1. Key trends in the fight against terrorism and key aspects of international human rights law

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The dramatic attacks of 11 September 2001 in the US, which consisted of the simultaneous hijacking of four planes, and resulted in thousands of victims¹ in the heart of New York and Washington, had an overwhelming impact on the world. The scale and nature of the attacks and the means used showed the strength and resolve of a terrorist group, the damage that can be caused by a few determined and organized individuals, the vulnerability of some of the world's key financial and defence centres, and the exposure of aviation transportation to terrorist attacks. Yet, in the immediate aftermath of the attacks, the response given to these unprecedented attacks was calm and a clear resolve from the world's leaders that such crimes, and those who caused them, would not prevail over 'shared values' of democracy, freedom, the rule of law and human rights.²

Unfortunately, the legal response that followed – from the Security Council to governments – was very different. It was soon argued that the new threat of terrorism from various groups in several parts of the world was such that it threatened the very existence of democracy. Countering terrorism was rebranded the 'war against terror' and the existing international legal framework was deemed insufficient to address the new paradigm. New rules, a new approach unconstrained by existing rules of international law, were necessary. The choice was clear: security or human rights. With the former clearly taking the lead to the detriment of

¹ The attacks resulted in the deaths of 2996 people, while more than 6000 were injured.

² See UN Security Council (2001), 'Security Council condemns "in strongest terms" terrorist attacks on United States', press release, 12 September, UN Doc. SC/7143, <http://www.un.org/press/en/2001/SC7143.doc.htm>, accessed 10 May 2017.

the latter, what followed was an overhaul of calmly, well established rules of international law: lines between legal regimes were blurred, 'exceptional' rules became the norm, and rules in violation of non-derogable human rights law, or outside the scope of any judicial review or control, were created. In turn, this opened the door to impunity for human rights violations, and lack of accountability from States committing them.

Yet, some sixteen years later, the threat of terrorism is as present as ever. New, more virulent and powerful terrorist groups have emerged, which control territory and are engaged in full-fledged armed conflicts; terrorist acts continue to take place, unabated; and a range of new phenomena have been identified, such as 'self-radicalized' individuals, 'lone wolves', and 'foreign terrorist fighters'. Following a short historical approach to the way in which terrorism has been dealt with by the United Nations (UN), this chapter will examine the developments and main trends in the 'fight against terrorism' since 2001, highlighting some of the key conceptual and legal fractures caused by the post-2001 approach and focusing on key tensions with international human rights law (IHRL). It will also recall some of the key aspects of the international human rights framework, most notably its ability to respond to serious threats faced by governments.

1. THE UNITED NATIONS RESPONSE TO TERRORISM

1.1 Prior to 2001

The General Assembly first dealt with the question of terrorism in 1972, following the kidnapping and killing of 11 Israeli athletes by the Palestinian 'Black September' group during the Munich summer Olympics. Resolution 3034 (1972)³ was a sign of its times: entrenched in Cold

³ Entitled 'Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes'. In 1991, the series' name was shortened to 'measures to prevent international terrorism'.

War politics, as reflected by the voting pattern,⁴ it became polarized on the question of national and liberation movements, and their link to terrorism. Instead of condemning terrorism, the resolution highlighted its underlying causes, namely misery, frustration, grievance and despair, focused on the right to self-determination and the legitimacy of the struggle of national and liberation movements, and endorsed the concept of 'State terrorism',⁵ since then set aside.⁶ It was not until 1985 that the General Assembly was able to depart from this position. Through resolution 40/61 (1985), adopted by consensus after the Achille Lauro hijacking by the Palestinian Liberation Front, the General Assembly affirmed that terrorist violence could not be justified under any circumstance,⁷ and that the struggle of national liberation movements must be in accordance with the principles and purpose of the Charter and the Declaration on principles of international law concerning friendly relations and cooperation among States, a document which explicitly prohibits recourse to terrorist violence in the exercise of the right to self-determination.

Despite this resolution, the question of whether the definition of terrorism should cover acts of self-determination and liberation movements, or not, remained open, as revealed by a draft resolution put forward by Syria in 1987.⁸ This question is still largely on the table, and

⁴ With 76 in favour, composed largely of the Eastern Group and the Group of 77, while 35 countries voted no, largely the Western Group. Seventeen countries abstained.

⁵ See also General Assembly (GA) resolution 39/159 of 17 December 1984, entitled 'Inadmissibility of the policy of State terrorism', 117 votes in favour, and 30 – western – countries abstained (no country voted against).

⁶ In 2005, the Secretary-General stated that it is 'time to set aside debates on so-called state-terrorism. The use of force by States is already regulated under international law' (UN General Assembly (2005), 'In larger freedom', UN Doc. A/59/2005, para. 91), while the chair of the Counter-Terrorism Committee clarified in 2002 that State-terrorism is not an international legal concept. In this reasoning, 'State terrorism' is in fact abuse of power and use of force by States, which is already regulated by international law, namely IHRL, IHL and international criminal law. The concept is no longer referred to in GA resolutions.

⁷ The resolution 'unequivocally condemns, as criminal, all acts, methods and practices of terrorism, wherever and by whom ever committed'. The qualification that terrorist acts are 'unjustifiable' was added with GA resolution 44/29 of 4 December 1989.

⁸ The draft resolution, presented by Syria and supported by the group of developing States called for an international conference to define terrorism and to differentiate it from the struggle of peoples for national liberation, which was

is one of the main stumbling blocks to the adoption of the International Convention on Terrorism.⁹ While some may have seen elements of a definition in two Declarations contained in General Assembly resolutions,¹⁰ which state that ‘criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them’, the reference to a political purpose makes this wording different to that contained in the UN Draft Comprehensive Convention, which does not require a political motive, and instead focuses on intimidation or coercion, and other international documents.¹¹ This suggests that the

never adopted. Instead, GA resolution 42/159 of 7 December 1987 requests the Secretary-General to ‘seek the views of Member States on how to combat international terrorism, including through the possibility of convening an international conference to define terrorism and to differentiate it from the struggle of peoples for national liberation’. This much weaker wording left open the possibility that this conference not take place, thereby excluding that the ‘struggle of peoples for national liberation’ be excluded from the definition of terrorism.

⁹ In 1996, General Assembly resolution 51/210 established an Ad Hoc Committee, which negotiated several texts resulting in the adoption of three treaties: the International Convention for the Suppression of Terrorist Bombings (GA resolution 52/164 of 15 December 1997); the International Convention for the Suppression of the Financing of Terrorism (GA resolution 54/109 of 9 December 1999); and the International Convention for the Suppression of Acts of Nuclear Terrorism (GA resolution 59/290 of 13 April 2005). In 2000, work had begun on a draft comprehensive convention on international terrorism to criminalize all forms of international terrorism and deny terrorists, their financiers and supporters access to funds, arms, and safe havens. While most of the text has been agreed, the outstanding issues are however key, and revolve around: (1) the definition (article 2); (2) the exclusionary clauses (article 3, former article 18), particularly on whether the text would be applicable to (a) the armed forces of a state in the exercise of their official duties and (b) to ‘self-determination/resistance movements’. See also Ben Saul (2006), ‘Defending “terrorism”: Justification and excuses for terrorism in international criminal law’, *Australian Yearbook of International Law*, 25, 177–226.

¹⁰ GA resolution 49/60 of 9 December 1994, which contains the Declaration to Eliminate International Terrorism, and GA resolution 51/210 of 17 December 1996, which contains the Declaration to Supplement the Declaration to Eliminate International Terrorism.

¹¹ See Ben Saul (2012), ‘The Special Tribunal for Lebanon and terrorism as an international crime: Reflections on the judicial function’, Legal Studies Research Paper No. 12/64, September, Sydney Law School, pp. 7 and 8.

legal definition of terrorism remains deeply contested, and that, at best, the definition reflects nascent political agreement on a shared concept of terrorism, but not legal agreement evidencing a customary crime.¹²

First attempts at addressing the question of terrorism and human rights also hit an ideological stumbling block, as evidenced by the short-lived 'Human Rights and Terrorism' resolutions.¹³ The consensus over these resolutions fractured over the question of whether terrorist groups could commit 'gross human rights violations',¹⁴ and whether terrorism itself could be considered as a violation of human rights. Many States argued that terrorism was a criminal act, not a violation of human rights; that only States could commit human rights violations; and that accepting otherwise would give terrorist groups a legitimacy that they might be looking for, but should not be granted. Following an increasing number of abstentions or votes against, the series was discontinued in 2005.¹⁵ In a worrying development, Human Rights Council resolution 31/30 (2016), sponsored by Egypt, on 'the effects of terrorism on the enjoyment of all human rights', contains some of the same flaws. By overly focusing on the impact of terrorism, it 'instrumentaliz[es] victims of terrorism to weaken the international human rights system that is designed for their protection'. As noted by Belgium prior to the adoption of the resolution, '[w]e cannot be guided by fear, quite the opposite; our responsibility is to pursue a framework that preserves our values. We are convinced that the fight against terrorism, even in the most tragic moments must be undertaken with full respect for human rights and fundamental freedoms ... We have just been victims of a terrorist attack, but we call for you to

¹² See Saul, *ibid.*

¹³ The first in this series started after the adoption of the Vienna Declaration and Plan of Action in 1993, with GA resolution 48/122 of 14 February 1994. The last was GA resolution 59/195 of 22 March 2005. In 1994, the UN Commission on Human Rights also started adopting resolutions on terrorism and human rights, which contained similar provisions.

¹⁴ See e.g. Preamble, UN Doc. A/RES/54/164.

¹⁵ See Kalliopi Koufa (2006), 'The UN, human rights and counter-terrorism', in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism* (Aldershot: Ashgate), pp. 51 and 52. See also Economic and Social Council, 'Terrorism and human rights', Working paper submitted by Kalliopi K. Koufa in accordance with Sub-Commission resolution 1996/20, E/CN.4/Sub.2/1997/28.

vote against this text ... this sends the wrong message of the way in which we should tackle the issues facing us at the moment.’¹⁶

1.2 The Security Council Response Post-2001 and its Consequences

Prior to 2001, the Security Council had largely stayed away from the debate tainted by ideology that was taking place in the General Assembly, and the issue of terrorism had mostly taken the form of sanctions against States considered to have links to certain acts of terrorism.¹⁷ Foreshadowing its post-2001 work on setting up an international counter-terrorism framework, in resolution 1269 (1999), the Security Council asked Member States to enhance international cooperation and coordination, and encouraged them to sign up and implement the counter-terrorism Conventions.

Following resolution 1368 (2001)¹⁸ which stated that ‘acts of international terrorism’ were a threat to international peace and security, the UN Security Council adopted on 28 September 2001 resolution 1373, which is a key building block of the ‘counter-terrorism framework’ set up by the Council. The resolution was an immediate response to the terrorist attacks that took place on 11 September, but it was also a politically motivated, hastily adopted document that had a dramatic impact on human rights, whose consequences are still very largely felt today, in every corner of the world.

The resolution, adopted under Chapter VII of the Charter of the UN, required States to take a number of measures, including the criminalization of various acts of terrorism,¹⁹ the prevention and suppression of the

¹⁶ Article 19 (2016), ‘UNHRC 31: States must reject flawed resolution on “terrorism”’, 22 March, <https://www.article19.org/resources.php/resource/38310/en/unhrc-31:-states-must-reject-flawed-resolution-on->, accessed 17 October 2017; International Service for Human Rights (2016), ‘Counter-terrorism: Egyptian-led resolution sends wrong message at wrong time’, 4 April, <http://www.ishr.ch/news/counter-terrorism-egyptian-led-resolution-sends-wrong-message-wrong-time>, accessed 17 October 2017.

¹⁷ Libya, resolution 748 (1992); Sudan, resolution 1054 (1996) and the Taliban resolution 1267 (1999) expanded to include Al-Qaida by resolution 1333 (2000).

¹⁸ 12 September 2001.

¹⁹ It requires all States to criminalize terrorist acts (OP 2(e)); to penalize acts of support for or in preparation of terrorist offences (OP 2(e)); and to criminalize the financing of terrorism (OP 1(b)).

financing of terrorism²⁰ and the freezing of assets of individuals linked to terrorism. For the first time, the Security Council imposed on all UN Member States a number of general, permanent obligations, not connected to a specific conflict situation. The obligations laid out in the resolution contain no end in time or space and apply to any act of terrorism worldwide. In effect, this resolution amounted to the Council establishing new binding rules of international law. The legitimacy of the Council's so doing has been questioned.²¹

Yet, resolution 1373 mostly stood out for what it did not do: define terrorism, or make an explicit mention of the need to respect human rights in this context (except through a passing reference regarding refugee law). In turn, this empowered governments to take strong measures against terrorism – however they wished to define it – while disregarding their long-established human rights obligations. Many States understood this resolution as an obligation to adopt stringent counter-terrorism legislation, quickly, often under ‘emergency’ procedures, in the absence of sufficient consultations with key stakeholders and respect for thorough parliamentary procedures,²² in a number of counter-terrorism areas. This impression was compounded by the accompanying monitoring mechanism set up by resolution 1373 whereby States were requested to report on their progress in the implementation of the resolution to the Counter-Terrorism Committee (CTC), with a first report due only ninety days after adoption of the resolution. Through State reporting, and later State visits and internal working documents to assess

²⁰ These obligations were already largely contained in the Convention on the Suppression of the Financing of Terrorism. As noted by Martin Scheinin, ‘[o]n 10 April 2002, after the 22nd ratification, the Convention entered into force and has by now obtained almost universal ratification (186 parties). Whatever criticisms we may have about resolution 1373, it was a success story in getting states on board to combat the financing of terrorism, and the emergency shortcut was remedied through subsequent action by states’, Martin Scheinin (2014), ‘A comment on Security Council Res 2178 (foreign terrorist fighters) as a “form” of global governance’, *Just Security*, 6 October, <https://www.justsecurity.org/15989/comment-security-council-res-2178-foreign-fighters-form-global-governance/>, accessed 10 May 2017.

²¹ For a detailed examination of all these developments, see Chapter 2 in this volume by Martin Scheinin.

²² ‘Special Rapporteur on human rights while countering terrorism’, UN Doc. A/70/371, para. 13.

States' implementation of resolution 1373 (and later also 1624 (2005)),²³ the CTC evaluated States' implementation of the various requirements of the resolutions, and ranked their level of implementation. As the CTC largely failed to take human rights into consideration in carrying out its mandate, the stage was set for the widespread, hasty adoption of counter-terrorism legislation that often did not comply with IHRL.²⁴

This top-down approach to the creation of an international counter-terrorism framework worked in combination with a lateral or horizontal approach,²⁵ in which States were inspired by, or simply copied, existing counter-terrorism legislation in other countries. This allowed certain governments to feel retroactively justified in their prior adoption of some rights-limiting counter-terrorism measures which had been criticized as not being compliant with the international human rights framework. This led, for example, former Egyptian Prime Minister Atef Abeid to offer that '[a]fter these horrible crimes committed in New York and Virginia, maybe Western countries should begin to think of Egypt's own fight against terror as their new model',²⁶ or the former Malaysian Minister of Justice to state, following a meeting with the former US Attorney General: 'I believe that (...) there will be no more basis to criticize each other's systems, specifically the [ISA – Internal Security Act], because if they do that, then the Patriot Act, which is quite similar in nature to the ISA, could come into a position of jeopardy itself.'²⁷ This also allowed

²³ See Preliminary Implementation Assessments, set up in December 2006, replaced in 2013 by an overview for implementation assessment and the detailed implementation assessment.

²⁴ For a detailed examination of all these developments, see Chapter 2 in this volume by Martin Scheinin.

²⁵ See Victor V. Ramraj (2012), 'The impossibility of global anti terrorism law', in Victor V. Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti Terrorism Law and Policy*, 2nd edn (Cambridge: Cambridge University Press), pp. 44–66 at 48.

²⁶ See Human Rights Watch (HRW) (2001), 'Egypt: Human rights background', October, <https://www.hrw.org/legacy/backgrounder/mena/egypt-bck-1001.htm>, accessed 29 February 2016. See also Kent Roach noting that 'as with Egypt, Syria was able to proudly report the existence of offences to the CTC that before 9/11 would have been widely regarded within the UN and elsewhere as repressing political freedoms', in Kent Roach (2001), *The 9/11 Effect. Comparative Counter-Terrorism* (Cambridge: Cambridge University Press), p. 94.

²⁷ As quoted in Neil Hicks, Director of International Programs (2004), 'The impact of counter Terror on the Promotion and Protection of Human Rights: A Global Perspective', Human Rights First Paper prepared for 'Human Rights in an Age of Terrorism' a conference at the University of Connecticut, 9–11 September 2004.

States to justify some of the rights-limiting measures included in their new legislation by reference to what other States were doing. The impact of this subtle, non-prescriptive process is not negligible, and the particularly negative role of US and UK²⁸ legislation and practice on the rest of the world is a case in point. Combined with existing national differences in implementation of the rule of law, in institutional safeguards, in the role of and protection afforded to the judiciary, of human rights protection and of mechanisms to address alleged human rights violations, the emerging global counter-terrorism framework failed to take account of the political, institutional, legal, cultural, and religious differences in each State.

In this context, the need to respect individual rights and the international human rights framework in countering terrorism was relegated to a second zone, after the political imperatives of adopting counter-terrorism legislation to look strong in the face of the new terrorist threat, however defined, and to comply with new international obligations. At the most extreme end of the spectrum, human rights activists or members of the political opposition critical of this approach, were accused of assisting terrorists. For example, the US Attorney General John Ashcroft said in December 2001:

[t]o those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists for they erode our national unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends. They encourage people of good will to remain silent in the face of evil.²⁹

In the same vein, the Director of the Canadian Security Intelligence Service (CSIS) said:

So why then, I ask, are those accused of terrorist offences often portrayed in media as quasi-folk heroes, despite the harsh statements of numerous judges? Why are they always photographed with their children, given tender-hearted

²⁸ See Kent Roach (2006), 'The post 9/11 migration of Britain's 2000 Terrorism Act', in Sudit Choudry (ed.), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press).

²⁹ Testimony of Attorney General John Ashcroft, Senate Committee on the Judiciary, 6 December 2001, <https://www.justice.gov/archive/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm>, accessed 7 May 2017. See also former Indian Deputy Prime Minister L.K. Advani, who in calling for the adoption of a new Prevention of Terrorism Act in November 2001, stated: 'If the opposition opposes the ordinance they will be wittingly or unwittingly helping terrorists', quoted in Hicks (n 27).

profiles, and more or less taken at their word when they accuse CSIS or other government agencies of abusing them? It sometimes seems that to be accused of having terrorist connections in Canada has become a status symbol, a badge of courage in the struggle against the real enemy, which would appear to be, at least sometimes, the government. To some members of civil society, there is a certain romance to this. This loose partnership of single-issue NGOs, advocacy journalists and lawyers has succeeded, to a certain extent, in forging a positive public image for anyone accused of terrorist links or charges.³⁰

More generally, former Egyptian President Hosni Mubarak was reported as saying that human rights arguments should not be put forward on all occasions, and that those who carry out terrorist acts have no claim to human rights,³¹ a view which was largely shared.

As noted by the former UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, ‘for a while, the global consensus about the imperative of combatting terrorism was so compelling that authoritarian governments could get away with their repressive practices simply by renaming political opponents as terrorists’.³² Governments were able to prosecute dissidents and breach fundamental human rights with the apparent blessing of the UN Security Council, while the strong international stance against terrorism prevented the international community from being critical of governments that were carrying out these practices. One such example was the position of the EU in relation to Central Asian States, given their perceived importance in countering terrorism.³³

³⁰ Remarks by Richard B. Fadden to the Canadian Association for Security and Intelligence Studies (CASIS) Annual International Conference, 20 October 2009, <http://www.casis-acers.ca/wp-content/uploads/2014/06/Dick-Fadden-CSIS-Speech-To-CASIS-OCT-091.pdf>, accessed 7 May 2017.

³¹ See HRW (n 26).

³² Martin Scheinin and Mathias Vermeulen, ‘Unilateral exceptions to international law: Systematic analysis and critique of doctrines that seek to deny or reduce the applicability of human rights norms in the fight against terrorism’, European University Institute Working Papers, Law, 2010/08, Paper delivered under the DETECTER project, p. 2.

³³ See Scheinin and Vermeulen, *ibid.*, in relation to Uzbekistan, at p. 2. See also Gordon Crawford: ‘The embrace of Central Asian states by the EU due to their strategic importance in combating perceived Islamist threats (...) can be manipulated by authoritarian rulers to provide them with enhanced legitimacy at home and a relatively free hand in repressing opposition political parties and non-governmental activist groups (...). Western support is more likely to result in rising authoritarian trends than in political liberalisation and democratisation’.

What resolution 1373 failed to mention in relation to human rights was remedied by resolution 1456 (2004). It stated that ‘States must ensure that any measure taken to combat terrorism comply with international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law’. All Security Council resolutions from thereon routinely included this, or other similar, language. However, as we will see, this was not sufficient to reverse the negative impact that resolution 1373, together with the lack of human rights interest of the CTC, had already had.

1.3 The General Assembly

In the post-2001 context, the General Assembly largely put aside its own internal conceptual differences to the question of terrorism, to address what some saw as the discriminatory and possibly counter-productive result of the Security Council approach. Putting itself forward as the sole body with universal legitimacy – ‘the general organ having competence to consider measures to eliminate international terrorism’³⁴ – in 2003, it started focusing on the question of ‘protection of human rights while countering terrorism’, with a series of resolutions that address the human rights concerns posed by States’ counter-terrorism measures.³⁵

In 2004, the Panel on Threats, Challenges and Change recommended that the UN ‘make better use of its assets in the fight against terrorism, articulating an effective and principled counter-terrorism strategy that is respectful of the rule of law and universal human rights’. The Panel noted ‘the imperative to develop a strategy that addresses root causes and the rule of law and fundamental human rights’, stating that what was required is a ‘comprehensive strategy that incorporates but is broader than coercive measures’.³⁶ In 2005, through the World Summit Outcome Document, the General Assembly was charged with the development of a Strategy to promote comprehensive, coordinated and consistent responses, at the national, regional and international levels, to counter

Gordon Crawford (2008), ‘EU human rights and democracy promotion in Central Asia: From lofty principles to lowly self-interests’, *Perspectives on European Politics and Society*, 9 (2), 172–91.

³⁴ UN GA resolution 58/81 of 8 January 2004.

³⁵ UN GA resolution 57/219 of 27 February 2003. All these resolutions contain a human rights clause, and this series is still ongoing.

³⁶ Report of the Secretary-General’s High Level Panel on Threats, challenges and change (2004), “A more secure world: Our shared responsibility”, UN Doc. A/59/565, para. 148.

terrorism, which also takes into account the conditions conducive to the spread of terrorism.³⁷ In May 2006, the UN Secretary-General's report 'Uniting Against Terrorism',³⁸ set forth elements for the Strategy, while noting the indispensability of the rule of law, nationally and internationally, in countering the threat of terrorism and the importance of human rights: 'Effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing ones. Accordingly, the defence of human rights is essential to the fulfillment of all aspects of a counter-terrorism strategy'.

Thus, between 2004 and 2006, the General Assembly, together with the Secretary-General, recalibrated the UN's approach to countering terrorism, away from coercive policies, and back towards the core values of the UN. These efforts culminated in the unanimous adoption, on 8 September 2006, of the UN Global Counter-Terrorism Strategy and Plan of Action (UN GCTS),³⁹ which can be seen as the General Assembly's answer to the Security Council's approach on the issue of countering terrorism. By stating that human rights are 'the fundamental basis of the fight against terrorism' and 'essential to all components of the Strategy', the Strategy places human rights at its centre, as the thread that runs through its entirety.⁴⁰ The Strategy also reaffirms the inextricable links between human rights and security, and places respect for the rule of law and human rights at the core of national and international counter-terrorism efforts. Since its adoption, the Strategy has been reviewed every two years by the General Assembly, and has – thus far – always been reaffirmed by consensus. In order to assist Member States in their implementation of the Strategy, and to provide a single UN interface on this issue, the Secretary-General set up the UN Counter-Terrorism Implementation Task Force (CTITF), an entity which comprises all the relevant UN secretariat branches and agencies that have a role to play in implementing the Strategy.⁴¹ The CTITF has been severely criticized,

³⁷ UN Doc. A/RES/60/1, para. 82.

³⁸ UN Doc. A/60/825.

³⁹ UN GA resolution 60/288 of 20 September 2006.

⁴⁰ Composed of four Pillars, the first is devoted to addressing the conditions conducive to the spread of terrorism, while the fourth deals with measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.

⁴¹ To assist Member States in their implementation of the Strategy, and to provide a single UN interface, the Secretary-General set up the UN Counter-Terrorism Implementation Task Force. See <https://www.un.org/counterterrorism/ctitf/en/about-task-force>, accessed on 14 February 2016.

notably for its failure to give human rights the importance it deserves in light of its prominent role in the Strategy.⁴²

1.4 A More Nuanced Approach

Following the General Assembly's new approach, the Security Council also started taking small steps to reintroduce human rights in what was essentially still a security-based approach to countering terrorism. In addition to the systematic inclusion of a human rights clause in its counter-terrorism resolutions, the Security Council also requested the CTC to adopt a more pro-active policy on human rights.⁴³ The big stride came in the fall of 2010, when in language that seemed directly borrowed from the UN GCTS, the Security Council recognized – for the first time – that ‘terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone’. The Council underlined the need to address the conditions conducive to the spread of terrorism, including the need to promote the rule of law, the protection of human rights and fundamental freedoms, tolerance and inclusiveness to offer a viable alternative to those who could be susceptible to terrorist recruitment and to radicalization leading to violence. Further, the Security Council recognized that development, peace and security, and human rights are interlinked and mutually reinforcing.⁴⁴ This move – away from a pure security and law-enforcement approach to countering terrorism, now considered inadequate – was confirmed through resolution 2178 (2014), which recognized that ‘terrorism will not be defeated by military force, law enforcement measures and intelligence operations alone’, and underlined ‘the need to address the conditions conducive to the spread of terrorism, as outlined in pillar I of the UN Global Counter-Terrorism Strategy (General Assembly resolution 60/288)’.⁴⁵

Unfortunately, the Security Council's post-resolution 1373 interest in human rights has been insufficient to either correct the damage that had been done by the adoption of the first wave of counter-terrorism legislation, or to prevent States from adopting new counter-terrorism

⁴² ‘Special Rapporteur on human rights and counter-terrorism’, UN Doc. A/HRC/34/61.

⁴³ See resolution 1535 (2004) and the CTC's May 2006 policy guidance for CTED in the area of human rights (see <http://www.un.org/en/sc/ctc/rights.html>, accessed 17 October 2017).

⁴⁴ UN Doc. S/PRST/2010/19 and UN Security Council resolution 1963 (2010).

⁴⁵ UN Doc. A/70/371 (n 22), para. 14.

legislation that included similar, as well as new, human rights shortcomings.⁴⁶ The more principled, long-term approach, which focuses on prevention, addressing the conditions conducive to terrorism, human rights and the rule of law, is a promising step in the right direction. Yet at present, the vagueness, broadness and overall lack of clarity of the concepts involved in ‘preventing or countering violent extremism’, a key aspect of the UN’s post-2014 agenda,⁴⁷ renders any thorough analysis of measures that are adopted by States largely impossible. As a recent examination shows, such measures could have a negative impact on IHRL, while still failing to effectively counter terrorism.⁴⁸

2. KEY TRENDS IN NATIONAL RESPONSES

In the immediate aftermath of the September 2001 terrorist attacks in the US, some governments were quick to argue that – given the renewed threat and new nature of terrorism – there was a need for stronger measures that could not be accommodated by the existing international framework. This scenario has unfortunately repeated itself, as exemplified by the reaction of the French government following the attacks in Paris in 2015. It appears that new terrorist attacks lead governments to adopt strong(er) measures against existing, and potential, terrorists, which vary in time and space – adapting and reacting to public revelations and change in public opinion, as well as to calls for accountability for human rights violations. For example, enhanced interrogation, secret detention and extraordinary rendition have given way to bulk surveillance and increased use of armed drones; and the moment at which governments start criminalizing preparatory acts of terrorism has moved forward in time, with recent measures that target ‘extremism’ in the absence of any link to violence.

In the wide array of measures that have been adopted to counter and prevent terrorist acts, some general, recurring trends and approaches can be found. This section will focus on the examination of a few, yet it is important to note that these are in no way exhaustive, nor do the examples reflect the number of States that are concerned by them. They

⁴⁶ See ‘Report of the UN High Commissioner for Human Rights’, UN Doc. A/HRC/28/28, paras. 21–30.

⁴⁷ ‘Secretary General’s plan of action to prevent violent extremism’, UN Doc. A/70/674.

⁴⁸ ‘Report of the Special Rapporteur on human rights while countering terrorism’, UN Doc. A/HRC/31/65.

include: the use of the war paradigm in the context of countering terrorism (section 2.1); the externalization of counter-terrorism measures to limit the applicability of IHRL (section 2.2); attempts at circumventing the absolute nature of the prohibition of torture and refoulement (section 2.3); (ab)use of national security and reliance on intelligence information (section 2.4); and the instrumentalization of various branches of national and international law to counter terrorism (section 2.5).

2.1. The Use of the War Paradigm in the Context of Countering Terrorism

2.1.1 The US ‘war against terror’

On 14 September 2001, the US Senate passed the Authorization for the Use of Military Force, which gave the President broad authority to use ‘all necessary and appropriate force against those nations, organizations and persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent future acts of international terrorism against the United States by such nations, organizations or persons’.⁴⁹ One day later, US President Bush declared: ‘Everyone who wears the uniform should get ready. We’re at war. There’s been a war declared.’⁵⁰ A few days later, President Bush clarified that ‘[o]n September the 11th, enemies of freedom committed an act of war against our country. (...) Our war on terror begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.’⁵¹

From a legal perspective, the US considered itself ‘engaged in a continuing armed conflict against Al-Qaida, the Taliban and other terrorist organizations supporting them’, with troops on the ground in several places engaged in combat operations’.⁵² The US government originally argued that this conflict was neither an international armed conflict

⁴⁹ Pub. L. 107-40, 115 Stat. 224.

⁵⁰ Ed Vulliamy, Peter Beaumont, Kamal Ahmed and Luke Harding (2001), ‘Get ready for war, Bush tells America’, *The Guardian, Observer Special*, 16 September, <http://www.theguardian.com/world/2001/sep/16/terrorism>, september11, accessed 4 March 2016.

⁵¹ Address to a Joint Session of Congress and the American People, 20 September 2001, <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>, accessed 17 February 2016.

⁵² ‘Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay’,

governed by the Geneva Conventions, because Al-Qaeda was not a State party to the conventions, nor a non-international armed conflict (NIAC), because it exceeded the territory of one State.⁵³ The effect of such a statement was to exclude the armed conflict against 'Al-Qaida, the Taliban and other terrorist organizations supporting them' entirely from the protection of international humanitarian law (IHL).⁵⁴ Combined with arguments that IHRL obligations do not extend to extraterritorial actions,⁵⁵ this was an attempt to remove government measures against 'Al-Qaida, the Taliban and other terrorist organizations supporting them' in their entirety from the remit of international law. The US Supreme Court did not accept this position. Following its 2004 *Rasul* decision,⁵⁶ in which the Supreme Court affirmed the statutory jurisdiction of US federal courts to determine the legality of the detention of Guantanamo Bay detainees, in its 2006 *Hamdan* case, the Court ruled that the conflict was non-international in nature and governed by common article 3.⁵⁷ While this ruling importantly recalled the applicability of international law, it still had the effect of placing the US' counter-terrorism actions under the framework of IHL. In turn, this limited the applicability of IHRL in areas also governed by IHL, with severe consequences on individual rights.⁵⁸

Cuba, 10 March 2006, <http://www.state.gov/documents/organization/98969.pdf>, accessed 15 February 2016.

⁵³ See White House Memorandum of 7 February 2002 on the 'Humane treatment of Taliban and Al Qaeda detainees', para. 2, http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf, accessed 16 February 2016. The US Supreme Court in *Hamdan* disagreed with this position. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁵⁴ See US government's argumentation in *Hamdan*, accepted by the Court of Appeal but rejected by the Supreme Court, 548 US 557, No. 04-5393, 15 July 2005.

⁵⁵ 'Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay' (n 52).

⁵⁶ *Rasul v. Bush* (03-334) 542 U.S. 466 (2004).

⁵⁷ *Hamdan v. Rumsfeld* (n 53).

⁵⁸ Thus, individuals believed to belong to, or to be associated with terrorist groups were qualified as 'enemy combatants', even when arrested outside areas of armed conflict. See Military Commissions Act of 2006, Public Law 109-366 – 17 October 2006, para. 948a (preceded by the Military Order of 13 November 2001, Section 2).

2.1.2 Other uses of the war paradigm in a counter-terrorism context

The links between terrorism and armed conflict are complex and multifaceted. For example, one of the reasons why there is still no international definition of terrorism is that the UN draft Comprehensive Convention on International Terrorism has been stalled, inter alia, about whether and how acts committed in armed conflict should be excluded from its scope. The international terrorism conventions also are ambivalent about whether they apply in times of armed conflict, with some including exclusionary clauses and others not. Further, in situations of NIACs, States have often referred to their opponents as ‘terrorists’, and the various acts committed by them as ‘acts of terrorism’, partly to discredit their enemies and their actions, while prolonged unresolved conflicts have been unanimously recognized as a condition conducive to terrorism by the UN GCTS. Since September 2001, the perception that terrorism and armed conflict are distinct phenomena is progressively changing. The ‘war on terror’ was aimed at artificially broadening the scope of application of IHL, and in recent years, while the rhetoric has changed and the expression ‘war on terror’ is no longer favoured,⁵⁹ the use of the conflict paradigm in a counter-terrorism context continues. The US still considers itself at war with Al-Qaida, and former-US President Obama sought a new authorization to use force against ISIL from its parliament.⁶⁰ Immediately after the Paris attacks in November 2015, former President Hollande, declared itself at war with ‘Islamist terrorism’,⁶¹ while after the attacks in Brussels in March 2016, the then French Prime Minister confirmed this position,⁶² which remains vague and under theorized.

⁵⁹ See Toby Harnden (2010), ‘Barack Obama declares the “War on Terror” is over’, *The Telegraph*, 27 May: ‘Yet this is not a global war against a tactic – terrorism – or a religion – Islam. (...) We are at war with a specific network, al-Qaeda, and its terrorist affiliates who support efforts to attack the United States, our allies, and partners’. In March 2009, it was already reported that the Obama administration wanted to stop using the expression ‘war on terror’. Al Kamen (2009), ‘The end of the global war on terror’, *Washington Post*, 23 March.

⁶⁰ CNN (2015), ‘Transcript: President Obama’s address to the nation on the San Bernardino terror attack and the war on ISIS’, 7 December.

⁶¹ <http://www.elysee.fr/declarations/article/discours-du-president-de-la-republique-devant-le-parlement-reuni-en-congres-3/>, accessed 10 May 2017.

⁶² See (2016), ‘Attentats de Bruxelles: «Nous sommes en guerre», dit Manuel Valls’, *Le Figaro*, 22 March, <http://www.lefigaro.fr/flash-actu/2016/03/>

Attempts at considering counter-terrorism operations under the framework of the law of armed conflict continue to be numerous and are multifaceted. They include, for example, the extraterritorial use of armed drones to carry out lethal operations against suspected terrorists. In recent years, lethal drone strikes have increased in numbers and expanded geographically. Indefinite detentions such as those in Guantanamo Bay continue. And even though the war paradigm usually covers extraterritorial actions by States, the use of military courts to try civilian suspects of acts of terrorism also aim at lowering the level of protection that the IHRL framework aims to afford all individuals. In the last few years, the deadliest terrorist groups are involved in armed conflict, either with the State or with other non-State armed groups.⁶³ This is the case of conflicts involving ISIL in Iraq and Syria, Boko Haram in Nigeria, the Taliban in Afghanistan, and the Al-Qaida ‘network’, including the Al-Nusra Front, AQAP, AQIM and Al-Shabaab. Their common denominator is that they entertain a certain conflation of legal regimes. Many of the legal questions will be discussed separately in later chapters; This chapter will simply bring some clarification and note a few of the key challenges.

2.1.3 The legal framework

Provided the legality of any action taken to counter terrorism depends on its evaluation within a specific legal framework, the determination of what legal framework is applicable, where and when, is essential. It is clear that in some cases, measures to counter terrorism do take place under the framework of IHL. And, provided that the Security Council itself can designate non-State armed groups as ‘terrorist’, a group can indeed be both. From a national legal perspective, in some States, jurisdiction can extend to acts of terrorism committed extraterritorially even in the context of an armed conflict while, in others, acts committed in the context of an armed conflict by any party to the conflict are excluded from the definition of terrorist acts. Consequently, any action that is taken under the rubric of ‘terrorism’ is not determinative, as the ‘terrorism’ legal framework can operate under the international umbrella of either IHL in conjunction with IHRL, or solely under the umbrella of

22/97001-20160322FILWWW00103-attentats-de-bruxelles-nous-sommes-en-guerre-dit-manuel-valls.php, accessed 10 May 2017.

⁶³ Institute for Economics and Peace (2016), ‘Global terrorism Index 2016’, <http://economicsandpeace.org/wp-content/uploads/2016/11/Global-Terrorism-Index-2016.2.pdf>, accessed 17 October 2017.

IHRL. In this logic, what is determinative is whether the counter-terrorism action is taken under the framework of IHRL, tainted or untainted by IHL.

The International Committee of the Red Cross' (ICRC) position on the use of the expression 'war against terror' is that 'on the basis of an analysis of the available facts, [it] does not share the view that a global war is being waged and it takes a case-by-case approach to the legal qualification of situations of violence that are colloquially referred to as part of the 'war on terror'. Simply put, where violence reaches the threshold of armed conflict, whether international or non-international, IHL is applicable. Where it does not, other bodies of law come into play.'⁶⁴ In the same vein, five UN Special Rapporteurs noted in 2006 that 'the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law'.⁶⁵

It is important to clarify that certain conflicts that were placed under the banner of the 'global war against terror', did clearly qualify as armed conflicts for the purpose of the application of IHL. International armed conflicts included the October 2001 to June 2002 conflict in Afghanistan between the US-led coalition and the Taliban regime, and the 2003 international armed conflict in Iraq, between the US-led coalition and the Iraqi regime led by Saddam Hussein. NIACs included the one that started after the election of the Afghan government in June 2002, which opposed the Afghan government and the international forces against non-state armed groups, including the Taliban and Al-Qaeda, and the one in Iraq that started after the end of the formal occupation and the transfer of powers to the Iraqi government in 2004. More recently, the conflicts in Mali and Syria have been considered as NIACs.

Yet the US 'war against terror' encompassed more than these conflicts which qualified as armed conflicts for the purpose of the application of IHL, insofar as it opposed one country against a range of terrorist groups based in a number of other countries. More fundamentally, placing counter-terrorism operations and measures under a war paradigm raises one of the most contentious questions posed by developments since 9/11, which is whether there can exist a single, global or transnational NIACs between a State and one or several non-State armed groups that operate

⁶⁴ See ICRC (2007), 'International humanitarian law and the challenges of contemporary armed conflicts', *International Review of the Red Cross*, **89** (867), 724–25.

⁶⁵ 'Report of the Five UN CHR Rapporteurs on the situation of detainees at Guantánamo Bay', UN Doc. E/CN.4/2006/120, para. 21.

out of a number of different territories – thus linking the applicability of IHL to the person (and their belonging to a group) rather than to the territory. This possibility was the one that was put forward in the ‘war on terror’, but is also the one used today to carry out lethal drone strikes in States where the threshold for armed conflict is not met (see Chapter 3).

Under IHL, NIACs are conflicts between a State and one or more non-State armed group, or between two or more non-State armed groups. The determination of the existence of a NIAC is made with reference to objective criteria based on facts on the ground, and the criteria to be considered are, first, its intensity and protraction⁶⁶ and, second, the degree of organization of the parties to the conflict.⁶⁷ Traditionally, there exists a presumption of territorial limitation to the existence of NIACs – because the intensity and protracted nature of a conflict is measured by analysing the frequency and severity of armed attacks within a geographically-limited area. Yet it is now increasingly recognized that it is at least theoretically possible to have a transnational, or global, NIAC with non-State armed groups.⁶⁸ However, where individual acts of terrorism take place outside the context of clearly defined armed conflicts, or where lethal drone attacks are carried out outside the context of an existing armed conflict, in practice they do not in themselves trigger the application of the IHL rules applicable to NIACs, because it is not possible to make the twofold demonstration that is required: first, show that intensity and protraction of violence has reached the necessary threshold and, second, show that the terrorist group responsible for the attacks or targeted by a strike is one and the same party to a pre-existing NIAC.⁶⁹ As highlighted by the International Criminal Tribunal for the former Yugoslavia (ICTY), these criteria allow to distinguish armed

⁶⁶ International Criminal Tribunal for Rwanda, *Prosecutor v. Musema*, case No. ICTR-96-13-A, judgment of 27 January 2000, para. 248 and *Prosecutor v. Duško Tadić* (Trial Judgment) IT-94-1-T (7 May 1997), para. 562.

⁶⁷ International Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić*, decision on the defence motion for interlocutory appeal on jurisdiction, case No. ICTY-94-1 (2 October 1995), para. 70.

⁶⁸ See the written evidence from Christof Heyns, Dapo Akande, Lawrence Hill-Cawthorne and Thompson Chengeta to the UK Joint Committee on Human Rights for the UK Parliamentary Inquiry into UK Policy on the Use of Drones for Targeted Killings (DRO0024), December 2015, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-uk-governments-policy-on-the-use-of-drones-for-targeted-killing/written/25641.html>, accessed 17 February 2016.

⁶⁹ See Jelena Pejic (2011), ‘The protective scope of Common Article 3: More than meets the eye’, *International Review of the Red Cross*, **93** (881),

conflict from, inter alia, ‘terrorist activity, which are not subject to international humanitarian law’.⁷⁰

Importantly, it has also been argued that accepting the existence of NIACs in these circumstances would also allow the whole world to be a potential battlefield, with the very severe consequences that this can have on all parties to the conflict. Indeed, not only does IHL allow for more flexibility regarding the use of force than the rules applicable outside an armed conflict, IHL is also based on the premise that certain acts of violence against military objectives are not prohibited, and provides for the possibility of proportionate civilian casualties, unlike other international legal frameworks. This should be borne in mind by those claiming the applicability of IHL on a global scale, as it could potentially put their armed forces at greater risk wherever they are located in the world, as well as allow the targeting of individuals in areas otherwise free of hostilities.⁷¹

It is also essential to bear in mind that in a situation of armed conflict, it is now well settled that IHRL continues to apply, and both IHRL and IHL frameworks act in a complementary and mutually reinforcing way.⁷²

195–97. See also ‘Special Rapporteur on human rights while countering terrorism’, UN Doc. A/68/398, paras. 63–65. See also ICRC, ‘much of the ongoing violence taking place in other parts of the world that is usually described as “terrorist” is perpetrated by loosely organized groups (networks), or individuals that, at best, share a common ideology. On the basis of currently available factual evidence it is doubtful whether these groups and networks can be characterised as party to any type of armed conflict, including “transnational”’. ICRC (2001), ‘International humanitarian law and terrorism: questions and answers’, 1 January, <https://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm>, accessed 11 May 2017.

⁷⁰ ICTY, Opinion and judgment of 7 May 1997, *Prosecutor v. Dusko Tadic*, No. IT-94-1-T, para. 562.

⁷¹ See International Commission of Jurists (2009), ‘Assessing damage, urging action: Report of the eminent jurist panel on terrorism, counter-terrorism and human rights’, <http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/icj/icj-2009-ejp-report.pdf>, accessed 11 May 2017, p. 55, arguing that this is based on the IHL bedrock principle of equality of the parties. See also ‘Special Rapporteur on human rights while countering terrorism’, UN Doc. A/68/398, para. 63; Pejic (n 69), at 196; and ICRC (n 64), at 724.

⁷² See International Court of Justice (1996), ‘Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion’, I.C.J. Reports 1996, paras. 24 and 25; International Court of Justice (2004), ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion’, I.C.J. Reports 2004, para. 106. See also Human Rights Committee (2004), ‘General Comment No. 31’: ‘the Covenant applies also in situations of armed conflict to which the

In addition, as IHRL applies at all times, inherently belongs to all individuals and is key to individual dignity, there is increasing recognition for the pragmatic position that not only State parties to a NIAC, but also non-State armed groups that control territories on which populations live, have human rights obligations.⁷³ As IHL is neither sufficient nor made to regulate many aspects of the relationship between the ruling authority and individuals within their power, this is a requirement for holding non-State armed groups accountable for the way in which they treat the populations under their control. From the perspective of the rights-holder, it does not matter whether their rights are guaranteed by the *de jure* government, or a non-State armed group, as long as they are able to live with the dignity to which they are entitled.⁷⁴

Critically, the applicable framework is not the result of a choice by a State. As already noted, IHRL is applicable at all times, even in armed

rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive'. UN Doc. CCPR/C/21/Rev.1/Add.13, para. 11.

⁷³ OHCHR (2011), 'Human rights in armed conflict', http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf, accessed 17 October 2017, pp. 24 and 25; 'Special Rapporteur on human rights while countering terrorism', UN Doc. A/HRC/29/51, paras. 30 and 31. Note that a number of non-State armed groups have already been considered as holders of human rights obligations, including the Taliban: UNAMA/OHCHR (2013), 'Protection of civilians in armed conflict', February, p. 13; LTTE: 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka', 31 March 2011, para. 188, non-State armed groups in Libya: 'Report of the CoI on LAJ', UN Doc. A/HRC/17/44, 1 June 2011, para. 72. Note also that Article 11 of the Constitution of Abkhazia states that the 'Republic of Abkhazia shall recognize and guarantee the rights and freedoms proclaimed in the Universal Declaration of Human Rights, the International covenants of economic, social, cultural, civil and political rights and other universally recognized international legal instruments'. Already in the early 1990s, during the discussions in relation to the situation in Bosnia and Herzegovina, a member of the UN Human Rights Committee noted that 'thus [the Bosnian Serb authorities] might be asked to explain how they complied with the [ICCPR], not as a successor State, but as an authority in control of a territory'. See Decision on State Succession to the Obligations of the Former Yugoslavia under the International Covenant on Civil and Political Rights (separate opinion Mullerson), Human Rights Committee, in European Human Rights Reports 15 (1993), pp. 233–36.

⁷⁴ 'Special Rapporteur on human rights while countering terrorism', UN Doc. A/HRC/29/51, paras. 30 and 31.

conflict,⁷⁵ where it complements IHL. IHL applies only when there is a situation of armed conflict, whose existence is determined primarily on the basis of the situation on the ground, according to set criteria such as the intensity and protraction of the conflict and degree of organization of the parties. That the State decides to respond with military means to a terrorist threat, a group designated as terrorist, or one of its members, does not imply that IHL will apply, nor does it displace the applicability of IHRL. Similarly, that a State decides to deny the applicability of IHL to an armed conflict on the basis that non-State armed groups are designated as a terrorist organization, or that war crimes do not apply in NIACs where a person is a member of an organized armed group, does not mean that this is legally correct.⁷⁶

Thus, plainly, attempts at lowering the protection that individuals deserve by artificially applying a war paradigm to measures to counter terrorism does not stand up to legal scrutiny. IHRL applies at all times, and IHL applies when and where there is an armed conflict; that is when the conditions for its existence and threshold are met. Absent an armed conflict, the main legal international framework that regulates the use of force is IHRL. Terrorism needs to be treated as a crime under domestic laws, and should be fought within a law-enforcement paradigm, on a national or international scale. This is the position that was adopted by many countries, which reacted against applying the ‘war paradigm’, even

⁷⁵ See ‘Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion’ (n 72); ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion’ (n 72).

⁷⁶ See e.g. the adoption in Australia of a new text whose aim is to clarify that certain war crimes do not apply in NIACs where a person is a member of an organized armed group. Criminal Code Amendment (War Crimes) Bill 2016, adopted by both Houses of Parliament on 1 December 2016. Without defining who is a member of an organized armed group, or making a clear distinction between those directly or indirectly supporting organized armed groups, the text may lead to exclude from liability those responsible for the commission of war crimes against individuals who accompany or indirectly support such groups. This distinction is particularly important, and must take into careful consideration the particular role and substantial contributions of the person concerned to the activities of the group, particularly as in conflicts involving groups also qualified as terrorist there is a trend towards excluding such groups from the normal operation of the international humanitarian rights law framework. One aspect of this trend is to attempt to include all persons supporting the armed group – even indirectly – as targetable, even though many individuals who join terrorist groups also involved in armed conflicts will never hold any combat function.

after terrorist attacks had taken place on their soil, treating such acts, instead, as criminal acts.⁷⁷

2.1.4 Use of military courts to try civilians

The ‘war paradigm’ has also led some States to bring home the militarization of the fight against terrorism, best illustrated by the use of military courts to try individuals accused of acts of terrorism. In the post-2001 context, the US has used Military Commissions to try persons suspected of acts of terrorism as ‘enemy combatants’, notwithstanding the circumstances of their arrest, in particular whether they were or not taking an active part in hostilities.⁷⁸ In turn, this was retroactively used as a justification by some States to continue their use of military or State courts to try civilians accused of acts of terrorism.⁷⁹

While the International Covenant on Civil and Political Rights (ICCPR) does not prohibit the trial of civilians in military or special courts, the UN Human Rights Committee stated that ‘military courts should not have the faculty to try cases which do not refer to offences committed by members of the armed forces in the course of their duties’.⁸⁰ UN Special Procedures mandate holders have also repeatedly made the more specific point that ‘using military or emergency courts to

⁷⁷ See, for example, the statement of the former UK Director of Public Prosecutions: ‘... London is not a battlefield. Those innocents who were murdered on July 7, 2005 were not victims of war [...]. We need to be very clear about this. On the streets of London, there is no such thing as a “war on terror”, just as there can be no such thing as a “war on drugs”. [...] The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement’. International Commission of Jurists (n 71), at 51. See also International Commission of Jurists (n 71), at 54: ‘The post September 11 terrorist bombings in London, Madrid and Bali were not treated as acts of war, but as criminal acts, and the authorities applied law enforcement, not military, means to address them’. In Norway, Anders Behring Breivik – who killed 77 people – was convicted of terrorism and premeditated murder by the Oslo District Court, and given the maximum sentence of 21 years’ imprisonment in August 2012.

⁷⁸ The Special Rapporteur on human rights while countering terrorism has examined this question in depth, see UN Doc. A/HRC/6/17/Add.3.

⁷⁹ See International Commission of Jurists (n 71), at 137. On the use of military courts in Egypt until 2009, see ‘Special Rapporteur on human rights while countering terrorism’, UN Doc. A/HRC/13/37/Add.2.

⁸⁰ See UN Doc. CCPR/C/79/Add. 23, para. 9; see also Human Rights Committee (2007), ‘General Comment No. 32’, UN Doc. CCPR/C/GC/32, para. 22.

try civilians in the name of national security, a state of emergency or counter-terrorism is a regrettably common practice that runs counter to all international and regional standards and established case law'.⁸¹ This potentially raises issues under the right to a fair trial, and particular concerns have been raised regarding the independence and impartiality of the judges; the possibility of full review – in law and fact – of the conviction and sentence; the broad discretion of the executive over these courts; the lower fair trial guarantees that often characterize such courts (prolonged periods of pre-charge and pre-trial detention with inadequate access to counsel, intrusion into the attorney-client confidentiality and strict limitations on the right to appeal and bail); and the lower procedural and evidential standards in these courts that often encourage systematic resort to extra-legal practices such as torture to extract confessions of alleged terrorist suspects. Thus, the use of military tribunals should be limited to trials of military personnel for acts committed in the course of military actions, and the trying of any civilians by military should take place only in limited exceptional situations where resort to such trials is necessary and justified by objective and serious reasons such as military occupation of foreign territory where regular civilian courts are unable to undertake the trials.⁸² As noted by the Eminent Jurist Panel, there does not seem to be any convincing reason why military courts would be better equipped than civilian courts to deal with terrorism cases. Rather, the evidence suggests that military courts are used to bypass normal standards applicable in ordinary civilian courts, and to benefit from simplified rules that facilitate the conviction of accused persons.⁸³

2.1.5 An emerging international 'terrorism' paradigm?

It is often the case that in NIACs, State parties refer to their opponents as 'terrorists', and the various acts committed by them as 'acts of terrorism'. Yet, the determination that a group is 'terrorist' is irrelevant for the purpose of the application of IHL, or for the evaluation of the lawfulness of the violence.⁸⁴ Such a qualification is often done for political reasons, in an effort to discredit the enemy and their actions. In the post 9/11

⁸¹ See 'Special Rapporteur on the independence of judges and lawyers', UN Doc. A/68/285, para. 46.

⁸² 'Special Rapporteur on human rights while countering terrorism', UN Doc. A/63/223, paras. 24–28.

⁸³ International Commission of Jurists (n 71), at 139.

⁸⁴ See Helen Duffy (2015), *The War on Terror and the Framework of International Law*, 2nd edn (Cambridge: Cambridge University Press), p. 346.

context, it has proven particularly effective, given that the priority of the fight against terrorism meant that in so doing, governments largely shielded their own actions against international criticism. It has been alleged that in the post-2001 context, internal armed conflicts have been redefined as ‘wars against terrorism’ in numerous countries, including, for example, China,⁸⁵ Colombia,⁸⁶ Thailand,⁸⁷ Macedonia and Russia, with Human Rights Watch noting that ‘after September 11, governments from Skopje to Moscow scrambled to cast their own often brutal internal conflicts as part of the new international antiterrorist cause. With too few exceptions, this opportunism went unchecked.’⁸⁸

Yet, in an interesting development, the Security Council is also entertaining a confusion between non-State armed groups parties to NIACs and ‘terrorist groups’ that commit acts of terrorism. This is particularly visible in the case of ISIL, regarding which the Security Council uses, on the one hand, language borrowed from the criminal law framework, and on the other hand, from the international humanitarian and human rights law framework,⁸⁹ the ‘apex’ of which is the use of the

See also Sandra Kraehenmann (2014), ‘Foreign fighters under international law’, Geneva Academy Briefing No. 7, October, p. 23.

⁸⁵ ‘For China, the question was how a war on terrorism could be used to intensify a campaign against splittists in Xinjiang’. HRW (2002), ‘Human Rights Watch World Report 2002’, <https://www.hrw.org/legacy/wr2k2/asia4.html>, accessed 17 October 2017. See also Fu Hualing (2012), ‘Responses to terrorism in China’, where it is analysed that ‘China responded to 9/11 actively and has used the event to highlight and magnify the terrorist threat in Xinjiang’, in Victor V. Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy*, 2nd edn (Cambridge: Cambridge University Press), p. 347.

⁸⁶ See International Commission of Jurists (n 71), at 65; see also Neil Hicks (n 27), ‘The impact of counter terror on the promotion and protection of human rights: A global perspective’, paper prepared for ‘Human Rights in an Age of Terrorism’ a conference at the University of Connecticut, 9–11 September, p. 3, which cites the former President of Colombia as saying in 2003 that Colombia’s struggle against guerrilla forces is ‘working to the same ends’ as the US-led global war on terrorism.

⁸⁷ See Hicks (n 27), *ibid*.

⁸⁸ See HRW (n 85). Other examples, such as the Philippines and Nepal, may be given.

⁸⁹ See e.g. UN Security Council resolution 2170 (2014) and Security Council Presidential Statement on the situation in Syria, UN Doc. S/PRST/2013/15.

expression ‘foreign terrorist fighter’.⁹⁰ Similarly to States’ tactics, this aims at discrediting ISIL’s actions, as well as applying the international terrorism sanctions framework to it.⁹¹

It is critical to ensure that the distinction between the IHL framework, and the ‘terrorism’ criminal law framework is maintained, as it can have very serious practical consequences, most notably for assessing the lawfulness of the use of force by a non-State armed group involved in an armed conflict.⁹² Indeed, in situations short of armed conflict, where IHRL is the main applicable international framework, violence committed by non-State actors against either the State or other non-State actors that is qualified as ‘terrorist’ by domestic law will always be unlawful and criminal.

Most acts which are considered as terrorist outside the context of an armed conflict are also prohibited under IHL, such as attacks against civilians or civilian objects, or acts qualified by IHL itself as ‘terrorist’.⁹³ Therefore, in situations of armed conflict, there is no legal significance in describing deliberate acts of violence against civilians or civilian objects as ‘terrorist’ because such acts would already be prohibited, and may even constitute war crimes.⁹⁴ However, in NIACs, acts of violence targeting military objectives, whether committed by a State’s armed forces or by a non-State armed group party to a NIAC are not prohibited as a matter of IHL. Therefore, some acts which would be considered as terrorist if they were committed outside the context of an armed conflict may be considered as lawful. Should the targeting of legitimate military targets be considered as terrorist – in war as in peace – this would remove the whole *raison d’être* of IHL. Indeed, the distinction between civilian and military targets is at the core of IHL. Qualifying legitimate acts as terrorist would make them prohibited, and in turn would render IHL redundant.

⁹⁰ See ‘Special Rapporteur on human rights while countering terrorism’, UN Doc. A/HRC/34/61.

⁹¹ See ‘Special Rapporteur on human rights while countering terrorism’, UN Doc. A/HRC/29/51, paras. 35–45.

⁹² For a full review of this question, see Kraehenmann (n 84), particularly p. 61 *et seq.*

⁹³ Indeed, IHL also contains specific prohibitions that are qualified as acts of terrorism under IHL. For a full review, see Kraehenmann (n 84), at 24–31.

⁹⁴ ICRC (2011), ‘International humanitarian law and the challenges of contemporary armed conflicts’, <https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>, accessed 18 October 2017, p. 50.

An important concern is that in the context of a NIAC, government authorities retain the power to prosecute and punish individuals that violate domestic law, including for acts of terrorism. This ‘unfavourable’ treatment is often presented as one of the reasons non-State armed groups are reluctant to abide by the rules of IHL, as they lack the incentive to do so. Consequently, adding the qualification of ‘terrorist’ to all acts committed in armed conflict, including to those that are not prohibited, reduces even more the chances that non-State armed groups party to a NIAC will comply with the rules of IHL.⁹⁵ It may also have serious consequences for those, particularly civil society, wishing to engage with them on humanitarian or human rights grounds, as it could be qualified as ‘supporting’ individuals or entities involved in acts of terrorism, and may also be criminalized under various national laws.⁹⁶ It is thus important to preserve the distinction between the IHL/IHRL and the criminal (or law enforcement) framework, as a conflation of these regimes would disserve IHL and, ultimately, the protection of civilians, which is one of IHL’s main objectives.

These are not merely theoretical issues. The rhetoric in the Security Council regarding the armed conflict in Syria, particularly the situation in Aleppo where it was alleged that the indiscriminate air strikes carried out by government forces and their allies are war crimes and crimes against humanity,⁹⁷ is a cause of great concern. Both Syria’s and Russia’s representatives to the UN justified the attacks against the city as necessary in the fight against terrorism. In particular, the Russian representative stated that the humanitarian situation in Syria could not be discussed separately from the challenge of combating terrorism, and that easing civilians’ suffering would not happen by ceasing counter-terrorism. The representative of Syria decried ‘lightheaded’ political practices that sent a message to terrorists and encouraged their acts.⁹⁸ Earlier, the President of the Russian Federation had said that ‘Russia

⁹⁵ Id., at 49.

⁹⁶ See ‘Special Rapporteur on human rights while countering terrorism’ (n 22), UN Doc. A/70/371, paras. 31–44; and ICRC (n 64), 2011, p. 50.

⁹⁷ OHCHR (2016), ‘Zeid tells Council siege and bombardment of Aleppo “constitute crimes of historic proportions”’, 21 October, <http://www.ohchr.org/EN/NewsEvents/Pages/HRCTacklesAleppoCrisis.aspx>, accessed 18 October 2017; HRW (2016), ‘Russia/Syria: War crimes in month of bombing of Aleppo’, 1 December, <https://www.hrw.org/news/2016/12/01/russia/syria-war-crimes-month-bombing-aleppo>, accessed 18 October 2017.

⁹⁸ See <https://www.un.org/press/en/2016/sc12605.doc.htm>, accessed 10 May 2017.

would pursue “terrorists” even if they hid among civilians’, because ‘terrorists’ can’t be allowed to ‘use people as human shields and blackmail the entire world’, before adding that ‘civilian deaths were the ‘sad reality of war’.⁹⁹ On 5 December 2016, the Syrian representative described a vetoed draft resolution on a humanitarian ceasefire as one that ‘would protect terrorism in Syria’.¹⁰⁰ That war crimes, or crimes against humanity, are committed in the name of countering terrorism is an extremely worrying development and a sharp reminder that for some States the fight against terrorism is a trump card that casts international law aside. It is important to note that IHRL and IHL exist primarily to protect individuals, and that neither are impediments to countering terrorism. That force is used against a group that has been determined to be ‘terrorist’, even by the UN, does not impact on the applicability of principles of IHL, which primarily aim to protect the civilian population living under its aegis.

2.2 The Externalization of Measures to Limit the Applicability of International Human Rights Law

In the post 9/11 context, some States externalized, or internationalized, some of their counter-terrorism measures, while at the same time positing that human rights obligations are territorial in scope. Through this construction, they attempted to circumvent both their human rights obligations and any accountability for human rights violations caused by their counter-terrorism measures. This position is meant to generally endorse the idea that a State is able to do abroad what it cannot do at home.

Examples abound. This was the construction put forward by the US when placing persons detained in the context of its war on terror in locations outside US territory, such as Guantanamo Bay,¹⁰¹ to prevent the

⁹⁹ BBC News (2016), ‘Syria conflict: Russian war crimes claim “rhetoric” says Putin’, 13 October, <http://www.bbc.co.uk/news/world-middle-east-37633256>, accessed 18 October 2017.

¹⁰⁰ See <http://www.un.org/press/en/2016/sc12609.doc.htm>, accessed 10 May 2017.

¹⁰¹ ‘Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba’ (n 52). By simultaneously arguing (until the *Hamdan* overruling in 2006) that IHL did not apply either, the US administration sought to create a ‘legal black hole’, to which no international or national law applied (see *Rasul v. Bush* (n 56) and *Boumediene v. Bush*, 553 U.S. 723 (2008)).

application of cruel, inhuman and degrading treatment provisions¹⁰² or access to judicial review of their detention,¹⁰³ and the position of some States regarding occupied territories.¹⁰⁴ It was also the argument put forward by States to limit the accountability of troops using lethal force in foreign countries.¹⁰⁵ Following a short reminder of the international legal framework regarding extraterritorial obligations, two examples will be examined: detention and non-refoulement obligations when operating abroad.

2.2.1 Legal framework

Article 2(1) of the ICCPR provides that '[e]ach State party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.¹⁰⁶ This is generally interpreted as meaning that wherever a State exercises jurisdiction, or powers that affect the rights protected by the Covenant, it must comply with the Covenant.¹⁰⁷ The Human Rights Committee has noted, in particular that:

¹⁰² This 'loophole' was closed by the US Detainee Treatment Act adopted in 2005, 42 U.S.C. § 2000dd: US Code – Section 2000DD: Prohibition on cruel, inhuman, or degrading treatment or punishment of persons under custody or control of the US government. See also David Luban (2014), 'Just looking for loopholes', Just Security, 19 October, <https://www.justsecurity.org/16540/just-loopholes/>, accessed 30 March 2016.

¹⁰³ Access to habeas corpus was granted through two US Supreme Court rulings: *Rasul v. Bush* (n 56) and *Boumediene v. Bush* (n 101).

¹⁰⁴ See UN Doc. CCPR/C/ISR/CO/3.

¹⁰⁵ See the UK government's position in the European Court of Human Rights in the Grand Chamber case of *Al-Skeini and others v. UK*, App. no. 55721/07 (ECtHR 7 July 2011), paras. 109–119. See also House of Lords judgment, *Al-Skeini v. Secretary of State* [2007] UKHL 26.

¹⁰⁶ For an overview, see Marko Milanovic (2011), *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford: Oxford University Press).

¹⁰⁷ 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion' (n 72), at p. 136, para. 10; UN Committee against Torture (2004), 'Conclusions and recommendations: United Kingdom of Great Britain and Northern Ireland', UN Doc. CAT/C/CR/33/3, 10 December, para. 4(b); UN Committee against Torture (2006), 'Consideration of Reports Submitted by States Parties under Article 19 of the Convention, United States of America', UN Doc. CAT/C/ USA/CO/2, 25 July, para. 14.

States Parties are required ... to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.¹⁰⁸

This must be done without any discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Committee against Torture (CAT Committee) stated on several occasions that the Convention against Torture (CAT) applies in any territory under a State party's jurisdiction which is to be understood to include 'all areas under the effective de facto control' of the State party, and 'all persons under the effective control of its authorities, of whichever type, wherever located in the world.'¹⁰⁹ This is also the position of regional human rights bodies.¹¹⁰ The notions of 'power' and 'effective control' are indicators of whether a State is exercising 'jurisdiction' or governmental powers, the abuse of which human rights protections are intended to constrain.¹¹¹

¹⁰⁸ Human Rights Committee, 'General Comment No. 31' (n 72), UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10. See also UN Docs. CCPR/CO/78/ISR, para. 11; CCPR/CO/72/NET, para. 8; CCPR/CO/81/BEL, para. 6; UN Human Rights Committee (1981), 'Views of 29 July 1981, *López Burgos v. Uruguay*', Communication No. 52/1979. See also Manfred Nowak (2005), *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd rev. edn (Kehl: N.P. Engel), pp. 43–5.

¹⁰⁹ UN Doc. CAT/C/CR/33/3, para. 4 (b); UN Doc. CAT/C/USA/CO/2, para. 20.

¹¹⁰ Inter-American Commission on Human Rights (IACHR) (2002), 'Request for precautionary measures in favour of detainees being held by the United States at Guantánamo Bay' (12 March), *I.L.M.*, 41, 532–35. See also IACHR (2002), 'Report on terrorism and human rights', OAS Doc. OEA/Ser.L/V/ II.116, Doc. 5 rev. 1 corr., 22 October. See also for the European Court of Human Rights which covers overall control over a territory and over an individual: *Loizidou v. Turkey*, App. no. 15318/89 (ECtHR 28 November 1996); *Issa v. Turkey*, App. no. 31821/96 (ECtHR, 16 November 2004); *Bankovic and Others v. Belgium and 16 Other Contracting States*, App. no. 52207/99 (ECtHR, 12 December 2001); *Al-Skeini and Others v. UK*, App. no. 55721/07 (ECtHR, 7 July 2011); *Hirsi Jamaa et al. v. Italy*, App. no. 27765/09 (ECtHR, 23 February 2012).

¹¹¹ See UN High Commissioner for Human Rights (2014), 'The right to privacy in the digital age', UN Doc. A/27/37, para. 33.

2.2.2 Detentions abroad and non-refoulement obligations

The US argued that human rights law did not apply to persons detained in the context of its war on terror in locations outside US territory,¹¹² such as Guantanamo Bay.¹¹³ However, according to a correct application of the principles spelt out above, instead of being placed out of reach of international law, IHRL – operating alone or together with the relevant IHL in the case of detainees captured during an armed conflict – apply to all those detainees that were, or still are, detained.¹¹⁴ All those detained must have access to a judicial authority, to review the legality of their detention,¹¹⁵ and those that weren't captured in the course of an armed conflict can only be considered to be arbitrarily detained under IHRL.¹¹⁶ Continued, indefinite detention is arbitrary, and the right of access to courts – with all fair trial guarantees provided by article 14 of the ICCPR – must be provided.

Further, some States that maintained detention facilities outside their territories, such as the UK and the US, in Iraq or Afghanistan, have claimed that the non-refoulement principle was not applicable to the detainees held there, as it is restricted to their own territories. Thus, they transferred detainees to the domestic authorities of Iraq or Afghanistan without assessing any risk of torture.¹¹⁷ The prohibition of refoulement is

¹¹² 'Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba' (n 52). By simultaneously arguing (*Hamdan* in 2006) that IHL did not apply either, the US administration sought to create a 'legal black hole', to which no international or national law applied.

¹¹³ Thousands of persons have reportedly been detained by the US as 'enemy combatants', including 779 held at Guantánamo since the prison opened on 11 January 2002. Of those, as at January 2016, 678 have been released or transferred, one was transferred to the US to be tried, and nine have died. Ninety-one men are still held, and 34 of these men have been recommended for release by high-level governmental review processes. See: <http://www.closeguantanamo.org/Prisoners#sthash.P4icsZpe.dpuf>, accessed on 22 February 2016.

¹¹⁴ See 'Special Rapporteur on human rights while countering terrorism: Mission to the United States of America', UN Doc. A/HRC/6/17/Add.3, 22 November 2007.

¹¹⁵ See Article 9(4) ICCPR, and ICRC, 'Customary IHL, Rule 99, Deprivation of Liberty', https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule99, accessed 18 October 2017.

¹¹⁶ See 'Report by five Special Rapporteurs on the situation of detainees at Guantanamo Bay', UN Doc. E/CN.4/2006/120, paras. 25 and 26. See also Human Rights Committee (2014), 'General Comment No. 35', UN Doc. CCPR/C/GC/35, paras. 15, 24, 32, 36 and 37.

¹¹⁷ 'Special Rapporteur on torture', UN Doc. A/HRC/13/39/Add.5, para. 241.

also applicable to transfers of detainees in custody beyond the State territories. Otherwise this would give States the possibility to circumvent their obligations by transferring a person to one of their own detention facilities abroad, prior to transferring them to national authorities.¹¹⁸

2.2.3 Extraordinary renditions and proxy detention

Since 2005, the details of a related, even more disturbing, practice¹¹⁹ started to emerge, in which the US – in addition to secretly capturing, transferring and detaining people itself, was also transferring people (so-called ‘extraordinary renditions’) to other States with poor human rights records and ‘harsher’ interrogations methods than those applied in the US detention facilities at Guantanamo Bay, Abu Ghraib, Bagram Air Base and similar detention centres abroad, for the purpose of interrogation or detention without charge. Further, terrorist suspects were kidnapped in third States and brought to countries where they were exposed to interrogations involving torture and ill-treatment.¹²⁰ This practice, known as ‘proxy detention’ involves the responsibility of both the State that is detaining the victim and the State on whose behalf or at whose behest the detention takes place. The Central Intelligence Agency (CIA) appears to have been generally involved in the capture and transfer of prisoners, as well as in providing questions for those held in foreign prisons.¹²¹ In some cases, persons have been rendered to other countries precisely to circumvent the absolute prohibition of torture in international

¹¹⁸ See ‘Special Rapporteur on torture: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention’, UN Doc. A/HRC/13/39/Add.5, para. 241.

¹¹⁹ See ‘Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Working Group on Arbitrary Detention represented by its vice-chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its chair, Jeremy Sarkin’, UN Doc. A/HRC/13/42, para. 36.

¹²⁰ See ‘Special Rapporteur on torture’, UN Doc. A/HRC/13/39/Add.5, para. 244.

¹²¹ See ‘Joint study on secret detention’ (n 119), paras. 36 and 141. These foreign prisons were allegedly in Jordan, Egypt, Morocco, the Syrian Arab Republic, Pakistan, Ethiopia and Djibouti and likely in Uzbekistan. See ‘Joint study on secret detention’ (n 119), para. 143.

law¹²² ('outsourcing of torture'). A very large number of States have been found complicit in these practices.¹²³

The UN Special Procedures mandate holders that examined the practice of secret detention determined that the removal of a person to a State for the purpose of holding that person in secret detention, or the exclusion of the possibility of review by domestic courts of the sending State, can never be considered compatible with the obligation laid down in article 2(2) of the ICCPR.¹²⁴ Extraordinary rendition for the purpose of torturing individuals is to be condemned as a clear violation of international law and the non-refoulement principle in particular.¹²⁵ In addition, the CAT and other cruel, inhuman or degrading treatment or punishment not only expressly bans torture, but article 4(1) also implicitly prohibits complicity in acts of torture, as it requires each State party to ensure that all acts of torture, including those acts by any person that constitute complicity or participation in torture, are criminal offences under its criminal law. In particular, the CAT Committee has considered complicity to include acts that amount to instigation, incitement, superior order and instruction, consent, acquiescence and concealment.¹²⁶ A State is therefore responsible when it was aware of the risk of torture and ill-treatment, or ought to have been aware of the risk, inherently associated with the establishment or operation of such a facility or a given transfer to the facility, and did not take reasonable steps to prevent it.¹²⁷ Such practices can amount to a violation of the State's obligation under customary international law of non-refoulement.¹²⁸

The European Court of Human Rights (ECtHR) has taken the international judicial lead in addressing the impunity that continues to surround these practices, with some assistance – mainly at regional level¹²⁹ – to address the question of State responsibility, as well as ensure

¹²² See 'Joint study on secret detention' (n 119), para. 287.

¹²³ Including the UK, Germany, Canada and Australia. See 'Joint study on secret detention' (n 119), para. 159.

¹²⁴ See 'Joint study on secret detention' (n 119), para. 38.

¹²⁵ See 'Special Rapporteur on torture', UN Doc. A/HRC/13/39/Add.5, para. 245.

¹²⁶ See 'Joint study on secret detention' (n 119), para. 39.

¹²⁷ See 'Joint study on secret detention' (n 119), para. 40.

¹²⁸ See 'Joint study on secret detention' (n 119), para. 43.

¹²⁹ See 'Alleged secret detentions in Council of Europe member States' ('Marty Report'), AS/Jur (2006) 03 rev, and the follow-up report 'Secret detentions and illegal transfers of detainees involving Council of Europe member States: second report', Doc. 11302 rev.; 'Secretary General's report under article 52 of the European Convention on Human Rights on the question of secret

State accountability for participation in extraordinary rendition. Four cases have addressed the role and responsibility of Council of Europe (CoE) Member States in international, cross-border illegal counter-terrorism operations that are clear, blatant violations of human rights. Thus far, the Court has found three CoE member States – namely Macedonia,¹³⁰ Poland¹³¹ and Italy¹³² – responsible for their participation in recent past abuses in the context of the ‘war on terror’, including for

detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies’ (SG/Inf (2006) 5, 28 February 2006) and his supplementary report on the subject (SG/Inf (2006) 13, 14 June 2006); European Commission for Democracy through Law (Venice Commission) (2006), ‘Opinion on the international legal obligations of Council of Europe members States in respect of secret detention facilities and inter-State transport of prisoners’, 17–18 March, Opinion No. 363/2005, CDL-AD(2006)009; Council of Europe (COE) (2007), ‘Secret detentions and unlawful inter-state transfers of detainees involving Council of Europe Member States: Second report’, Doc. 11302 rev., 11 June, Rapporteur Dick Marty; EP Directorate-General for Internal Policies (2012), ‘The results of inquiries into the CIA’s programme of extraordinary rendition and secret prisons in European states in light of the new Legal framework following the Lisbon Treaty’, May, PE 462.456; EP Committee on Foreign Affairs (2012), ‘Opinion on the alleged transportation and illegal detention of prisoners in European countries by the CIA, 6 July, Rapporteur Sarah Ludford, AD/908016EN.doc; CoE (2011), ‘Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations’, 16 September, Doc. 12714. At the time of writing, the full US Senate Select Committee on Intelligence (SSCI) summary report of the study of the programme of detention and interrogation operated by the Bush-era CIA has still not been made public (SSCI (2014), ‘Committee Study of the Central Intelligence Agency’s detention and interrogation program’, released on 9 December 2014, <http://www.intelligence.senate.gov/study2014/sscistudy1.pdf>, accessed 8 May 2017), the Council of Europe’s Secretary General decided to close, in February 2016, its Article 52 inquiry into European States’ roles in the CIA rendition and secret detention. Despite some national inquiries, no one with responsibility for the serious violations has been held accountable; and no effective investigations have taken place at national level. This has led the European Parliament to recently express ‘serious concern about the apathy shown by Member States and EU institutions with regards to recognizing the multiple fundamental rights violations and torture which took place on European soil between 2001 and 2006, investigating them and bringing those complicit and responsible to justice’.

¹³⁰ *El-Masri v. Former Yugoslav Republic of Macedonia*, App. no. 39630/09 (ECtHR, 13 December 2012).

¹³¹ *Al Nashiri v. Poland*, App. no. 28761/11 (ECtHR, 16 February 2015); *Husayn (Abu Zubaydah) v. Poland*, App. no. 7511/13 (ECtHR, 16 February 2015).

¹³² *Nasr and Ghali v. Italy*, App. no. 44883/09 (ECtHR, 23 February 2016).

torture, extraordinary rendition, arbitrary detention and hosting a CIA black site (in the case of Poland).

2.2.4 Surveillance

In respect of mass electronic surveillance and interception, there is increasing evidence emerging regarding the practice of States to outsource surveillance tasks to others. There is credible information to suggest that some governments have systematically routed data collection and analytical tasks through jurisdictions with weaker safeguards for privacy. Reportedly, some governments have operated a transnational network of intelligence agencies through interlocking legal loopholes, involving the coordination of surveillance practice to outflank the protections provided by domestic legal regimes.¹³³ Both the UN General Assembly and the Human Rights Council have addressed this issue, particularly by affirming that the same rights that people have offline must also be protected online, including the right to privacy.¹³⁴

A continuing issue of serious concern is that of extraterritorial mass surveillance programmes, and the proliferation of laws that authorize asymmetrical protection regimes for nationals and non-nationals. The German parliament recently adopted a text that allows for the bulk surveillance on broad grounds and without judicial supervision of non-German citizens by the Federal Intelligence Service from within Germany.¹³⁵ In France, a law on the surveillance of international communications was adopted in 2015,¹³⁶ authorizing the mass surveillance of broad categories of persons or geographic areas, providing for long, renewable periods of surveillance and even longer periods of retention, absent judicial supervision. In the US, extraterritorial mass surveillance programmes are still in place, notably those under Section 702 of the Foreign Intelligence Surveillance Amendments Act,¹³⁷ and those under Executive Order 12333,¹³⁸ which is the primary authority

¹³³ See Report of the UN High Commissioner for Human Rights (2014), 'The right to privacy in the digital age' (n 111), UN Doc. A/HRC/27/37, para. 30.

¹³⁴ See GA resolution 68/167 of 18 December 2013 and UN Doc. A/HRC/DEC/25/117.

¹³⁵ 'Gesetz zur Ausland-Ausland Fernmeldeaufklärung des Bundesnachrichtendienstes', adopted on 21 October 2016.

¹³⁶ Loi no. 2015-1556 du 30 novembre 2015 relative aux mesures de surveillance des communications électroniques internationales.

¹³⁷ Has been renewed for four years by the FISA Amendments Reauthorization Act of 2017 (H.R. 4478).

¹³⁸ Signed by US President Ronald Reagan on 4 December 1981.

under which the National Security Agency (NSA) gathers foreign intelligence, without sufficient safeguards, supervision or oversight.¹³⁹ The UN Special Rapporteur on human rights and counter-terrorism has recalled that differential treatment of nationals and non-nationals is incompatible with the principle of non-discrimination, itself inherent in any proportionality assessment. States are legally bound to afford the same protection to nationals and to non-nationals, and to those within and outside their jurisdiction, which is also the position of the UN Human Rights Committee.¹⁴⁰

In relation to these emerging practices, the UN High Commissioner for Human Rights has noted that:

[a] State cannot avoid its human rights responsibilities simply by refraining from bringing those powers within the bounds of law. To conclude otherwise would not only undermine the universality and essence of the rights protected by international human rights law, but may also create structural incentives for States to outsource surveillance to each other.¹⁴¹

In applying the principles relating to States' extraterritorial obligations, the High Commissioner concluded that:

digital surveillance may engage a State's human rights obligations if that surveillance involves the State's exercise of power or effective control in relation to digital communications infrastructure, wherever found, for example, through direct tapping or penetration of that infrastructure. Equally, where the State exercises regulatory jurisdiction over a third party that physically controls the data, that State also would have obligations under the Covenant. If a country seeks to assert jurisdiction over the data of private companies as a result of the incorporation of those companies in that country,

¹³⁹ See Faiza Patel (2015), 'Bulk collection under Section 215 has ended ... What next?', *Just Security*, 30 November, <https://www.justsecurity.org/27996/bulk-collection-ended-whats-next/>, accessed 11 May 2017; Electronic Frontier Foundation (2014), 'A primer on Executive Order 12333: The mass surveillance starlet', 2 June, <https://www.eff.org/deeplinks/2014/06/primer-executive-order-12333-mass-surveillance-starlet>, accessed on 11 May 2017; ACLU (2016), 'ACLU comments to the Privacy and Civil Liberties Oversight Board on its review of Executive Order 12333', 13 January, <https://www.aclu.org/letter/aclu-comments-privacy-and-civil-liberties-oversight-board-its-review-executive-order-12333>, accessed 11 May 2017.

¹⁴⁰ See 'Special Rapporteur on human rights and counter-terrorism', UN Doc. A/HRC/34/61, para. 33. In relation to the Human Rights Committee, see UN Docs. CCPR/C/GBR/CO/7, para. 24(a), CCPR/C/USA/CO/4, para. 24(a).

¹⁴¹ See Report of the UN High Commissioner for Human Rights (n 111), 'The right to privacy in the digital age', UN Doc. A/HRC/27/37, para. 33.

then human rights protections must be extended to those whose privacy is being interfered with, whether in the country of incorporation or beyond. This holds whether or not such an exercise of jurisdiction is lawful in the first place, or in fact violates another State's sovereignty.¹⁴²

The specific issue of extraterritorial surveillance and interception of communications has a particular importance in this question. Indeed, the US, appears to make a distinction between the surveillance of US citizens and individuals in US territory, and non-US citizens abroad. While this position which is linked to the question of extraterritorial application of IHRL may be in the process of evolving,¹⁴³ the UN Human Rights Committee has articulated concerns that non-US persons enjoy only limited protection against excessive surveillance, and has recommended that measures be taken to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity, regardless of the nationality or location of the individuals whose communications are under direct surveillance.¹⁴⁴

2.2.5 International intelligence cooperation

The need for international cooperation in the fight against terrorism of a transnational nature has long been recognized.¹⁴⁵ When it became known that the 11 September attacks were in part prepared in Western Europe and that some of the individuals allegedly involved in its preparation were under observation by some European intelligence agencies, the need for more effective and coordinated cooperation between intelligence agencies was widely acknowledged.¹⁴⁶ Yet this type of cooperation – while certainly necessary and legitimate – can pose serious human rights concerns. The imperative of gaining information where terrorist cells are based may lead some States to work with other States that have lower human rights standards, where intelligence agencies are given many (unregulated) powers, or where torture, ill-treatment and other human rights violations are routine. At the receiving end, the shared information

¹⁴² (n 111), para. 34.

¹⁴³ For a full review, see Marko Milanovic (2015), 'Human rights treaties and foreign surveillance: Privacy in the digital age', *Harvard Law Review*, **56** (1), 81–146.

¹⁴⁴ UN Doc. CCPR/C/USA/CO/4, para. 22.

¹⁴⁵ See the pre-2001 GA resolutions entitled 'Measures to eliminate international terrorism', e.g. resolution 46/51 of 9 December 1991.

¹⁴⁶ See 'Special Rapporteur on human rights while countering terrorism', UN Doc. A/HRC/10/3, para. 47. This was also a key element of UN Security Council resolution 1373 (2001).

can be used without knowledge of how it was obtained, or with the knowledge that in its collection other States violated IHRL.

The secrecy that surrounds the collection and dissemination of the information,¹⁴⁷ the principles that underlie most intelligence-sharing agreements,¹⁴⁸ the overwhelming need to maintain this type of co-operation with certain States, combined with the limited mandates of national oversight bodies, are all impediments to proper accountability. Yet in the current counter-terrorism context, which includes a manifold increase in reliance on intelligence information as the basis for a number of varied and serious legal and operational measures that can have very serious impacts on the rights of the individuals concerned, such as arrest and detention, decisions on immigration and asylum status, decisions to carry out drone strikes, to restrict freedom of expression or to ban non-governmental organizations (NGOs) and websites – there is a need for a clear legal framework to regulate the sharing of intelligence information between States.

Where States routinely exchange information from countries with poor human rights records, regarding which it is known that they, or their intelligence agencies, routinely engage in human rights violations, such as torture, ill-treatment or arbitrary detention, they are likely to be complicit in the human rights violations in question.¹⁴⁹ Any defence based on the difficulties assessing the origin of the information must be discarded as simply allowing governments to deny responsibility for using information that has been obtained in breach of international law.¹⁵⁰ There is further agreement that the differentiation that is sometimes made between the ‘operational’ and the ‘legal’ uses of the information is both unhelpful and unnecessary for the purpose of responsibility. Indeed, not only does it further undermine the absolute prohibition of torture,¹⁵¹ the mere reliance on information that has been obtained through human rights violations – even for operational

¹⁴⁷ See the references to the agreements within NATO and the Shanghai Cooperation Organisation in the report of the ‘Special Rapporteur on human rights while countering terrorism’, UN Doc. A/HRC/10/3, para. 49.

¹⁴⁸ See the references to the ‘need to know’ approach to intelligence distribution and the policy of ‘originator control’ in ‘Special Rapporteur on human rights while countering terrorism’ (n 146), UN Doc. A/HRC/10/3, para. 48.

¹⁴⁹ See International Commission of Jurists (n 71), at 85; ‘Special Rapporteur on human rights while countering terrorism’ (n 146), UN Doc. A/HRC/10/3, para. 55.

¹⁵⁰ ‘Special Rapporteur on human rights while countering terrorism’ (n 146), UN Doc. A/HRC/10/3, para. 56.

¹⁵¹ International Commission of Jurists (n 71), at 85.

purposes – inevitably implies a ‘recognition of lawfulness’ of such practices and can trigger State responsibility.¹⁵² Further, given the wide range of measures that can be impacted by intelligence information, particularly given the increased use of administrative measures in countering terrorism, as well as the increased reliance even in court proceedings on classified information, it is at best naïve to accept this differentiation as a basis for limiting or absolving responsibility. In sum, according to the former Special Rapporteur on human rights and counter-terrorism, it would be contrary to the rule of law for States or their intelligence services to request a foreign entity to undertake activities in their jurisdiction that they could not lawfully undertake themselves. National law should contain an absolute prohibition on intelligence services cooperating with foreign entities in order to evade legal obligations that apply to their own activities.¹⁵³

2.3 Attempts at Circumventing the Absolute Nature of the Prohibition of Torture and Refoulement

In their fight against terrorism, States have repeatedly tried to circumvent the absolute prohibition of torture and of refoulement. As seen, the deliberate internationalization of counter-terrorism measures combined with claims of territorial limitations of the human rights framework through the use of proxy detention, extraordinary rendition, and transfer to other States from detention centres located abroad was one means, another being the simple acceptance, as described above, of information or evidence obtained through torture in foreign countries.

In his capacity as Special Rapporteur on torture, one of the authors of this chapter was struck, during his tenure, at how ‘ticking bomb scenarios’, no matter how unlikely, appeared to have become the guiding cognitive frame when it came to upholding the protection of human dignity. While fully respecting and understanding the fundamental security challenges with which many States are confronted, and expressing his full support for their legitimate and lawful endeavours to protect their citizens, it was somewhat astounding to see how many alleged ‘exceptional circumstances’ and ‘unique situations’ were presented to him. A number of government officials indicated that their country was currently

¹⁵² ‘Special Rapporteur on human rights while countering terrorism’ (n 146), UN Doc. A/HRC/10/3, para. 55.

¹⁵³ ‘Special Rapporteur on human rights while countering terrorism: Good practices on legal and institutional frameworks for intelligence services and their oversight’, UN Doc. A/HRC/14/46, para. 50.

confronted with an unrivalled and critical security challenge which included the ‘global war on terror’, and officials of all ranks at least implicitly put the absoluteness and non-derogability of the torture prohibition into question and on some occasions portrayed it as an academic or theoretical, if not naïve, ideal which lacked applicability and a sense of realism. He noted that this is the first time the absolute and non-derogable nature of the prohibition of torture was put into question since the existence of the UN, even in democratic States. He also stressed that there are good philosophical and historical reasons for States agreeing in the aftermath of the Nazi Holocaust that the prohibition of torture should be guaranteed under IHRL as one of the few absolute and non-derogable rights. History, including the recent context of the global ‘war on terror’ shows that putting the absolute prohibition of torture in question means opening Pandora’s box. It will take many years until the global damage that was inflicted on the prohibition of torture as a rule of *jus cogens* is repaired.¹⁵⁴

2.3.1 The legal framework

The prohibition of torture is one of the few absolute and non-derogable human rights. Article 2(2) CAT holds in unambiguous terms that ‘[n]o 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 of torture.’¹⁵⁵ The absolute nature of the prohibition of torture means that the right to personal integrity and dignity – the freedom from torture – cannot be balanced against any other right or concern. Torture must not be balanced against national security interests or even the protection of other human rights. No limitations are permitted on the prohibition of torture. Even under exceptional circumstances such as ‘war or a threat of war, internal political instability or any other public emergency’, the prohibition of torture remains untouchable (article 4(2) ICCPR).¹⁵⁶

The principle of non-refoulement is an important principle of international law prohibiting the expulsion, return or extradition of a person to another State where there are substantial grounds for believing that he or

¹⁵⁴ ‘Special Rapporteur on torture’ (n 125), UN Doc. A/HRC/13/39/Add.5, paras. 43–45.

¹⁵⁵ See also articles 4 and 7 ICCPR. The prohibition against torture is also a part of customary international law, and a norm of *jus cogens*.

¹⁵⁶ ‘Special Rapporteur on torture’ (n 125), UN Doc. A/HRC/13/39/Add.5, paras. 40–42.

she would face the risk of being tortured.¹⁵⁷ It is codified in international conventions (article 3 CAT, article 33 Refugee Convention) and considered a part of the prohibition of torture and ill-treatment (article 7 ICCPR, article 3 European Convention on Human Rights (ECHR)) according to the well-established case law of the Human Rights Committee¹⁵⁸ and the ECtHR.¹⁵⁹ Furthermore, it is considered as part of international customary law, thus binding all States irrespective of the ratification of any of the mentioned treaties.¹⁶⁰ As a consequence, States are not only prohibited from subjecting persons to torture by its own authorities but also from sending them to a State where they run the risk of being tortured. This includes the sending of aliens to a State that will send them to a third State where they risk being tortured, so called indirect or ‘chain-refoulement’. It is therefore the responsibility of the sending State to assess the general situation in the receiving State and the risk of the particular individual concerned upon return. In sum, the non-refoulement principle is absolute and applies irrespective of the victim’s conduct. As noted by the International Court of Justice’s (ICJ) Eminent Jurist Panel, some States see non-refoulement as an impediment to effectively fighting terrorism. However, it would be more correct to say that torture and other serious human rights violations are an impediment to refoulement.¹⁶¹

2.3.2 Disingenuous Legal Interpretations

In their fight against terrorism, some States have tried to introduce the notion that the protection of national security from the threat of terrorism is a trump card that allows *all* human rights, even those that are absolute, to be weighed against that imperative. States have argued that when fighting terrorism, no right is absolute; all rights can be tempered by the requirement to protect individuals from the threat of terrorism, including absolute rights.

¹⁵⁷ See ‘Special Rapporteur on torture’ (n 125), UN Doc. A/HRC/13/39/Add.5, para. 238.

¹⁵⁸ See e.g. UN Doc. CCPR/C/48/D/470/1991, para. 13.2; UN Doc. HRI/GEN/Rev.7, p. 150 *et seq.*, para. 9.

¹⁵⁹ *Jabari v. Turkey*, App. no 40035/98 (ECtHR, 11 July 2000), para. 38.

¹⁶⁰ Nowak (n 108), Art. 7, para. 45; UN Declaration on Territorial Asylum 1967; GA resolutions 37/95 of 13 December 1982, 48/116 of 20 December 1993; Sanremo Declaration on the Principle of Non-Refoulement; UNHCR ExCom Conclusions on International Protection No. 25 (1982), No. 55 (1989), No. 79 (1996).

¹⁶¹ International Commission of Jurists (n 71), at 102.

In the US, the initial ‘torture memos’¹⁶² argued that the prohibition of torture required the intentional infliction of severe pain of the level associated with death and organ failure (a standard imported from a health benefits statute having no relevance to the issue at hand, and aimed at highlighting that only an extraordinarily high degree of pain amounts to torture); that an interrogator could inflict even that level of severe pain as long as he did not ‘specifically intend’ to do so; that no criminal law could constrain the president as commander in chief, and that he could order outright torture; and that an interrogator who engages in torture could defend his behaviour by claiming that it was done because of ‘necessity’ or because it was required for self-defence – of the nation, not of the interrogator himself – even where no imminent threat was posed. A review of the legality of these memos in 2005¹⁶³ concluded that the CIA could continue to engage in whatever coercive tactics it requested, that it did not need to change its practices, despite the fact that the law, at least for public consumption, had grown increasingly restrictive with respect to interrogation tactics. The Legal Advisor reasoned that the relevant standard under US law for what constitutes ‘cruel, inhuman, or degrading’ is whether government conduct ‘shocks the conscience’, a due process test, which amounts to the exercise of power without any reasonable justification in the service of a legitimate government objective and concluded that the CIA enhanced interrogation programme would not shock the conscience as no government objective can be more compelling than the security of the nation, which is that pursued by interrogators. He also noted that not all conduct could be justified by sufficiently weighty government interest, but that in the present case, not only the techniques do not amount to torture the government also sought to ‘minimize the risk of injury or any suffering that does not further the Government’s interest in obtaining actionable intelligence’.¹⁶⁴ This amounts to saying that ‘whether prisoner abuse is cruel, inhuman or

¹⁶² Referred to as three documents prepared by the Office of the Legal Counsel at the United States Department of Justice and signed in August 2002 (‘Yoo, Bybee, Bradbury Memos’).

¹⁶³ May 2005, issued by the Office of the Legal Counsel and signed by Stephen Bradbury.

¹⁶⁴ See David Cole (2010), ‘The sacrificial Yoo: Accounting for torture in the OPR Report’, Georgetown Public Law and Legal Theory Research Paper No. 10-73, *J. Nat’l Security L. & Pol’y*, 4, 455–64, at 457–60; Manfred Nowak (2006), ‘What practices constitute torture? US and UN Standards’, *Human Rights Quarterly*, 28, 809–41.

degrading depends not on the abuse, but on the motive of the interrogator'.¹⁶⁵ These practices were stopped first by the 2005 Detainee Treatment Act, as well as through President Obama's Executive Order 13491 on Ensuring Lawful Interrogations.

Other States argued that it is necessary to deport dangerous individuals in order to protect their communities from terrorist threats.¹⁶⁶ They thus tried to introduce a test of reasonableness applicable to terrorist suspects, balancing the absolute rights of the individual against the threat to national security. While this approach has had some support, for example, from the Canadian Supreme Court in its 2002 *Suresh* judgment, where it was accepted that refoulement could occur in exceptional circumstances if a substantial risk to the national security of the State was proven,¹⁶⁷ it has been rejected by the CAT Committee, which confirmed the absolute nature of article 3 on numerous occasions.¹⁶⁸ Similarly, the ECtHR has discarded any 'balancing act'. In the case of *Saadi v. Italy*, the UK made a third party intervention, in which it claimed that the security risk posed by an individual's dangerousness ought to be weighed against the risk to the individual in the receiving State. It was argued that where an individual is suspected of involvement in terrorism, the standard of proof that expulsion would constitute a breach of article 3 ought to be the 'more likely than not' standard rather than the 'real risk' standard currently applied. The Court, however, rejected this reasoning. While recognizing the danger of terrorism and the 'immense difficulties' for States to protect their communities, it has stated that this 'must not, however, call into question the absolute nature of Article 3'.¹⁶⁹ The Court qualified the possible 'balancing' exercise as misconceived, noting that:

¹⁶⁵ See also David Luban (2014), 'Just looking for loopholes' (n 102), *Just Security*, 19 October.

¹⁶⁶ See 'Special Rapporteur on torture' (n 122), UN Doc. A/HRC/13/39/Add.5, para. 240.

¹⁶⁷ Supreme Court of Canada, *Manickavasagam Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1. File No.: 27790. No Canadian court has found that such 'exceptional circumstances' exist.

¹⁶⁸ See e.g. UN Doc. CAT/C/18/D/39/1996, para. 14.5; UN Doc. CAT/C/SR.652, para. 59; UN Doc. CAT/C/NPL/CO/2, para. 17; UN Doc. CAT/C/FRA/CO/3, para. 6. In *Tapia Paez v. Sweden*, the Committee stated that '[t]he nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention', UN Doc. CAT/C/18/D/39/1996, 28 April 1997, para. 14.5.

¹⁶⁹ *Saadi v. Italy*, App. no. 37201/06 (ECtHR, 28 February 2008), para. 137. Note, that in a later case with a similar outcome, *Lithuania, Portugal, Slovakia*

[t]he concepts of 'risk' and 'dangerousness' in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back, or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return.¹⁷⁰

2.3.3 Diplomatic assurances

In order to circumvent the absolute prohibition of torture in cases where an individual would normally be at risk of torture if deported to a third country, some States have relied on 'diplomatic assurances' obtained from foreign authorities that they would refrain from torturing an individual upon return. In some cases, general Memoranda of Understanding have been concluded with third countries.¹⁷¹ This practice raises a number of serious human rights concerns. The UN High Commissioner for Human Rights has emphasized that, as a practical matter, these arrangements do not work as in reality they do not provide adequate protection against torture and other ill-treatment, nor, as a legal matter, can they nullify the obligation of non-refoulement.¹⁷² In one of the author's capacity as Special Rapporteur on the question of torture, the practice of diplomatic assurances has been repeatedly criticized as 'nothing but attempts to circumvent the absolute prohibition of torture and non-refoulement'.¹⁷³ Indeed, diplomatic assurances are an unreliable and ineffective instrument for the protection against torture, as witnessed by numerous cases where suspected terrorists were subjected to torture upon return despite of given assurances and guarantees.¹⁷⁴

and the UK made similar arguments. See *A. v. the Netherlands*, App. no. 4900/06 (ECtHR, 20 July 2010).

¹⁷⁰ *Saadi*, *ibid.*, para. 139.

¹⁷¹ The UK has signed such agreements with Jordan, Libya, Lebanon and Algeria. See generally on this: 'Special Rapporteur on torture' (n 125), UN Doc. A/HRC/13/39/Add.5, para. 244; UN Doc. E/CN.4/2006/6, para. 29; Manfred Nowak and Elizabeth McArthur (2008), *The International Convention Against Torture, A Commentary* (New York: Oxford University Press), p. 216, fn. 474.

¹⁷² See, for example, 'Report of the UN High Commissioner for Human Rights', UN Doc. A/HRC/4/88 and the High Commissioner's statement on Human Rights Day, December 2005, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2117&LangID=E>, accessed 1 March 2016.

¹⁷³ See 'Special Rapporteur on torture' (n 125), UN Doc. A/HRC/13/39/Add.5, para. 243; UN Doc. E/CN.4/2006/6, para. 32; UN Doc. A/HRC/10/44/Add.2, para. 68.

¹⁷⁴ See also Committee against Torture, views on communication No. 233/2003, *Agiza v. Sweden*, 20 May 2005 (A/60/44, annex VIII, s. A), and

The main concerns are that the assurances are sought mostly from countries with a proven record of torture and mostly in relation to persons belonging to a high-risk group (e.g. 'Islamic fundamentalists'). Assurances are not legally binding and thus unlikely to be complied with by States who otherwise violate their binding obligations under international law. In addition, the authority providing the assurance might not have the power to enforce their compliance vis-à-vis its own security forces. Diplomatic assurances cannot be and are often not securely monitored, as even the best monitoring mechanisms (e.g. ICRC, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) are no guarantee against torture. They neither provide for sanctions nor for recourses for the victims in case of a violation.¹⁷⁵ In sum, this practice leads to an erosion of the principle of non-refoulement. It encourages States to seek an exception to their obligation instead of using all their diplomatic and legal powers as States parties to hold other States parties accountable for their violations. In cases of violations of the principle upon return, despite given assurances, both the sending and receiving States have a common interest in denying it and exert pressure to blur accountability.¹⁷⁶

The CAT Committee, the Human Rights Committee, and the ECtHR have not generally opposed diplomatic assurances in principle. They have nonetheless clarified that they do not absolve a State from its obligation to assess the risk of torture in the individual circumstances of the case. In the highly publicized case of *Othman (Abu Qatada)*¹⁷⁷ regarding the envisaged deportation of an individual to Jordan, the ECtHR accepted the deportation of the individual in question, despite noting that '[a]ssurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment'¹⁷⁸ and that 'the picture painted by the reports of United Nations bodies and NGOs of torture in Jordanian prisons is as consistent as it is disturbing (...) torture remains (...) "widespread and routine"'.¹⁷⁹ The Court noted that it did not 'consider that the general

Human Rights Committee, views on communication No. 1416/2005, *Alzery v. Sweden*, 25 October 2006 (A/62/40 (vol. II), annex VII).

¹⁷⁵ 'Special Rapporteur on torture, Report to the Commission on Human Rights', UN Doc. E/CN.4/2006/6, 23 December 2005, para. 31.

¹⁷⁶ 'Special Rapporteur on torture' (n 125), UN Doc. A/HRC/13/39/Add.5, para. 243.

¹⁷⁷ *Othman (Abu Qatada) v. the UK*, Appl. no. 8139/09 (ECtHR 17 January 2012).

¹⁷⁸ *Ibid.*, at para. 187.

¹⁷⁹ *Ibid.*, at para. 191.

human rights situation in Jordan excludes accepting any assurances whatsoever from the Jordanian Government. Instead, the Court considers the UK and Jordanian governments have made genuine efforts to obtain and provide transparent and detailed assurances to ensure that the applicant will not be ill-treated upon return to Jordan.¹⁸⁰ In such circumstances, one is left to wonder in what cases the Court would give no weight whatsoever to such assurances. The Court's reasoning sits rather uncomfortably with the CAT Committee's recommendations that diplomatic assurances should only be relied upon with regard to States which do not systematically violate the UN CAT's provisions.¹⁸¹

2.4. Increased Reliance on Intelligence Information and (Ab)use of National Security

2.4.1 Intelligence information as a basis for rights-limiting measures

Another defining feature of the post-2001 context has been the increased use of intelligence information as a basis for various rights-limiting counter-terrorism measures. This is due, first, to the view of some States that 'traditional' law-enforcement is useless in the face of the new terrorist threat. This is what Vice President Cheney meant when he referred to the need to increasingly work on 'the dark' side.¹⁸² Perhaps another way of putting this argument is that given the potentially devastating effect of any terrorist attack, there is a need to take effective, flexible and speedy measures to prevent the occurrence of acts of terrorism. And preventive information-gathering on international terrorist groups will often be the result of transnational intelligence cooperation. Given the complexities of international inquiries and prosecutions, particularly when much of the information comes from foreign intelligence agencies, States have attempted, where possible, to use the information collected through intelligence or received through intelligence sharing as

¹⁸⁰ Id., at para. 194.

¹⁸¹ UN Doc. CAT/C/USA/CO/2, para. 21.

¹⁸² 'We also have to work, through, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective'. US Vice-President Dick Cheney (2001), 'Meet the press', interview by Tim Russert, NBC News, 16 September.

such, without needing to ‘transform’ it into hard evidence that can be used in a court of law. Consequently, in the post-9/11 context, there has been a surge in the use of executive decisions based on confidential intelligence information against individuals regarding whom there is an alleged suspicion of involvement in acts of terrorism or who are vaguely defined as a threat to national security. The administrative nature of these measures allows States to by-pass more stringent criminal law procedures, protect sources, and maintain good diplomatic relations with other States with which information is exchanged.

A broad range of counter-terrorism measures are concerned, from detention (i.e. preventive administrative detention on grounds of national security; administrative detention for extradition purposes); to measures that limit freedom of movement within and limit entry or departure from a State (control orders, retention of travel documents), measures to limit spoken or written expression (measures that prevent certain individuals from speaking in public, or that allow executive authorities to block websites in the absence of any initial judicial control or ex-post facto judicial recourse¹⁸³), as well as measures to block financial resources (the listing of terrorist suspects). These measures can have a very serious impact on the individuals to whom they apply and their families. They can also have a much broader negative impact, as unjustified or secret measures may give the impression that they are arbitrary, regardless of whether they are or not. In turn, this can alienate certain particularly targeted communities,¹⁸⁴ or even withdraw the trust that societies place in their governments that they are rightly and fairly countering terrorism.

Another issue at least worth mentioning is the strong link between the work of intelligence bodies, whose aim is to detect potential national security threats, including terrorist threats, by gathering data and information in such a way as not to alert those targeted, through a range of special investigative techniques such as secret surveillance, interception and monitoring of (electronic) communications, secret searches of premises and objects, the use of infiltrators,¹⁸⁵ and the increased criminalization of preparatory activities, which can be several steps away from the actual commission of acts of terrorism. The further away these inchoate offences are from the criminal terrorist act, the more they rely on *mens rea* rather than *actus reus* and, as no act of terrorism has been committed,

¹⁸³ ‘Special Rapporteur on human rights while countering terrorism’, UN Doc. A/HRC/31/65, UN Doc. para. 40.

¹⁸⁴ International Commission of Jurists (n 71), at 92.

¹⁸⁵ ‘Special Rapporteur on human rights while countering terrorism’, UN Doc. A/HRC/10/3, para. 26.

their discovery heavily relies on intelligence information. In turn, this can blur the lines between intelligence information and the collection of evidence.

It is clear that under IHRL, States have not only a right, but a duty, to prevent acts of terrorism. Indeed, States have an obligation to take positive measures to protect the lives and security of individuals under their jurisdiction.¹⁸⁶ At the same time, all of the measures adopted that impact on individual human rights must comply with the international human rights framework; in particular, they must be provided by law, strictly necessary and proportionate, and must not be discriminatory. In addition, as often the only way to ensure compliance with these requirements is to ensure a possibility of judicial review, such an option must be open, preferably *ex-ante* and *ex-post facto*, with all the guarantees that are attached to such review under IHRL. It appears however that, often, administrative counter-terrorism measures taken on the basis of intelligence information do not comply with such requirements; in some cases, they even seem to be adopted precisely to by-pass the judicial process altogether, and allow for simplified, expeditious, less stringent procedures, where executive authorities are able to act on the basis of suspicion rather than evidence.

This increased use of intelligence information raises two main issues. First, when the authorities assert the confidential nature of the information used as a basis for the adoption of rights-limiting administrative measures – either because it is too vague to be used in court, or because sources and methods of work must be protected – the possibility for individuals concerned to be able to defend themselves of the actions for which they are sanctioned is extremely challenging. Second, the mere existence of administrative measures rooted in intelligence information creates an ever-more important need for information that can be used in this way. In turn, this has led to increased powers given to intelligence agencies. In many States, intelligence agencies have been allowed to detain and interrogate individuals, powers that traditionally lie with law-enforcement agencies. Unfortunately, this increase in power has rarely been combined with a simultaneous import of the checks and balances that are normally associated with law-enforcement powers. Due to the low levels of oversight of intelligence agencies, any increase in their powers creates a risk for human rights protection.

¹⁸⁶ Office of the High Commissioner for Human Rights (2008), 'Terrorism, counter-terrorism and human rights, Fact Sheet No. 32', July, pp. 1 and 8.

The former Special Rapporteur on human rights and counter-terrorism has shown concern that in several countries the power shift from law enforcement agencies to intelligence agencies for countering and preventing terrorist threats was accomplished precisely to circumvent the necessary safeguards in a democratic society, thereby abusing the usually legitimate secrecy of intelligence operations. He noted that this shift could ultimately endanger the rule of law, as the collection of intelligence and the collection of evidence about criminal acts becomes more and more blurred. In particular, he highlighted that this can lead to a situation where States begin preferring to use undisclosed evidence gathered by intelligence agents in administrative proceedings over attempts to prove guilt beyond reasonable doubt in a criminal trial.¹⁸⁷ In this respect, a good practice is that '[i]f intelligence services possess powers of arrest and detention, they comply with international human rights standards on the rights to liberty and fair trial, as well as the prohibition of torture and inhuman and degrading treatment'.¹⁸⁸

2.4.2 Administrative detention

As former UN High Commissioner Louise Arbour noted:

[a]dministrative measures are used to effect the detention of an individual much earlier in an investigation than would be required under criminal law principles such as the presumption of innocence. In my view, the onus should be squarely on governments to establish that the procedures used in 'standard' criminal investigations (...) which allow the arrest to be made close to the charge, are unsuitable to their counter-terrorism efforts.¹⁸⁹

Indeed, in their counter-terrorism efforts, States have increased their use of two specific kinds of detention, which are both outside the criminal justice process and can therefore both be qualified as administrative detention: (1) the detention of individuals in the context of deportation and extradition,¹⁹⁰ and (2) the preventive detention on grounds of

¹⁸⁷ 'Special Rapporteur on human rights while countering terrorism' (n 146), UN Doc. A/HRC/10/3, para. 37.

¹⁸⁸ 'Special Rapporteur on human rights while countering terrorism', UN Doc. A/HRC/14/46, Practice 29.

¹⁸⁹ Louise Arbour (2006), 'In our name and on our behalf', Chatham House, 15 February.

¹⁹⁰ See e.g. UK's Part IV of the 2001 Anti-Terrorism, Crime and Security Act, s. 23(1), which allowed the indefinite detention of non-UK citizens who could not be deported; Canada's 'Security Certificates', Immigration and Refugee Protection Act, S.C. (2001), c.27, s. 34.

national security.¹⁹¹ While many States already had in their legal arsenal some form of administrative preventive detention on national security grounds, other States have introduced or increased the detention of individuals on the grounds that they are suspected of being engaged in terrorist activities or are a danger to national security following a determination by one or several members of the executive in the post-2001 context. Such detention can be easily abused, and is permitted under the ICCPR in very limited circumstances ‘where the person concerned constitutes a clear and serious threat to society that cannot be contained in any other manner’.¹⁹² The ECHR, for its part, does not allow for such detention, and the ECtHR has on a number of occasions found ‘internment and preventive detention without charge to be incompatible with the fundamental right to liberty (...), in the absence of a valid derogation under Article 15’.¹⁹³ The former Special Rapporteur on human rights while countering terrorism has highlighted that the use of ‘administrative detention’ as a counter-terrorism tool against persons on the sole basis of a broadly formulated element of suspicion that a person forms a ‘threat to national security’ or similar expressions that lack the level of precision required by the principle of legality was of special concern, particularly as much of the information concerning the reasons for such detention is often classified, so that the detainee and his or her

¹⁹¹ See Singapore’s Internal Security Act (ISA), in force since Singapore’s independence in 1965, which allows preventive detention where the president is subjectively satisfied that the detention is necessary for the purposes of national security, public order or essential services. See Chapter 143, s. 8 of the ISA; Israel’s 1979 Emergency Powers (Detention) Law, which allows for the detention of individuals by the executive for State or public security, renewable on a six-month basis; Australia’s Control Orders, s. 104.4 of the Criminal Code (amendments 2005); In the UK, the Prevention of Terrorism Act 2005 allowed the Home Secretary to restrict an individual’s liberty for the purpose of ‘protecting members of the public from a risk of terrorism’.

¹⁹² Human Rights Committee, *David Alberto Campora Schweizer v. Uruguay*, Communication No. 66/1980, para. 18.1.

¹⁹³ *A and Others v. UK*, App. no. 3455/05 (ECtHR, 19 February 2009), para. 172. In this case, the British government argued that 11 individuals were detained on national security grounds with a view to deportation in their home country (i.e. detention of aliens under article 5(1)(f)). The European Court requalified the legal basis for detention (para. 191) and noted that ‘[I]t is, instead, clear (...) that the applicants were certified and detained because they were suspected of being international terrorists and because it was believed that their presence at liberty in the United Kingdom gave rise to a threat to national security’.

lawyer have no access to this information and thereby no effective means of contesting the grounds of the detention.¹⁹⁴

Access to courts is essential in this context. It is important to recall that all persons who are detained, whatever the reason or legal basis for their detention, and wherever they are detained, must have access to courts to review the legality of their detention.¹⁹⁵ The Court must be able to carry out a substantive review. Even though the ECHR does not apply to the specific context of preventive security on grounds of national security, the ECtHR provides interesting and useful guidance on the review procedure and the use of secret intelligence information regarding detention in the context of deportation and extradition. The ECtHR notes that although there is no uniform standard to be applied irrespective of the context, '[t]he reviewing court must not have merely advisory functions, but must have the competence to "decide" on the "lawfulness" of the detention and to order release if detention is unlawful'.¹⁹⁶ In all cases, the proceedings must be adversarial and must always ensure equality of arms between the parties.

This requirement is particularly relevant, as increased reliance on intelligence for countering terrorism has often been done without adequate consideration for the due process safeguards necessary to protect against abuses. Not only can the information used be partial, overstated, misunderstood, incomplete, or simply wrong, but in the absence of publicity of the 'information' neither the judge nor the individual concerned may be in a position to rectify the facts.¹⁹⁷ The ECtHR has admitted the use of intelligence in principle, but noted that '(...) there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. There will not be a fair trial, however, unless

¹⁹⁴ 'Special Rapporteur on human rights while countering terrorism', UN Doc. A/63/223, paras. 19 and 20.

¹⁹⁵ Article 9(4) ICCPR, which contains a broad right of *habeas corpus*. See also article 5(4) ECHR, and Article 7 American Convention on Human Rights.

¹⁹⁶ *A and Others v. UK* (n 193), App. no. 3455/05 (ECtHR, 19 February 2009), para. 202.

¹⁹⁷ As noted by the Supreme Court of Canada: 'The judge (...) is not in a position to identify errors, find omissions, or assess the credibility and truthfulness of the information in the way the named person would be'. Supreme Court of Canada, *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9, para. 63.

any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities'.¹⁹⁸ Whether the review procedure provides sufficient guarantees to protect the detainees' rights despite the use of secret information must be examined on a case-by-case basis, but various elements to be considered include whether the judges are able to consider both the 'open' and 'closed' material, whether the applicant can appoint or have appointed a 'security-cleared counsel' who is able to consider the 'closed' material, and act on the defendant's behalf, and whether recommendations can be made regarding the need to de-classify some of the material.

In sum, the detention of terrorist suspects on grounds of national security is problematic. On the practical side, given that in order to be legal such detention can only be temporary, its benefits outside the context of true emergencies that threaten the existence of the nation must be questioned. Where individuals have committed crimes of terrorism, they should be tried in proceedings to which all fair trial guarantees apply. It is indeed argued that the right to a fair trial enshrined in all international and regional human rights instruments also includes the right to a trial. States should not be allowed to circumvent the safeguards protecting criminal defendants by detaining them as terrorist suspects without charging them.¹⁹⁹ In addition, given the very serious impact that detention can have on individuals, their families, their communities and society as a whole, full respect for due process and the rule of law not only reduces the threat of terrorism by showing that the criminal justice system is capable of punishing those responsible for violations of the law, it also increases the State's credibility in enforcing the law, and ensures that the fragile trust that the individuals place in their authorities that they are not taking arbitrary, overly broad or discriminatory measures in countering terrorism is maintained.

¹⁹⁸ *A and Others v. UK* (n 193), para. 205.

¹⁹⁹ This is the point made by the UN Working Group on Arbitrary Detention in the case of *Satray v. Malaysia* (Opinion No. 32/2008, U.N. Doc. A/HRC/13/30/Add.1 at 123 (2010)), in which the Working Group noted that Mr Satray had been detained for more than six and a half years without any charges being brought against him, and without the possibility of a fair and public hearing by an independent and impartial tribunal. During this time, the government had not produced any evidence to substantiate its accusation that he was a member of the Jemaah Islamiyyah. Based on Article 10 Universal Declaration of Human Rights (UDHR), the Working Group considered that no one should be detained without trial.

2.4.3 State secrecy provisions

Another key issue has been the broad invoking of national security concerns as a blanket bar to access to justice.²⁰⁰ This issue will be addressed in greater detail in the chapter on accountability (Chapter 8), but also needs to be mentioned in the present context due to its close ties with ways in which States have broadly responded in a post-9/11 context. As already noted, there are many reasons why a State would want to keep its intelligence information confidential, notably to protect the methods of its intelligence agencies, to protect its agents on the ground, and to protect its diplomatic relations with other States with which it is cooperating on intelligence matters. For example, when asked to release documents on the detention and interrogation of Binyam Mohamed, regarding which there had been allegations that the UK government had been involved in his ill-treatment, the UK refused at first, arguing that releasing the documents without US permission would damage the UK's relationship with the US, and that the US would cut intelligence-sharing ties with the UK. This reasoning was rejected by UK courts, which instead highlighted the important role played by the UK in Binyam Mohamed's interrogation, and decided that the information concerning his treatment – including information received from the CIA – was evidence of the UK government's complicity in his torture, and should thus be de-redacted. The government was prohibited from using secret evidence in its defence, and it was required that allegations of wrongdoing be heard in public.²⁰¹ In the same vein, some States that entirely depend on other States for their access to intelligence are very concerned about protecting the confidential information that is provided to them. Canada is a case in point.²⁰² Due to its special relationship in intelligence cooperation, and long borders with the US, as well as fears about its security expressed by the US as revealed by Canada being singled out in the US' Patriot Act,²⁰³ Canada's response in a post-9/11 context has been

²⁰⁰ U.N. Doc. A/63/223, para. 13.

²⁰¹ For a summary of this case, see Open Society Justice Initiative (OSI) (2013), 'Globalizing torture: CIA secret detention and extraordinary rendition', OSI, <https://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>, accessed 13 May 2013, pp. 115–17.

²⁰² See the analysis of Canada's response to 9/11: Kent Roach (2011), 'Canada responds: Border and human security', in Roach (n 26), at 361–425.

²⁰³ See *Uniting And Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism (USA Patriot Act) Act of 2001*, 115 STAT. 272 PUBLIC LAW 107–56—OCT. 26, 2001, Title 4, Subsection A, 'Protecting the Northern Border'.

to assuage the concerns of its southern neighbour.²⁰⁴ In doing so, it enhanced its intelligence cooperation in various ways,²⁰⁵ as well as its secrecy provisions as part of its 2001 anti-terrorism legislation.²⁰⁶

While States may limit the disclosure to the general public of specific information which is important for the protection of national security, for instance about the sources, identities and methods of intelligence agents, many States have gone far beyond what is absolutely necessary. State secrecy doctrines have been used to conceal illegal acts from judicial authorities. As noted by the ECtHR, '[t]he concept of "State secrets" has often been invoked to obstruct the search for the truth'.²⁰⁷ In the case of *Nasr*, the Court noted that the legitimate principle of 'State secrecy' had clearly been applied in order to ensure that those responsible did not have to answer for their actions.²⁰⁸ Secrecy can lead to impunity and a lack of accountability for serious human rights violations, which can frustrate the victims' right to truth. The former UN High Commissioner for Human Rights importantly noted that legitimate national security considerations do not include governmental interests and activities that constitute grave crimes under IHRL, let alone policies that are precisely calculated to evade the operation of human rights law.²⁰⁹

2.5 The Instrumentalization of Various Branches of National and International Law to Counter-Terrorism

One of the key defining trends of the fight against terrorism since 11 September 2001 has been the use by States of various parts of their legal arsenal to counter-terrorism. In many States, counter-terrorism measures have not remained confined to criminal law. Rather, States have

²⁰⁴ Roach (n 26), at 361.

²⁰⁵ See in particular the case of Maher Arar, in which the Canadian Police Force passed on inaccurate information to its American counterparts, which eventually contributed to Arar's detention and subsequent rendition to Syria, where he was detained and tortured for almost a year. See the Dennis O'Connor (2006), 'Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Analysis and Recommendations', Government of Canada Publications.

²⁰⁶ Roach (n 26), at 387–89.

²⁰⁷ *El-Masri v. Macedonia* (n 130), App. no. 39630/09 (ECtHR, 13 December 2012), paras. 191–93.

²⁰⁸ *Nasr and Ghali v. Italy* (n 132), App. no. 44883/09 (ECtHR, 23 February 2016), para. 272.

²⁰⁹ Observations on behalf of the High Commissioner for Human Rights to the European Court of Human Rights in *El-Masri* (n 130), *ibid.*

used their immigration laws, citizenship laws, banking laws, and laws applicable to civil society to address the threat posed by terrorism. Measures have been adopted in the field of development, humanitarian assistance, but also education and health, for example. The seeping of measures to counter-terrorism in almost all areas regulated by the State can have very serious human rights consequences. This section will focus on three examples: the use of immigration laws; the regulation of civil society through laws to address the financing of terrorism; and impact of counter-terrorism legislation on the right to development.

2.5.1 Immigration law

States have increasingly placed their immigration policies and laws at the centre of their counter-terrorism strategies. This was partly to respond to Security Council resolution 1373, which required States to ensure that terrorists do not abuse refugee status.

As examined in greater detail by Ben Emmerson in Chapter 3, with terrorist groups gaining control of territory and participating in armed conflicts in a number of regions, and governments, international organizations and civil society increasingly concerned about violent extremism and how to tackle it, there is a growing perception that the movement of people is a threat to national security. It is not disputed that States have a right to determine who is entitled to enter and stay on their territory. At the same time, they also have an obligation to respect, protect and fulfil the human rights of all individuals in their jurisdiction, regardless of their nationality, origin and immigration status, as well as their specific obligations under international refugee law. It is legitimate for States to want to increase border security through border controls to identify security threats before an individual enters their territory. Yet ‘Maritime interception operations’ or ‘push back operations’, as well as bilateral or multi-lateral readmission agreements, such as the EU-Turkey Statement, agreed on 18 March 2016, which provides for the blanket return of all migrants crossing from Turkey to Greece, pose specific challenges as they may amount to collective expulsion²¹⁰ and violations of the principle of non-refoulement.²¹¹

²¹⁰ HRW (2016), ‘EU: Turkey mass-return deal threatens rights, would harm refugees, undermine EU’s principles’, press release, 15 March.

²¹¹ Amnesty International (2015), ‘Europe’s gatekeeper: Unlawful detention and deportation of refugees from Turkey’, 16 December, EUR 44/3022/2015; Amnesty International (2016), ‘Turkey “safe country” sham revealed as dozens of Afghans forcibly returned hours after EU refugee deal’, press release, 23 March; Amnesty International (2016), ‘EU-Turkey deal: Greek decision

The administrative detention of foreign nationals considered to be a security threat has been a recurrent approach of States. As former UN High Commissioner for Human Rights Louise Arbour noted already in 2006:

countries are using various laws at their disposal – asylum, immigration, extradition and so on – to remove persons alleged to constitute national security threats from their territories. In particular one sees an attempt to avoid the heavy due process requirements of the criminal system by turning instead to the administrative law framework.²¹²

That tendency was observable in Canada's certificates under the Immigration and Refugee Protection Act 2001 for detention of foreign nationals for up to 120 days without review, followed by removal; and in the UK's indefinite detention of foreign terror suspects under the Anti-terrorism, Crime and Security Act 2001. These schemes were deemed by national and international courts to be unconstitutional, and/or discriminatory, and/or in breach of fundamental rights. It is crucial that, amidst mounting terrorism concerns and increased numbers of migrants moving into foreign territories, States do not resort to similar measures that violate human rights. States have a right to detain foreigners prior to deportation and extradition.²¹³ But detention should always be a last resort and must comply with the principle of legality. Continued detention in this context can become arbitrary where the State does not have any intention of deporting or extraditing the individual; where the State is not diligent enough in carrying out the proceedings, or where the proceedings take too long; and where there are legal or practical reasons the deportation or extradition becomes impossible, such as a risk of violation of the absolute prohibition of *refoulement* should the individual be returned. In these cases, the individual must be released. Further, the detention of children can never ever be in their best interest: alternatives

highlights fundamental flaws', press release, 20 May, on the appeal won by a Syrian national who arrived in Greece, against a decision that would have led to his forcible return to Turkey; HRW (2016), 'Turkey: border guards kill and injure asylum seekers', 10 May, <https://www.hrw.org/news/2016/05/10/turkey-border-guards-kill-and-injure-asylum-seekers>, accessed 19 October 2017.

²¹² Speech by Louise Arbour, UN High Commissioner for Human Rights, Chatham House, Wednesday 15 February 2006, <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/ilparbour.pdf>, accessed 24 October 2017.

²¹³ See Article 9 ICCPR and e.g. Article 5 ECHR.

to detention must be provided to unaccompanied migrant children and families with children.

In sum, from a ‘macro-legal’ perspective, a State should not place immigration laws at the centre of their counter-terrorism strategies. This response is both an ineffective way to respond to the threat of terrorism, as its ultimate outcome is the export of the threat; it also lacks the capacity of criminal law in showing exemplar rigour in punishing individuals for wrongdoing. It is thus important that the State responds to criminal acts with criminal law, while immigration laws should serve to regulate immigration. From a more ‘micro-legal’ perspective, given the impact that such removal measures can have on the individuals, it is important that the individuals are given the opportunity to challenge the lawfulness of their detention,²¹⁴ and that the State includes appropriate safeguards before any deportation takes place, including to ensure that the deportation is not used as a form of administrative detention based on discriminatory grounds; to consider any risk of ill-treatment of the individual upon return to prevent any violation of the absolute prohibition of refoulement and to give any appeal a preventive effect, so as to avoid a violation of this absolute prohibition.

2.5.2 Regulation of civil society through laws to address the financing of terrorism

Measures to counter the financing of terrorism²¹⁵ have had an important impact on civil society. This is largely due to the very important impact of a (rather unknown) international organization, the Financial Action Task Force (FATF),²¹⁶ which has made a critical link between the two.

²¹⁴ See Human Rights Committee (2004), *Ahani v. Canada*, Communication No. 1051/2002 UN Doc. CCPR/C/80/D/1051/2002 (2004) ‘[G]iven that an individual under a security certificate has neither been convicted of any crime nor sentenced to a term of imprisonment, an individual must have appropriate access, in terms of Article 9(4) to judicial review of the detention, that is to say review of the substantive justification of the detention as well as sufficiently frequent review’.

²¹⁵ International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the UN in resolution 54/109 of 9 December 1999, entered into force on 10 April 2002, and Security Council resolution 1373 (2001).

²¹⁶ See 1989 G-7 Economic Declaration. FATF is an intergovernmental organization to develop policies to combat money laundering and, since 2001, the financing of terrorism. According to its mandate (2012–2020), current objectives are to set standards and to promote effective implementation of legal, regulatory and operational measures for combating terrorist financing, and to

Indeed, FATF has affirmed that it has been ‘demonstrated that terrorists and terrorist organizations exploit the non-profit organization (NPO) sector to raise and move funds, provide logistical support, encourage terrorist recruitment, or otherwise support terrorist organizations and terrorist activity’.²¹⁷ FATF has thus required States to review their legislation pertaining to NPOs²¹⁸ to ensure that they cannot be misused (a) by terrorist organizations posing as legitimate entities; (b) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and (c) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organizations’.²¹⁹ States are thus required to adopt a number of measures regarding the supervision and monitoring of the entire NPO sector, while for NPOs that ‘account for a significant portion of the financial resources under control of the sector and a substantial share of the sector’s international activities’, States are required to adopt more extensive specific standards.²²⁰ States’ implementation of the recommendations is monitored through a Mutual Evaluation process, and non-compliance with FATF recommendations can be damaging for a country, in particular for its financial and business sector.

FATF has highlighted the ‘vital role’ of NPOs, and noted that ‘[m]easures adopted by countries to protect the NPO sector from terrorist abuse should not disrupt or discourage legitimate charitable activities’, and actions taken by governments should ‘to the extent reasonably possible, avoid any negative impact on innocent and legitimate beneficiaries of charitable activity’. Unfortunately, this positive statement is accompanied by an important caveat: ‘this interest cannot excuse the need to undertake immediate and effective action to advance the immediate interest of halting terrorist financing or other forms of support by NPOs’.²²¹ This statement, in fact, maintains the perception that the fight

identify national-level vulnerabilities with the aim of protecting the international financial system from misuse (20 April 2012, Washington, DC).

²¹⁷ See FATF (2012), ‘Interpretative Note to Recommendation 8’, <http://fatfplatform.org/wp-content/uploads/2015/02/Interpretive-Note-to-Recommendation-8.pdf>, accessed 19 October 2017. See also FATF (2014), ‘FATF report: Risk of terrorist abuse in non-profit organizations’, FATF/OECD, paras. 13, 75 and 91–124.

²¹⁸ This chapter will refer to NPOs when referring to FATF (as this is the language FATF uses), otherwise it will use the term NGOs, as preferred human rights language.

²¹⁹ FATF, Recommendation 8, on NPOs.

²²⁰ Ibid.

²²¹ See FATF (2012), ‘Interpretative Note to Recommendation 8’ (n 217).

against terrorism is a trump card within the existing human rights and humanitarian law framework.

As stressed by Ben Emmerson, the former Special Rapporteur on Human Rights while countering terrorism,²²² while opportunities for abuse exist²²³ and there are examples in which the financing of terrorism through civil society have been established,²²⁴ abuse is in fact rare in the NPO sector²²⁵ and represents only a small part of the total funds managed by civil society.²²⁶ States should ‘avoid rhetoric that ties NPOs to terrorism financing in general terms because it overstates the threat and unduly damages the NPO sector as a whole’.²²⁷ Regarding the measures adopted to implement the FATF recommendation on abuse of NPOs, in fact, ‘very few, if any, instances of terrorism financing have been detected as a result of [civil society organization]-specific supervisory measures’.²²⁸

In fact, the FATF requirements relating to the financing of terrorism and NPOs have been a useful tool for a number of States to clamp down on civil society.²²⁹ In implementing these requirements, States have adopted legislation that strictly regulates, limits, restricts and controls civil society. Such legislation typically includes an obligation to register, with burdensome and complex procedures for the registration, which in

²²² See report, UN Doc. A/70/371 (n 22), para. 22.

²²³ See CTITF (2009), ‘CTITF Working Group Report: Tackling the financing of terrorism’, http://www.un.org/en/terrorism/ctitf/pdfs/ctitf_financing_eng_final.pdf, accessed 15 May 2017, paras. 63 and 64.

²²⁴ See Emile van der Does de Willebois (2010), ‘Nonprofit organizations and the combatting of terrorism financing, A proportionate response’, World Bank Working Paper No. 208, Ch. 2; FATF (2014), ‘Risk of terrorist abuse in NPOs’, FATF/OECD, Ch. 3.

²²⁵ Joint Select Committee (2015), ‘Draft Protection of Charities Bill’, 23 February, para. 37.

²²⁶ van der Does de Willebois (n 224). See also CTITF (n 223), para. 64. and Recommendation 65.

²²⁷ Ibid.

²²⁸ ‘Special Rapporteur on the rights to freedom of peaceful assembly and of association’, UN Doc. A/HRC/23/39, para. 25. See also ‘Special Rapporteur on human rights while countering terrorism’, UN Doc. A/70/371 (n 22), paras. 23 and 24.

²²⁹ See ‘Special Rapporteur on the rights to freedom of peaceful assembly and of association’ who warned against ‘the implementation of restrictive measures – such as FATF Recommendation 8 – which have been misused by States to violate international law’, UN Doc. A/HRC/23/39, para. 25. See also ‘Special Rapporteur on human rights while countering terrorism’, UN Doc. A/HRC/70/371 (n 22), para. 24.

turn enhance the possibility that the registration be denied, often coupled with limited ability to appeal the refusal; limited ability to obtain funding from abroad; and criminalization of various forms of membership of unregistered groups.²³⁰ The absence in the FATF recommendation of any reference to the rights to freedom of association and its corollary, the ability to access financial resources, nor to the need to respect the principles of legality, proportionality, necessity and non-discrimination, has lent legitimacy to States which adopt legislation without due respect for the right to freedom of association. In fact, the views of several UN special procedures mandate holders is that the FATF recommendation ‘fails to provide for specific measures to protect the civil society sector from undue restrictions to their right to freedom of association by States asserting that their measures are in compliance with FATF Recommendation 8’.²³¹

It should be noted, however, that in 2015 – for the first time – FATF stated that ‘as a matter of principle, complying with the FATF recommendations should not contravene a country’s obligations under (...) international human rights law to promote universal respect for, and observance of, fundamental human rights and freedoms, such as freedom of expression, religion, or belief, and freedom of peaceful assembly and of association’.²³² Yet, many States have already adopted rights-limiting legislation to comply with – or abuse – FATF’s recommendations, largely without FATF’s monitoring bodies raising any concerns regarding the lack of human rights compliance.²³³ Thus, while this is a very positive development, it will be difficult to fully repair the damage that has been done to civil society through counter-terrorism legislation to comply with FATF recommendations on NPOs.

²³⁰ For an overview, see Ben Hayes (2012), ‘Counter-terrorism, “policy laundering” and the FATF: Legalising surveillance, regulating civil society’, Transnational Institute/Statewatch, <https://www.tni.org/en/publication/counter-terrorism-policy-laundering-and-the-fatf>, accessed 15 May 2017.

²³¹ ‘Special Rapporteur on freedom of association and assembly’, UN Doc. A/HRC/23/39, para. 25 and ‘Special Rapporteur on human rights while counter-terroring terrorism’, UN Doc. A/HRC/70/371 (n 22), para. 26.

²³² FATF, Best Practices, 2015, para. 22.

²³³ Special Rapporteur on human rights while countering terrorism, A/HRC/70/371 (n 22), para. 26.

2.5.3 Impact of counter-terrorism legislation on humanitarian assistance and the right to development

Since 2001, a complex legal framework to criminalize or limit various acts of support to terrorism has been set up, involving all levels of government. From the Security Council, with resolution 1373,²³⁴ and the International Convention for the Suppression of the Financing of Terrorism, to national legislation that prohibits various forms of support to terrorism,²³⁵ the inclusion by donors of counter-terrorism related clauses in humanitarian grant and partnership agreement contracts to help ensure that their funds are not used to benefit terrorists or to support acts of terrorism,²³⁶ an intricate web of obligations at all levels that impacts on civil society acting domestically and abroad has been set up. This complexity is compounded by the lack of clarity and broadness of the laws themselves and their varying scope of application, as well as by case-law relating to material support.²³⁷ In turn, civil society's ability to operate, with the constant Damocles sword of possible prosecution for material support hanging over its head has been, rightly or wrongly, constrained. This fear of being sanctioned for carrying out its activities has a very serious impact on recipients and beneficiaries.²³⁸

Understandably, the complexities and risks of sanctions linked to operating in certain areas or with certain groups has had a chilling effect²³⁹ on many civil society actors. By way of example, humanitarian

²³⁴ UN Security Council resolution 1373 (2001), para. 1(d). Resolution 1373 has also been the basis for national and regional sanction regimes, see para. para. 1(c).

²³⁵ For a thorough examination, see Kate Mackintosh and Patrick Duplat (2013), 'Study of the impact of donor counter-terrorism measures on principled humanitarian action', July, https://docs.unocha.org/sites/dms/documents/ct_study_full_report.pdf, accessed 15 May 2017 and Harvard Program on Humanitarian Policy and Conflict Research (2011), HPCR Working Paper: Humanitarian action under scrutiny: Criminalizing humanitarian engagement', <http://c0186748.cdn1.cloudfiles.rackspacecloud.com/HPCR%20CHE%202011.pdf>, accessed 17 May 2017.

²³⁶ See Mackintosh and Duplat, *ibid.*, at p. 47 *et seq.*

²³⁷ See the US Supreme Court case of *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S. Ct. 2705.

²³⁸ For an overview of the complexities of the legal frameworks, and the risks for civil society, see 'Special Rapporteur on human rights while countering terrorism', UN Doc. A/70/371 (n 22), paras. 31–36.

²³⁹ See Press Conference, Special Rapporteur on human rights while countering terrorism, Martin Scheinin, 26 October 2010, cited in HCPR Working Paper (2011), http://www.un.org/press/en/2010/101026_Scheinin.doc.htm, accessed 15 May 2017.

NGOs have reoriented their operations to areas where there are no designated terrorist groups, or shifted their priorities to ensure first and foremost that they limit their contacts with, or bring indirect support to, any designated terrorist group. In turn, this has meant that responding to humanitarian needs can become a secondary concern, and has thus seriously impacted their ability to remain neutral, impartial, and independent. Others have simply refused to take funding from certain donors, which has affected their ability to access financial resources.

Specific counter-terrorism measures have also affected civil society's perceived independence, neutrality and impartiality, and have thus impacted its ability to work with certain groups, governments, or in certain areas.²⁴⁰ That certain NGOs are asked by the Security Council to report to the UN on groups and beneficiaries to which humanitarian assistance is being delivered²⁴¹ gives the impression that even humanitarian actors are being co-opted into the UN's broader counter-terrorism agenda. Policies such as the vetting of NGOs by donors also have an impact on NGOs' independence, and ability to work in a climate of trust with local implementing partners.²⁴²

²⁴⁰ For a general discussion, see Annyssa Bellal and Stuart Casey-Maslen (2011), 'Rules of engagement: Protecting civilians through dialogue with non-state actors', Geneva Academy of International Humanitarian and Human Rights Law, <https://nlbcdytz.preview.infomaniak.website/joomlatools-files/docman-files/Research%20documents/Rules-of-Engagement-EN.pdf>, accessed 19 October 2017, pp. 15 and 16. See also Mackintosh and Duplat (n 235), at 81; Harvard Program on Humanitarian Policy and Conflict Research (n 235), at 32; and Jessica Burniske with Naz Modirzadeh and Dustin Lewis (2014), 'Counter-terrorism laws and regulations: What aid agencies need to know', Humanitarian Practice Network at ODI Number 79 (November), p. 3 and Ashley Jackson and Abdi Aynte (2013), 'Talking to the other side: Humanitarian negotiations with Al-Shabaab in Somalia', HPG Working Paper (December), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8744.pdf>, accessed 15 May 2017, p. 6.

²⁴¹ See e.g. UN Security Council resolution 1916 (2010), para. 11. See also 'Special Rapporteur on human rights while countering terrorism' (n 22), UN Doc. A/70/371, para. 31.

²⁴² See Burniske et al. (n 240), at 6. See also Neal Cohen, Robert Hasty and Ashley Wonton (2014), 'Implications of the USAID partner vetting system and state department risk analysis and management system under European Union and United Kingdom data protection and privacy law, counterterrorism and humanitarian engagement project', Counterterrorism and Humanitarian Engagement Project, Research and Policy Paper, March.

Civil society's ability to operate has been impacted by restrictions in available funding in areas where terrorist groups are active,²⁴³ as well as by an increased reliance from donors on what may be seen as 'safe' implementing partners, such as UN agencies, other international or regional organizations, and large NGOs, to the detriment of smaller or local NGOs.²⁴⁴ In addition, counter-terrorism legislation has also affected NGOs' access to financial services.²⁴⁵ To protect themselves from any risk of liability under counter-terrorism legislation,²⁴⁶ some banks have refused to process transactions involving 'high-risk' environments or actors.²⁴⁷ NGOs have found that their ability to access financial services, including banking services, has been reduced, while other NGOs have seen their bank accounts altogether closed.

Given the importance of civil society in addressing the conditions conducive to the spread of terrorism, countering the appeal of violent extremism, protecting and promoting human rights and the rule of law, and delivering humanitarian relief, counter-terrorism measures that have a negative impact on the ability of the NGO sector to operate effectively and independently can ultimately be counterproductive in reducing the

²⁴³ Mackintosh and Duplat (n 235), at 82 for an example in Somalia, where following the listing of Al-Shabaab as a terrorist organization in 2008, 'a single instance of diverted aid or payments to local authorities was now potentially a crime under US law for which both USAID and its implementing partners could be held accountable'.

²⁴⁴ Mackintosh and Duplat (n 235), at 104.

²⁴⁵ Human Rights Council resolution 27/21: 'Concerned that unilateral coercive measures have, in some instances, prevented humanitarian organizations from making financial transfers to States where they work'.

²⁴⁶ 'The limited revenue that most INGOs may generate for a bank is not sufficient to justify the risks that banks believe doing business with INGOs will expose them to'. See Victoria Metcalfe-Hough, Tom Keatinge and Sara Pantuliano (2015), 'UK humanitarian aid in the age of counter terrorism: Perceptions and reality', Humanitarian Policy Group, ODI, <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9479.pdf>, accessed 15 May 2017, p. 13.

²⁴⁷ See Martin Arnold and Sam Fleming (2014), 'Regulation: bank counts the risks and rewards', *Financial Times*, 14 November, <https://www.ft.com/content/9df378a2-66bb-11e4-91ab-00144feabdc0>, accessed 19 October 2017. On the risks of these practices for money laundering and counter terrorist financing, see The Commonwealth and La Francophonie (2015), 'Walking a tightrope: AML/CTF regulation, financial inclusion and remittances', Annual Commonwealth & Francophonie Dialogue with the G20 Discussion Paper, 3.9, April.

threat posed by terrorism.²⁴⁸ In addition, this lacks coherence: the ability of civil society actors to be effective in countering terrorism and violent extremism depends in part on its ability to engage with communities in proximity to a terrorist threat, whether that is in areas where terrorist groups are active, or where the risk of radicalization has been demonstratively proven. NGOs cannot be asked to contribute to mitigating the risk while at the same time risking prosecution when they do so.

The preventing or countering violent extremism agenda, which has gained momentum in the past few years, and was fully consecrated by the Secretary-General's Plan of Action to Prevent Violent Extremism²⁴⁹ contains the seeds of the risk of instrumentalization of various fields of State involvement – such as human rights promotion and protection, development, education, gender issues, and democracy. While the Secretary-General is right in stressing that individuals are often not drawn to terrorist violence in a vacuum and thus that it is essential to take seriously the so-called 'conditions conducive to the spread of terrorism' contained in Pillar I of the UN GCTS,²⁵⁰ it is just as important to ensure that they remain long-term objectives in their own right, and not just as a part of the broader State agenda to counter or prevent violent extremism.²⁵¹ While human rights violations may be a factor conducive to violent extremism, the State must respect, protect and promote the rights of all individuals, of all ages, genders, ethnic or religious belonging without discrimination, regardless of any broader agenda, including the prevention and countering of violent extremism. Ending prolonged conflicts, fighting against impunity must be pursued as ends in themselves, and not only because they might be used by violent groups to recruit individuals to their cause, at the risk of undermining the *raison d'être* of international law, humanitarian values, or the UN itself.

²⁴⁸ 'Special Rapporteur on human rights while countering terrorism' (n 22), UN Doc. A/70/371, para. 45.

²⁴⁹ UN Doc. A/70/674 (n 47).

²⁵⁰ The conditions conducive of Pillar I include but are not limited to prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of the rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance.

²⁵¹ 'Special Rapporteur on human rights while countering terrorism', UN Doc. A/31/65, para. 50.

3. HUMAN RIGHTS WHILE COUNTERING TERRORISM: THE DEBATE, THE FRAMEWORK AND THE CHALLENGES

3.1 The Debate: Terrorism or Human Rights Versus Terrorism and Human Rights

As noted at the beginning of this chapter, the post-11 September 2001 context has brought with it a discourse of 'exceptionalism'. After initial statements promoting values such as human rights, the rule of law and democracy, the fear of terrorist attacks and the need to look tough on terror soon led governments to argue that the new terrorist threat was such that there was a stark choice to be made between guaranteeing national security on the one hand and preserving individual freedoms and liberty on the other. In this Hobbesian perspective, preserving security was prioritized over the protection of human rights. The assault on human rights went even further, as human rights were also portrayed as an *impediment* to security. States whose human rights records were far from stellar were able to proudly display as exemplary their rights-limiting measures, using terrorism as their new justification, while States that had proudly upheld human rights attempted to evade their human rights obligations through various legal constructions. Throughout, human rights advocates were often accused of being irresponsibly soft on terrorism. All of this was apparently done to comply with Security Council resolutions, and much of the legislation was adopted in the absence of criticism from international monitoring bodies (CTC or FATF monitoring mechanisms). A rollback phenomenon was observed post-2006 largely led by the General Assembly, national courts, and civil society. Yet it is clear that with each new wave of terrorist attack or threat, in new regions and by new terrorist groups, new rights-limiting measures are adopted with little consideration for human rights, as the new State of emergency proclaimed in France shows, or various statements referring to a 'war' being waged.

Yet this doesn't need to be so. It may be a commonplace, but it is worth bearing in mind that the modern international human rights framework, embodied in the Universal Declaration of Human Rights, was born in 1948, after some of the most brutal atrocities of the twentieth century. The international framework that was built upon in the next fifty years, which includes a set of binding international treaties and monitoring mechanisms, was not built in a vacuum by idealists who had no foot in reality. The framework itself is not only rooted in genocidal

atrocities but developed in an era that had as its backdrop the Cold War, a number of brutal conflicts in many regions of the world and the existence of terrorist threats and terrorist attacks in all regions of the world. The framework itself is realist and flexible, and rooted in the common belief that security can only be achieved where the dignity of all human beings was to be respected, where no one is unworthy of human rights protection.

There is truth in the fact that it is easier to point to how the post-9/11 framework has harmed the human rights framework than it is to show the successes that it has had in effectively countering terrorism. This is largely due to the secretive nature of national security, which means that successes remain secret.²⁵² Yet, it is also true that counter-terrorism measures are, and must remain, a subject of legal and societal debate among States' citizens, and it has never been compellingly argued that the post-2001 context is different in nature or intensity to past threats to national or international security, nor have any convincing results been presented of how the post-2001 security approach, which weighed the threat of terrorism against human rights, has produced effective results. In fact, a bird's view would show that some sixteen years after 9/11, the security approach to countering terrorism has not been as effective as it was promised to be, with the threat of terrorism looming large, the emergence of new and more virulent terrorist groups, and the commission of acts of terrorism in all regions of the world on an almost daily basis. The UN Secretary-General made that clear in his Plan of Action to Prevent Violent Extremism, where he stated: 'Over the past two decades, the international community has sought to address violent extremism [that leads to terrorism] primarily within the context of security-based counter-terrorism measures adopted in response to the threat posed by Al-Qaida and its affiliated groups. However, with the emergence of a new generation of groups, there is a growing international consensus that such counter-terrorism measures have not been sufficient to prevent the spread of violent extremism (...). There is a need to take a more comprehensive approach which encompasses not only on-going, essential security-based counter-terrorism measures, but also systematic preventive measures which directly address the drivers of violent extremism that have given rise to the emergence of these new and more virulent groups (...). I am convinced that the creation of open, equitable, inclusive and pluralist societies, based on the full respect of human rights and with economic

²⁵² Roach (n 26), at 431.

opportunities for all, represents the most tangible and meaningful alternative to violent extremism and the most promising strategy for rendering it unattractive'.²⁵³

Terrorism, together with the new concept of violent extremism, are highly complex phenomena. While much more work and study needs to be carried out about what brings any individual to turn to terrorist groups and commit acts of terrorist violence, the links between human rights and these phenomena are emerging. There is general consensus that human rights violations are one of the conditions that are conducive to terrorism. This was already made clear in the UN GCTS, and recalled by the Secretary-General in his Plan of Action to Prevent Violent Extremism: 'we must also acknowledge that [violent extremism that leads to terrorism] does not arise in a vacuum. Narratives of grievance, actual or perceived injustice, promised empowerment and sweeping change become attractive where human rights are being violated, good governance is being ignored and aspirations are being crushed (...)'.²⁵⁴ There is also agreement that the fight against terrorism is itself a fight for human rights and fundamental freedoms, democratic values, the rule of law, and pluralism. These humanistic, universal values cannot be defended through means that are contrary to them, as that would render their defense meaningless. Finally, to come full circle, there is also consensus that countering terrorism without respecting human rights can be counter-productive, as human rights violations are one of the conditions conducive to terrorism. This is what the General Assembly meant in the UN GCTS when it reaffirmed that 'the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing'.²⁵⁵

3.2 The Right Framework: Counter-Terrorism and Human Rights

The apparent dichotomy between human rights and security was made possible through the opposition of two seemingly contrary State obligations: its obligation to protect individuals from acts of terrorism, and its

²⁵³ UN Doc. A/70/674 (n 47), paras. 4–7.

²⁵⁴ See UN GA UN GCTS, Pillar I and 'Secretary General's plan of action to prevent violent extremism', UN Doc. A/70/674 (n 47), paras. 3 and 7.

²⁵⁵ UN Doc. A/RES/60/288, Pillar 4 of the Plan of Action.

obligation to respect IHRL.²⁵⁶ Yet it is important to note that States' duty to protect individuals under their jurisdiction from terrorist attacks is itself an obligation that arises out of human rights law. Indeed, States have not only a general duty to protect individuals under their jurisdiction against interference in the enjoyment of human rights,²⁵⁷ but a more specific duty to ensure respect for the right to life²⁵⁸ and the right to security of every person within its territory.²⁵⁹ This includes an obligation to take all appropriate and necessary steps to safeguard the lives of those within their jurisdiction. States must put in place effective criminal justice and law enforcement systems, such as measures to deter the commission of offences and investigate violations where they occur; ensure that those suspected of criminal acts are prosecuted; provide victims with effective remedies; and take other necessary steps to prevent

²⁵⁶ Each State has a duty to respect, protect and fulfil human rights, arising out of their specific treaty obligations (core human rights treaties include the International Covenant on Economic, Social and Cultural Rights, and the ICCPR and their Optional Protocols; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol; the Convention on the Rights of the Child and its two Optional Protocols; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the International Convention for the Protection of All Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities and its Optional Protocol. There are also various regional treaties on the protection of human rights and fundamental freedoms), or out of customary international law (these bind all States even if they are not party to a particular treaty. Some of the rights set out in the UDHR are widely regarded to hold this character, as well as some rights included in the ICCPR). In addition, some rights are recognized as having a special status as *jus cogens* (peremptory norms of customary international law), which means that there are no circumstances whatsoever in which derogation from them is permissible. According to the International Law Commission's articles on State responsibility, these include the prohibitions of torture, slavery, genocide, racial discrimination, crimes against humanity, and the right to self-determination.

²⁵⁷ On all this section, see Office of the High Commissioner for Human Rights (n 186), at 8 and 9.

²⁵⁸ This right is protected in most human rights treaties, and has been described as the 'supreme right', without which others are without meaning. See Human Rights Committee (1982), 'General Comment No. 6' and Nowak (n 108), at 121.

²⁵⁹ See Human Rights Committee, views on communication No. 859/1999, *Luis Asdrúbal Jiménez Vaca v. Colombia*, 25 March 2002, para. 7.3.

a recurrence of violations. In addition, international and regional human rights law has recognized that, in specific circumstances, States have a positive obligation to take preventive operational measures to protect an individual or individuals whose life is known or suspected to be at risk from the criminal acts of another individual,²⁶⁰ which certainly includes terrorists. Also important to highlight is the obligation on States to ensure the personal security of individuals under their jurisdiction where a threat is known or suspected to exist.²⁶¹ It can thus be said that the provision of security from terrorist attacks and the protection of human rights are not separate obligations, but are in fact part of one and the same obligation; which in turn triggers another requirement: that all measures taken to counter terrorism also comply with human rights.

One has to be cognizant of the difficulties inherent in the propositions made above. It can be very challenging for States to adopt effective counter-terrorism measures that fully comply with the international human rights framework. Yet the human rights framework, with its in-built flexibilities, was specifically conceived to enable States to address their changing security needs. As noted by the ICJ's Eminent Jurist Panel:

[h]uman rights and humanitarian law were not drafted with peace and political stability in mind. Rather, the very *raison d'être* of this legal system is to provide States with the framework that allows them to respond effectively to even the most serious of crises. Accordingly, human rights are not, and can never be, a luxury to be cast aside in times of difficulty. International law is the bulwark that will help States respond effectively whatever difficulties arise.²⁶²

IHRL thus allows for two types of restrictions to rights: limitations to a number of qualified rights and, in a very limited set of exceptional circumstances, derogations. States may also legitimately limit the exercise of certain rights, including the right to freedom of expression, to freedom of association and assembly, to freedom of movement and to respect for private and family life. In order to fully respect their human rights obligations while imposing such limitations, States must respect a number of conditions: the limitations must be prescribed by law, they

²⁶⁰ *Kiliç v. Turkey*, App. no. 22492/93 (ECtHR, 28 March 2000), para. 62. See also Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, judgment of 29 July 1988, para. 174.

²⁶¹ Human Rights Committee, views on communication No. 195/1985, *Delgado Páez v. Colombia*, 12 July 1990 (A/45/40 (vol. II), annex IX, s. D).

²⁶² International Commission of Jurists (n 71), at 18.

must be in a pursuit of a legitimate aim, and they must respect the principles of proportionality and non-discrimination. In the case of rights-limiting measures taken to counter terrorism, respect for the principle of legality is critical. It is important to bear in mind that the law must be accessible, precise and respect the principle of certainty of the law. Criminal laws must also comply with the principle of non-retroactivity: conduct that occurred prior to its entry into force as applicable law must not be criminalized and any penalties must be limited to those applicable at the time that any offence was committed, unless the law provides for a lighter penalty. There is little doubt that the countering of terrorism is an important objective which can, in principle, permit the limitation of certain rights. Yet States must not use this justifiable objective as a pretext to broaden State powers in other areas.²⁶³ Finally, it should be noted that the principle of proportionality has a critical link to the effectiveness of any counter-terrorism measure. States that adopt rights-limiting measures must be prepared to bring evidence of their effectiveness, as an ineffective measure will likely not comply with the principle of proportionality.

In addition, in genuine emergencies which threaten the life of the nation, States may derogate from certain human rights provisions under the ICCPR. Article 4 of the ICCPR sets out the formal and substantive requirements which a State party must fulfil to derogate legitimately from certain obligations under the Covenant. In addition to the need to immediately inform the other States Parties to the Covenant, through the intermediary of the UN Secretary-General, of the provisions from which it has derogated and of the reasons by which it was actuated, a state must fulfil a number of substantive conditions. Derogations must only take place in a time of 'public emergency which threatens the life of the nation'. In its General Comment No. 29, the Human Rights Committee has stated that such an emergency is one of an exceptional nature. While it is theoretically possible that this be triggered by terrorist acts or by the threat of terrorism, this must be assessed on a case-by-case basis. Any derogation under article 4(1) of the Covenant may only be 'to the extent strictly required by the exigencies of the situation'. Derogations must thus be understood as exceptional, temporary measures, and the restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of the derogating State. In

²⁶³ Offences created under counter-terrorist legislation, along with any associated powers of investigation or prosecution, must be limited to countering terrorism. See 'Special Rapporteur on human rights while countering terrorism', UN Doc. E/CN.4/2006/98, para. 47.

addition, any derogating measure must comply with the principles of necessity and proportionality. A rational link must exist between the derogating measure and the objective pursued and the measure must be the least intrusive on the right derogated from as possible. Finally, derogations must not be discriminatory.

A State may, however, never derogate from certain rights, which are considered so important that regardless of the nature of the threat they can never be set aside. Article 4(2) of the ICCPR identifies as non-derogable the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, the prohibition against slavery and servitude, freedom from imprisonment for failure to fulfil a contract, freedom from retrospective penalties, the right to be recognized as a person before the law, and freedom of thought, conscience and religion. In its General Comment No. 29, the Human Rights Committee has also emphasized that the Covenant's provisions relating to procedural safeguards can never be made subject to measures that would circumvent the protection of these non-derogable rights. In addition, article 4(1) of the ICCPR specifies that any derogating measures must not be inconsistent with obligations under international law which, as the Human Rights Committee has pointed out in its General Comment No. 29, includes obligations under IHRL, IHL and international criminal law. The Committee also identified rights and freedoms under customary international law that may not be derogated from even if not listed in article 4(2): The right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; the prohibitions against the taking of hostages, abductions or unacknowledged detention; the international protection of the rights of persons belonging to minorities; the deportation or forcible transfer of population without grounds permitted under international law; and the prohibition against propaganda for war or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.

In light of these flexibilities, the choice, then, for a State with a demonstrated need to adapt the level of human rights protection is not to choose between respect for human rights on the one hand and security on the other. Rather, the State must work within the human rights framework to adapt the level of protection to the needs of the State, be it protecting populations during a high-profile event such as the World Cup, to protect the methods used by intelligence agencies during the trial of an individual accused of acts of terrorism, or to protect its population after a series of terrorist attacks on its territory and a risk of more to come. As

noted by the former Special Rapporteur on the promotion and protection of human rights while countering terrorism:

[t]hrough the careful application of human rights law it is possible to respond effectively to the challenges involved in the countering of terrorism while complying with human rights. There is no need in this process for a balancing between human rights and security, as the proper balance can and must be found within human rights law itself. Law is the balance, not a weight to be measured.²⁶⁴

3.3 The Challenge: Upholding Human Rights While Countering Terrorism

In the post-9/11 context, the judiciary and civil society²⁶⁵ have played a particularly important role in reintroducing human rights law where it had been cast aside, as well as in assisting governments and parliaments in finding human rights-compliant ways to counter-terrorism. Some of the most emblematic cases have already been referred to, such as the US Supreme Court case of *Holder*, where the court simply reintroduced international law where the government had attempted to create a new legal framework from which international law was absent. In the cases of *Rasul* and *Boumediene*, the same court gave detainees at Guantanamo Bay access to courts for a judicial review of their detention, despite the fact that US Congress had denied them this right. In the case of *Charkaoui*,²⁶⁶ the Canadian Supreme Court declared that an important part of Canada's counter-terrorism architecture, its regime of Security Certificates violated the right to security of the person as protected by the Canadian Charter. Indeed, the Court noted the existence of a number of other, less rights-limiting alternatives through which the information serving as the basis for the certificates could be protected while at the same time affording the individuals subject to the certificates greater right of defence, and noted – through an evaluation of the necessity of the measures – that less restrictive means existed to protect the sensitive information, and thus that the infringement to the individual's rights could not be justified. Other examples abound. In addition to the

²⁶⁴ 'Special Rapporteur on human rights while countering terrorism', UN Doc. A/HRC/16/51, para. 12.

²⁶⁵ David Cole (2016), 'Engines of liberty: How civil society helped restore constitutional rights in the aftermath of 9/11', Just Security, 28 March, <https://www.justsecurity.org/30249/engines-liberty-civil-society-helped-restore-constitutional-rights-aftermath-911/>, accessed 15 May 2017.

²⁶⁶ *Charkaoui v. Canada (Minister of Citizenship and Immigration)* (n 197).

ECtHR's progressive jurisprudence relating to accountability to victims in the context of the 'war of terror', notably *El-Masri*, *Al-Nashiri* and *Nasr and Ghali*, a number of national courts have also held the executive to account for human rights abuses committed in the name of national security and counterterrorism.²⁶⁷

In the context of mass data surveillance, the Court of Justice of the European Union (CJEU)²⁶⁸ outlawed bulk access to contents data,²⁶⁹ by stating that access on a generalized basis to the content of electronic communications compromises the 'essence' of the fundamental right to respect for private life.²⁷⁰ Further, following its decision that the mandatory retention of metadata relating to a person's private life and communications is in itself an interference with the right to privacy,²⁷¹ the CJEU ruled that national legislation which provides for 'general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication' is contrary to EU law.²⁷² The ECtHR, for its part, has developed the requirement of 'reasonable suspicion' in the context of bulk interception,²⁷³ noting that the entity authorizing interception must be 'capable of verifying the existence of a reasonable suspicion against the

²⁶⁷ E.g., High Court of Kenya, *Salim Awdah Salim et al. v. Commissioner of Police and al.*, Petition No. 822 of 2008, 31 July 2013.

²⁶⁸ Case C-362/14, *Maximilian Schrems v. Data Protection Commissioner* (CJEU, 6 October 2015).

²⁶⁹ Martin Scheinin (2015), 'Mass surveillance and the right to privacy: Adding nuance to the Schrems case', Just Security, 13 October 2015, <https://www.justsecurity.org/26781/adding-nuance-context-max-schrems-case-safe-harbor/>, accessed 15 May 2017.

²⁷⁰ The Court also noted that the simple access to personal data by public authorities, even in the absence of any further processing of that data, was an interference into the right to privacy. This welcome position is also that taken in the US Court of Appeal for the Second Circuit, *ACLU v. Clapper*, no. 14-42-cv, 2015 WL 2097814, (2d Cir. 2015), 7 May 2015 and in UK Investigatory Powers Tribunal, *Privacy International v. Secretary of State for Foreign and Commonwealth Affairs and Others* [2016] UKIPTrib 15_110-CH.

²⁷¹ Joined Cases C-293/12 and C-594/12, *Digital Rights v. Ireland* (CJEU, 8 April 2014). On the decisions's impact, see e.g. District Court of the Hague striking down the Dutch data retention legislation NL:RBDHA:2015:2498, District Court of the Hague, 11 March 2015, Case no. C/09/480009/KG/ZA 14/.

²⁷² Joined Cases C-203/15 *Tele2 Sverige AB v. Post-och telestyrelsen* and C-698/15 *Secretary of State for Home Department v. Tom Watson and Others* (CJEU, 21 December 2016).

²⁷³ *Szabo and Vissy v. Hungary*, App. no. 37138/14 (ECtHR, 12 January 2016) and *Zakharov v. Russia*, App. no. 47143/06 (ECtHR, 4 December 2015).

person concerned', that the authorization itself must 'clearly identify' a specific person or a single set of premises, and that there must be the 'ability to verify whether sufficient reasons for intercepting a specific individual's communications exist in each case'.²⁷⁴ At national level, the US' bulk telephone metadata collection programme under Section 215 of the Patriot Act²⁷⁵ was declared illegal through the case of *ACLU v. Clapper*.²⁷⁶ In the UK, the Investigatory Powers Tribunal held, on 17 October 2016,²⁷⁷ that the regime for obtaining bulk communications data and for the retention of bulk personal datasets (prior to government acknowledgement in 2015), could not be 'foreseeable by the public when it was not explained to parliament'.²⁷⁸ In Germany, the Constitutional Court ruled that screening data across several private and public databases in order to find potential terrorists ('sleepers') was illegal.²⁷⁹ Regarding international cooperation between intelligence agencies, the UK's Investigatory Powers Tribunal ruled that the intelligence-sharing agreements between the UK's GCHQ and the US' NSA pertaining to their UPSTREAM and PRISM programmes were unlawful prior to 5 December 2014, due to their secrecy.²⁸⁰ Through these rulings, which

²⁷⁴ See also in Canada: case of *R v. Rogers*, 2016 ONSC 70, in which the Court produced a set of guidelines to ensure that orders to obtain customer information from telecommunications providers are proportionate.

²⁷⁵ Using section 215 of the Patriot Act, the NSA requested that the telephone metadata associated with telephone calls made by and to American citizens be turned over in bulk by phone companies to be collected and aggregated into a repository or data bank that could later be queried.

²⁷⁶ *ACLU v. Clapper* (n 270).

²⁷⁷ *Privacy International v. Secretary of State for Foreign and Commonwealth Affairs and Others* (n 270). See also the critical 'Review of Directions given under Section 94 of the Telecommunications Act 1984', July 2016 by the Interception of Communications Commissioner (IOCCO). See also the application to Strasbourg, *10 Human Rights Organisations v. the UK*, App. no. 24960/15, particularly the applicants' reply to observations of the government of the UK, September 2016.

²⁷⁸ This case focused on the quality of the law, without considering whether the bulk data collection regimes were proportionate, per se. Note that the operational case for the use of bulk powers was examined by the Independent Reviewer of Terrorism Legislation, David Anderson (2016), 'Bulk powers review – Report', August.

²⁷⁹ German Constitutional Court, 1 BvR 518/02, 22 May 2016.

²⁸⁰ They were considered lawful thereafter, as certain of the policies had been made public during the case before the Tribunal. Investigatory Powers Tribunal, *Liberty/Privacy Cases*, 6 February 2015 [2015] UKIPTrib 13_77-H, and 5 December 2014, [2014] UKIPTrib 13_77-H., application to Strasbourg, *10*

require governments to provide a human rights justification for the use of mass surveillance technology and reaffirm the applicability of the key human rights principles of legality, necessity and proportionality to interferences to the right to privacy, courts have actively curtailed mass surveillance programmes.

A most emblematic example of a progressive dialogue between courts and governments on finding counter-terrorism measures that satisfy a human rights framework is to be found in the UK's attempt at finding a solution to its administrative detention of foreigners regarding whom there is an alleged risk of being linked to terrorism, but who cannot be deported without a risk of refoulement. In 2001, the UK adopted the Antiterrorism, Crime and Security Act, which included, in its now infamous Part IV, the indeterminate detention of non-citizens regarding whom removal or deportation was not possible without violating the absolute prohibition of refoulement. The power to detain applied where the Secretary of State issued a certificate indicating his belief that the person's presence in the UK was a risk to national security and that he suspected the person of being an international terrorist. In order to act fully within the human rights framework, which included both the absolute prohibition of refoulement and ECHR requirement that such detention was possible only 'with a view to deportation or extradition,'²⁸¹ the UK accompanied this provision with a derogation from the ECHR. In addition, by including this power under immigration law rather than criminal law, the UK was able to use secret evidence, which would not have been allowed under criminal law, where the use of electronic surveillance is prohibited. Indeed, this provision was to be administered by a specialized tribunal, the Special Immigration Appeal Commission, which was allowed to consider both 'open' materials (that can be made public) and 'closed' materials (that – for reasons of national security – cannot be made public) through the appointment of security cleared counsels ('Special advocates') to challenge the evidence without such evidence being disclosed to the applicant.

During the lifetime of the legislation, only 16 individuals were certified under this provision and detained. Yet some of these individuals contested their detention, and in the *Belmarsh case*,²⁸² the House of Lords found that although there was a public emergency that threatened the life of the nation, the detention regime under Part IV of the 2001 Act

Human Rights Organisations v. the UK (n 277), particularly the applicants' reply to observations of the government of the UK, September 2016.

²⁸¹ See Article 5(1)(f) ECHR.

²⁸² *A. v. Secretary of State* [2004] UKHL 56, 16 December 2004.

and the use of immigration law as a tool to counter-terrorism was a disproportionate and non-rational response to the threat to security. The grounds for reaching their conclusion included first, that the legislation was discriminatory, because it only affected non-nationals, while the terrorist threat also came from British nationals; and, second, that it left individuals suspected of being international terrorists at liberty to leave the UK and continue their activities abroad.²⁸³ The House of Lords thus made a declaration of incompatibility, which is not binding on the parties, and which meant that the applicants remained in detention. The case eventually made it to the ECtHR,²⁸⁴ which concluded like the House of Lords that the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals.

In March 2005, the UK government replaced Part IV with ‘control orders’²⁸⁵ which could be made on the basis of intelligence leading to a reasonable suspicion of involvement of any individual in terrorism-related activities. Such activities were broadly defined,²⁸⁶ and while courts could review control orders, they could only quash them if they were ‘obviously flawed’. Control orders stopped short of the criticisms that applied to Part IV: they were not discriminatory, affecting nationals and foreigners alike, and stopped short of outright detention. They could nonetheless result in punitive house arrests, limit places of residence, and require individuals to surrender their passports. They have been challenged at national level for violating the right to liberty as well as the right to a fair trial, although they were never challenged before the ECtHR. On the right to liberty, the House of Lords concluded that although an 18-hour curfew was excessive, a 14-hour curfew did not

²⁸³ Lord Bingham noted that ‘the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem’, *ibid.*, para. 43.

²⁸⁴ *A. and Others v. UK* (n 193) App no. 3455/05 (ECHR, 19 February 2009).

²⁸⁵ Prevention of Terrorism Act 2005, Chapter 2.

²⁸⁶ See Terrorism Act 2000 which includes ‘serious damage to property’. This is at variance with the Special Rapporteur on human rights while countering terrorism’s proposed definition that terrorism only applies where there is serious harm to human beings. See UN Doc. A/HRC/16/51, Model provision 7. See also other terrorist offences included in the 2005 Act, which are also considered as overly broad by the Special Rapporteur, UN Doc. E/CN.4/2006/98/Add.1, para. 18.

violate the right to liberty.²⁸⁷ On the question of the right to a fair trial, notably the use of secret evidence and the Special advocates, the Lords relied on the reasoning of the ECtHR.²⁸⁸ In 2011, control orders were abandoned and replaced by terrorism prevention and investigation measures that did not allow the imposition of house arrests or relocation orders.²⁸⁹

While not subject to outright judicial condemnation, control orders could be seen as another example of a State attempting to circumvent the normal functioning of criminal law. Some have highlighted that because the link to any possibility of deportation or removal was gone, they were more akin to ‘preventive justice’, ‘future law’ and ‘pre-punishment’, where courts blindly accept the State’s characterization of such interventions as civil and preventive when they have effects that are similar to criminal punishments, and where imprecise tools like intelligence are used for imposing legal consequences.²⁹⁰ Their effectiveness was questioned. Indeed, seven individuals placed under control orders absconded, and while curfews did sufficiently prevent contact with others to be effective in countering acts of terrorism, they did prevent the gathering of evidence of crimes based on preparations for terrorism. In turn, this raises the question of their proportionality as a counter-terrorism measure, as discussed earlier. It seems – like in the case of preventive detention – that a more effective and fairer solution would have been found in prosecution of these individuals: those guilty of acts of terrorism, including inchoate offences, should be punished accordingly, while those against whom there is little to no evidence should be released. Yet, control orders could also be seen as an example of a State attempting to find a human rights compliant solution in response to a series of condemning rulings, to an identified and complex counter-terrorism requirement, within the framework of its national legislation (whose criminal law did not permit the use of intercept evidence).

This is also the position one can have vis-à-vis another aspect of this question, which relates to diplomatic assurances. Othman (Abu-Qatada) had been detained under a Part IV order, before being subject to a control

²⁸⁷ *Secretary of State for the Home Department v. JJ and Others* [2007] UKHL 45; *Secretary of State for the Home Department v. MB and AF* [2007] UKHL 46; *Secretary of State for the Home Department v. E and S* [2007] UKHL 47.

²⁸⁸ See *A. and Others v. UK* (n 193).

²⁸⁹ Terrorism Prevention and Investigation Measures Act 2011.

²⁹⁰ See Lucia Zedner’s analysis discussed in Roach (n 26), at 281. See more broadly on this question, Kent Roach’s analysis (n 26), at 280–87.

order. In 2005, he was due to be deported to Jordan, based on a memorandum of understanding (MoU) signed between the UK and Jordan, which was seen as a way to deport those the UK wanted out of its territory, while circumventing the absolute prohibition of refoulement. The ECtHR ruled that while the MoU sufficiently mitigated the risk of ill-treatment upon return, for the first time the Court ruled that – due to a real risk that in any retrial in Jordan, evidence obtained in breach of the absolute prohibition of torture would be used against him – there was a real risk of flagrant denial of justice. This meant that the individual could still not be returned to Jordan. The UK government complied with the ruling, despite serious opposition at home, then negotiated a specific treaty, which stipulated that if there was ‘a real risk’ that a statement was obtained through torture, it could not be admitted as trial evidence unless the prosecutor first proved ‘beyond any doubt’ that it was not coerced. It was on this basis that the applicant was sent back to Jordan. While this treaty has been criticized as being worthless,²⁹¹ this entire episode throughout which the UK has tried to solve one of its main counter-terrorism and human rights challenges, namely how to deal with individuals regarding whom there is intelligence-based information that they are somehow linked to terrorism, without violating the absolute prohibition of refoulement, and maintaining its own internal prohibition on the use of electronic surveillance as evidence, does highlight how a constructive human rights-based and solutions-oriented dialogue can take place to address States’ concerns in this field.

4. CONCLUSION

The link between terrorism and human rights violations, armed conflict, migration, marginalization, discrimination and impunity is increasingly apparent. There is now ample evidence that responses to terrorism adopted outside the international legal framework are not only ineffective but can also be counter-productive. Yet, in addressing new terrorist threats, States have continued to adopt measures that still do not comply with the international human rights, humanitarian and refugee law framework, despite the progressive jurisprudence from national and regional courts that reaffirm the applicability of IHRL in the context of countering terrorism. There is an undeniable need to understand that to

²⁹¹ See HRW (2014), ‘Abu Qatada trial showed UK/Jordan Torture Treaty is worthless’, 11 July, <https://www.hrw.org/news/2014/07/11/abu-qatada-trial-showed-uk/jordan-torture-treaty-worthless>, accessed 19 October 2017.

break the cycle of terrorist violence, counter-terrorism strategies must not only go beyond a strict security approach to countering terrorism, but must also respect all human rights, as an element of comprehensively addressing all the conditions conducive to terrorism and violent extremism that may lead to terrorism. Human rights law, humanitarian and refugee law are not impediments to effectively countering terrorism. Security and the protection of the rights and dignity of all individuals are complementary and mutually reinforcing. It is thus essential that any measure to counter terrorism be grounded in, and fully respect, international law.