

Evidence from recent press reports, photographs and accounts by detainees released from various detention centres under US custody have provided consistent reports of various

⁴⁶² Idem.

⁴⁶³ Working group memo note 449, pg.29.

⁴⁶⁴ Ibid., pgs. 29, 30.

⁴⁶⁵ The Eighth amendment to the Constitution of the United States establishes that cruel and unusual punishment shall not be inflicted. (<http://www.house.gov/Constitution/Constitution.html>).

⁴⁶⁶ Note 451, pg. 3 & 4.

⁴⁶⁷ Article 2340 18 U.S.C. defines torture as any “act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain”.

⁴⁶⁸ Working group memo note 449, pg. 11 – 16.

⁴⁶⁹ Section 2340 lists certain acts that constitute severe mental pain or suffering to include, the intentional infliction or threatened infliction of severe physical pain or suffering; administration or application, or threatened administration or application, of mind altering substances calculated to disrupt profoundly the senses or the personality; threat of imminent death; threat that another person will be subjected to the same acts.

⁴⁷⁰ Working group memo note 449, pg.13.

forms of ill-treatment and torture. The standards for treatment of detainees and interrogation have been well established in international human rights and humanitarian law that no circumstance could permit a defence of acting in good faith.

The use of force against a person who has committed, is committing, or is about to commit a serious offence is justified in certain circumstances under US domestic law.⁴⁷¹ Although the justifications do not relate specifically to interrogations but to the enforcement of military law, the Working Group memo suggests that they provide a “useful comparison” to the use of force to extract information from detainees in order to prevent terrorist acts.⁴⁷²

The defence of superior orders is raised as a possible defence to the use of torture in the Working Group memo.⁴⁷³ The memo relies on *dicta* from the *Hostages Case* and domestic law in its Manual Courts-Martial to say that the defence can be used in exceptional interrogations except where the order is patently unlawful.⁴⁷⁴ The reference to exceptional interrogations is mostly directed at more aggressive techniques considered by the Working Group, such as isolation, prolonged standing, sleep deprivation and removal of clothing.

Superior orders could not be raised as a defence and can only be considered as a mitigating factor in punishment under the Nuremberg Charter and the Statutes of the International Criminal Tribunals of the former Yugoslavia and Rwanda.⁴⁷⁵ Similarly, the Statute of the International Criminal Court provides that a person who commits a crime within the jurisdiction of the Court pursuant to a superior order is not relieved from criminal responsibility unless (a) the person was under a legal obligation to obey the order (b) the person did not know the order was unlawful and (c) the order was not manifestly unlawful. For the purposes of the ICC Statute, orders to commit genocide and crimes against humanity (which may include the specific act of torture) are manifestly unlawful.

The ICC Statute leaves a small window open for the possibility to raise the defence in those limited circumstances and reflects the *dicta* from the *Hostages Case* mentioned in the Working Group memo. An argument that an order was not manifestly unlawful might be used to raise the defence of superior orders however as noted earlier, most of the techniques considered would represent a significant departure from the norms binding on US military personnel and it is unconvincing to suggest that the combination of interrogation techniques used against the detainees was not manifestly unlawful.

3.3.4. General Immunities for Counter-terrorism actions and Military Operations Conducted in the ‘War against Terrorism:’ Impunity for Torture?

⁴⁷¹ Use of force in military law enforcement is justified when acting in self-defence and defence of others against a hostile persons when in imminent danger of death or serious bodily harm by the hostile person; to prevent theft or sabotage of assets vital to national security or resources inherently dangerous to others; to prevent commission of a serious crime that involves imminent danger of death or serious bodily harm; to prevent destruction of vital public utilities; for apprehension and to prevent escape; DODD 5210.56, 01 November 2001.

⁴⁷² Working group memo note 449, pg. 31.

⁴⁷³ *Ibid.*, pg. 32, 33.

⁴⁷⁴ The Hostage Case (*United States v. Wilhelm List et. al.*) *dicta* where the court after confirming that an act done pursuant to a superior order can mitigate but not justify the offence stated “We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the interior will be protected”, 11 TWC 1236. The Manual Courts-martial states, “An act performed pursuant to an unlawful order is excused unless the accused knew it to be unlawful or a person of ordinary sense and understanding would have known the order to be unlawful”, R.C.M. 916(d), MCM 2002.

⁴⁷⁵ Art 8 Charter of International Military Tribunal at Nuremberg and Art 8(4) ICTY Statute and Art 6(4) ICTR Statute.

As a further barrier to claims for reparation arising from violations of international human rights standards in the ‘war against terrorism’, some States have taken extraordinary steps to shield their own personnel from prosecution or civil suits.

Anti-terrorist legislation in India and Nepal grants immunity for proceedings against the State or for any member acting under the authority of the State for any act purported to be done in good faith in combating terrorism.⁴⁷⁶ The grant of immunity for acts done in good faith provides a defence to any proceedings brought against the State and impliedly justifies acts of torture on grounds that it was carried out in good faith. The term ‘in good faith’ imports a value judgment and requires the State to show that the circumstances satisfy that such acts were carried out in good faith. Such legislation raises the risk of torture against those held in detention and contravenes Article 2(2) of the Convention against Torture.

Multinational forces and non-Iraqi civilian and military personnel under the control of the Administrator of the then Coalition Provisional Authority of Iraq are immune from the Iraqi legal processes. Order 17 of the Coalition Provisional Authority (CPA) granted immunity to those personnel mentioned from Iraqi laws and process so that they are only subject to the exclusive jurisdiction and laws of their sending State.⁴⁷⁷ The immunity was also extended to contractors who are subject to contract agreements with the CPA.⁴⁷⁸ The US government has sought to continue the order after the handover of Iraq so that personnel remain immune from proceedings during the interim government until the newly elected government rescinds the order or all forces are withdrawn from Iraq.⁴⁷⁹

CPA Order 17 effectively restricts victims’ rights to redress in Iraq and places insurmountable barriers for Iraqi citizens who have a legitimate claim to bring proceedings in the jurisdiction of the State that has sent the military personnel concerned. The order grants immunity to multinational forces, which is widely defined in the Order to include the force, authorised by the UN Security Council resolutions and covers US and UK military personnel.

CONCLUSIONS

1. Domestic definitions to criminalise “terrorist offences” and “terrorist groups” should be clear and precise and include references to the gravity of the acts.

Terrorism should only apply to the most serious crimes. ‘Terrorism’ is a term that is highly politically charged and there is no global definition of terrorism under international law. There are many legal consequences triggered by defining an act as terrorism; States can derogate from certain human rights obligations, there is no recourse to the political offence doctrine, funds and other financial assets or economic resources can be frozen, etc. The Security Council has said that terrorism is an act that constitutes “a threat to international peace and security”. In this sense, the measures specified in Resolution 1373 and the other counter-terrorist measures it request States to implement, refers only to the most serious crimes under international law. This characteristic (the gravity of the act) needs to be reflected in

⁴⁷⁶ Article 57 Prevention of Terrorism Act, 2002 Act No. 15 of 2002 (CPA) states “No suit, prosecution or other legal proceeding shall lie against the Central government or a State government or any officer or authority of the Central government or State government or any other authority on who powers have been conferred under this Act, for anything which is in good faith done or purported to be done in pursuance of this Act; Section 20 Terrorist and disruptive activities (Control and Punishment) Act, 2002.

⁴⁷⁷ Section 2 CPA Order 17 (revised 27/06/2004).

⁴⁷⁸ Section 4 CPA Order 17.

⁴⁷⁹ Regular Department of Defense briefing 24/06/2004 and Department of Defense Press news “Speech testimony delivered to Senate Armed Services Committee on Transition in Iraq”, 25/06/2004.

domestic laws when defining acts as terrorist offences, groups as terrorist organisations, and generally when implementing security measures to combat “terrorism”.

- 2. *The rule of law needs to be respected at all times including when countering ‘terrorism’. At the same time, States need to acknowledge that there is a high risk of undermining human rights when implementing security measures.***

There is, therefore, a clear need to implement mechanisms to review the legality of counter-terrorist measures in the light of international human rights and humanitarian law. This needs to be done at the domestic and international level. In this regard, the UN Counter-Terrorism Committee (CTC) should request States to report on their compliance to implement counter-terrorist measures *comprehensively*. In other words, States should include in their reports information on *how* they are implementing counter-terrorism measures—the effectiveness of the said measures and their compatibility with other international obligations, including, in particular, with international human rights and humanitarian law. The CTC should also work in close cooperation with other UN human rights mechanisms; with the treaty-monitoring bodies (like the Human Rights Committee or the Committee Against Torture) and with the special procedures of the Commission on Human Rights (like Special Rapporteurs, Working Groups, etc).

- 3. *The prohibition against torture or cruel, inhuman or degrading treatment or punishment and the principle of non-refoulement are absolute, admit of no exception or justification and leave no room for balancing.***

Due to the *jus cogens* character of the norm prohibiting torture under international law, a balancing act would be contrary to general international law: In the same way, States cannot rely on *diplomatic assurances* when extraditing, deporting or expelling an individual to a country where the person is at risk of torture or cruel, inhuman or degrading treatment or punishment. States cannot expect countries that systematically commit torture or ill-treatment to be able to *assure* that the person extradited/deported will be protected.

- 4. *National security can only be achieved when all individuals are safe.***

States cannot claim to be secure if the government is committing, condoning or acquiescing to violations of fundamental human rights. It is precisely the argument that national security can overcome fundamental human rights that has created an environment where numerous grave violations of human rights are being committed (such as torture and ill-treatment, illegal rendition and *refoulement*).

- 5. *States have an obligation to follow legal procedures in inter-State transfers of individuals, whether it is an extradition, a deportation or expulsion.***

Within these legal procedures, States should implement safeguards against torture and cruel, inhuman or degrading treatment or punishment. States need to guarantee an effective remedy for individuals to challenge their extradition/expulsion/ deportation orders.

- 6. *The practice of “renditions” must stop.***

It is impossible to prevent arbitrary transfers if they are executed completely outside of the law. And it is impossible to protect individuals from torture and other human rights violations,

if governments do not provide an opportunity to their own judicial and/or administrative authorities to intervene in these procedures.

7. Effective safeguards against torture

As recent events have shown, **torture and ill-treatment will occur if there are no proper safeguards in place**. It is not only important to allow individuals to challenge governmental actions but it is also necessary to put in place effective mechanisms to prevent such violations. If there are no mechanisms in place to prevent torture and ill-treatment in detention centres and during interrogations, these violations are more likely to occur. General safeguards include access to the outside world, to lawyers, medical examinations, and the right to challenge the legality of the detention.

It is also vital to **allow access to detention facilities to organisations like the ICRC or monitoring bodies like the UN Special Rapporteur on Torture or the European Committee for the Prevention of Torture (as applicable)**. In particular, in cases where credible allegations of torture and cruel, inhuman or degrading treatment or punishment have been made, it is imperative to have an external review of the conditions of detention (and to assess whether detainees are held without charges, for an indefinite period of time and/or without recourse to an effective remedy). The use of secret detention centres must end.

Judicial review should not be limited during states of emergencies or armed conflicts.

It is precisely during these periods when it is most important to have an effective control of the security and armed forces (especially when States have derogated from human rights obligations that security and armed forces traditionally must comply with). In this respect it is important to note how in light of the allegations of detainee abuse in Iraq and Afghanistan, the Security Council did not renew this year's resolution to provide immunity to US troops from the jurisdiction of the International Criminal Court. The initiative was supported only by five of the fifteen members of the Council, and was finally withdrawn by the US, which shows how States recognise that the conduct of security and armed forces must be reviewable "at all times".

8. governmental departments need to harmonise and coordinate procedures to make sure that counter-terrorism measures do not breach constitutional or/and international human rights.

For example, if States are willing to implement an unprecedented measure that may have a negative effect on fundamental human rights, the responsible governmental authority should seek the opinion of the Courts (if possible) and international tribunals or bodies (i.e. advisory opinions) before implementing such an initiative.