

Countering Terrorism, Protecting Human Rights



A Manual

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A Manual



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List of Abbreviations and Acronyms

ACHR	American Convention on Human Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCJE	The Council of Europe's Consultative Council of European Judges
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CETS	Council of Europe Treaty Series
CFI	Court of First Instance of the European Communities
CFR	European Charter of Fundamental Rights
CFR-CDF	EU Network of Independent Experts in Fundamental Rights
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
CSECE	Conference on Security and Co-operation in Europe
CTC	UN Counter-terrorism Committee
CTED	Counter-terrorism Committee Executive Directorate
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (also known as European Convention on Human Rights)
ECommHR	European Commission on Human Rights
ECJ	European Court of Justice of the European Communities
ECOSOC	UN Economic and Social Council
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
ECSR	European Committee of Social Rights
EU	European Union
FCNM	Council of Europe Framework Convention for the Protection of National Minorities
FRA	European Fundamental Rights Agency
HCNM	High Commissioner on National Minorities
HRC	UN Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	UN Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
OJ	Official Journal of the European Communities
SIT	Special Investigative Technique
SMR	Standard Minimum Rules for Treatment of Prisoners
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
UDHR	Universal Declaration of Human Rights
UN	United Nations

Foreword

Since its origin in 1975 as the Conference on Security and Co-operation in Europe (CSCE), the OSCE has taken a comprehensive view of security. The human dimension of security — the protection of human rights and fundamental freedoms and the promotion of strong democratic institutions and rule of law — is considered to be as important for the maintenance of peace and stability as are the politico-military and economic dimensions. The Warsaw-based Office for Democratic Institutions and Human Rights (ODIHR) is the principle OSCE institution within the human dimension. Its overall task is to help ensure that OSCE commitments in the human dimension are implemented in the participating States. To that end, it is mandated to gather and analyse factual information on the state of implementation and to conduct programmes that assist states to develop and uphold a democratic culture that will respect and promote the principles expressed in those commitments. These commitments have been adopted over the years by the OSCE states. They are numerous and detailed; they concern the full protection of human rights, as well as democracy and the rule of law.

After the tragic events of 11 September 2001, countries throughout the OSCE region intensified their efforts to counter global threats of terrorism and violent extremism. Recognizing the need for mutual co-operation, the 56 OSCE participating States came together at a ministerial conference in Bucharest at the end of 2001 to agree upon a collaborative, international approach to tackling the threat, which they enshrined in a Plan of Action.

Noting that the newly heightened security environment puts at risk a number of fundamental rights and freedoms, including the rights to a fair trial, to privacy, and the freedoms of association and of religion or belief, participating States pledged under the Plan to fully respect international law, including the international law of human rights, in the development and implementation of their counter-terrorism initiatives. It was understood that poorly conceived counter-terrorism policies and practices, especially those that are drafted too broadly, or applied too forcefully, can compound resentment and therefore be counter-productive.

Recognizing this challenge, participating States tasked the ODIHR to offer to states technical assistance and advice for the appropriate implementation of anti-terrorism policies in line with their international obligations and human rights commitments, while simultaneously fostering collaboration between government agencies, national experts and civil society in addressing factors which engender conditions in which terrorists may recruit and win support.

This manual is one of the results that have emerged from the mandate given to the ODIHR. It aims to familiarize states' senior policy makers with the fundamental human rights standards they are obliged to adhere to under international law when devising efforts to combat terrorism and extremism. Although it has been developed to supplement a three-day training course, it is formulated as a working manual; a stand-alone reference for policy makers and counter-terrorism practitioners.

OSCE participating States are not only bound by the United Nations Conventions in this field; the vast majority of them are also Member States of the Council of Europe. In addressing this, the manual also refers to case law of the European Court of Human Rights, legal precedents that serve as working examples of how fundamental human rights law as set out by United Nations Conventions are applied in practical contexts. It gives in-depth guidance on, *inter alia*, the international frameworks protecting human rights and countering terrorism, extra-territorial application of international human rights obligations, and the rights to life, liberty, fair trial, privacy, freedom of expression and association, and how they may be respected in the context of countering terrorism. The impact of the absolute prohibitions on torture and ill-treatment are explained in the context of renditions, expulsions and extraditions.

States' policy makers are under immense pressure to be seen to be taken positive action in respect of terrorist threats, and are frequently facing competing political, logistical, and information requirements. I wish to offer all such policy makers the support of the ODIHR. I hope that this manual will facilitate their work and help them to maintain the highest standards of professionalism.

Ambassador Christian Strohal
ODIHR Director

Introduction

The best — the only — strategy to isolate and defeat terrorism is by respecting human rights, fostering social justice, enhancing democracy and upholding the primacy of the rule of law.

The late Sergio Vieira de Mello, UN High Commissioner for Human Rights (2002)

Our responses to terrorism as well as our efforts to thwart it and prevent it, should uphold the human rights that terrorists aim to destroy. Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism — not privileges to be sacrificed at a time of tension.

Former UN Secretary General, Kofi Annan (2003)

The OSCE participating States will not yield to terrorist threats, but will combat them by all means in accordance with their international commitments.... They will defend freedom and protect their citizens against acts of terrorism, fully respecting international law and human rights. They firmly reject identification of terrorism with any nationality or religion and reconfirm the norms, principles and values of the OSCE.

OSCE Bucharest Ministerial, Decision No. 1 on Combating Terrorism

This manual outlines the fundamental human rights principles that are most commonly engaged in the fight against terrorism. It explains states' obligations in respect of those rights when dealing with terrorism. Counter-terrorism strategies that are compliant with human rights not only avoid certain legal pitfalls, but may also prove more effective in the long term at winning the ideological battle against terrorism than strategies that themselves violate human rights.

One of the side effects of terrorist activity and the international response to it has been the tendency to pit the ideas of liberty and security against each other. The notion of human rights protection has often been presented as being in conflict with protection from terrorism. Nothing could be further from the truth. International human rights standards emerged from a need, and obligation, to control violent and extreme behaviour. United Nations human rights standards were, in part, created to deal with the ravages of political extremism, violence and war of the 1930s and 1940s. Human rights instruments are structured to respond to conflict and to provide the mechanisms to ensure peace and stability. The international human rights framework is therefore applicable in dealing with the terrorist threat, from addressing its causes, to dealing with its perpetrators, to protecting its victims, to limiting its consequences.

States have an obligation to provide protection against terrorism. Human rights standards impose positive obligations on states to ensure the right to life, protection from torture, and other human rights and freedoms. Acts of terrorism are likely to infringe on all of the rights that are part of a state's positive duty to protect. This does not necessarily mean that an act of terrorism amounts to a failure to protect by the state. However, if the state fails to take adequate and appropriate measures to protect those rights, the state itself bears some responsibility for the violation. An effective counter-terrorism strategy can therefore be a part of a state's human rights obligations.

Terrorism *per se* is an anathema to human rights. Modern human rights standards are rooted in the following four simple values:¹ freedom from want; freedom from fear; freedom of belief; and freedom of expression. These freedoms form the core principles of the Universal Declaration of Human Rights (UDHR), which sets out the fundamental elements of international human rights accepted by United Nations member states and elaborated in many subsequent human rights treaties. The UDHR is accepted as “a common standard of achievement for all peoples and all nations.”²

The random nature of terrorist acts undermines freedoms and, consequently, the international human rights framework. This is not because human rights represent a pacifist doctrine. Even the UDHR accepts that people may “be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression.”³ Still, even extreme circumstances cannot justify the use of random acts of violence or threats of violence against civilians. Human rights standards envisage a society that is based on the rule of law and democratic values. Therefore, even in the pursuit of such a society, using acts of terrorism, which are themselves in direct contradiction with those values, is never justified.

Internationally recognized human rights standards require governments to take into account and implement certain key universal principles. This imposes a level of discipline and rigour upon government agencies. If they ignore or misapply those human rights standards, they are to be held accountable before an independent and impartial court. As a general principle, the more severe the potential human rights violation, the greater the scrutiny that should be carried out by both decision makers and courts. Human rights standards ought to be uppermost in the minds of those implementing a counter-terrorism policy.

Counter-terrorism mechanisms and enforceable human rights standards are intimately linked. Counter-terrorism laws and practice that damage or destroy human rights are self-defeating and unacceptable in a society governed by human rights, the rule of law and democratic values.

How this manual works

This manual is designed as both a stand-alone tool and as a complement to the OSCE/ODIHR training programme for policy makers and practitioners working in counter-terrorism in OSCE participating States. It explains how human rights standards and counter-terrorism techniques work hand in hand. The manual and training programme are aimed at assisting states in ensuring that their counter-terrorism strategies comply with human rights standards and, as such, are more likely to meet their objectives.

Part I begins by emphasizing the relationship between human rights and counter-terrorism and stresses the need for clearly defined laws and principles to ensure the effectiveness of both. It then sets out the existing counter-terrorism and human rights frameworks in international law and discusses the ways in which the two ought to work together. Parts II and III outline key themes in promoting human rights and protecting against terrorism, and explain

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- 1 These were most famously articulated by the US President Franklin D. Roosevelt as “the four freedoms”, in his aims for the post-war world.
 - 2 Universal Declaration on Human Rights, adopted by the UN General Assembly, Resolution 217(III) of 10 December 1948, Preamble.
 - 3 *Ibid*, Preamble, third recital.

how human rights standards work, in particular the central principles most directly relevant to developing practical counter-terrorism strategies.

Sources of human rights within the manual

The human rights principles and standards found in this manual are those that apply in the OSCE region, although not every standard mentioned is binding on every participating State. These standards are largely reflected in the OSCE human dimension commitments, which drew their initial inspiration from the UN human rights framework. In addition, the manual relies on Council of Europe obligations and mechanisms to protect and promote human rights, as the great majority of OSCE participating States are also members of the Council of Europe.⁴ Moreover, the Council of Europe has, for over fifty years, created a body of human rights law and legal principles that can be readily applied and provide a useful interpretative tool for human rights in general. OSCE commitments frequently make reference to the Council of Europe's expertise in the field of human rights.⁵

Additionally, where appropriate, the work of other regional bodies such as the African Union, the Inter-American system and the European Union (EU) is reflected, as are, on occasion, the relevant decisions of domestic courts.

OSCE human dimension commitments provide a consistent thread throughout this manual. These politically binding commitments represent the essential values of the OSCE, which is not only a community of values, but also a community of responsibility. OSCE participating States have recognized that pluralistic democracy based on the rule of law is the only system of government suitable to guarantee human rights effectively.⁶

The human rights standards referred to in this manual provide a guide to the current and developing framework of human rights applicable to counter-terrorism in the OSCE region. These consist of both "hard" and "soft" law, as well as other commitments undertaken by some or all OSCE participating States. They should help policy makers and practitioners in OSCE participating States to ensure that their own developing counter-terrorism measures are fully compliant with their OSCE human dimension commitments and international obligations.

4 Forty-seven of the 56 OSCE participating States are members of the Council of Europe, and are therefore parties to the European Convention on Human Rights.

5 See, for example, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991 Moscow Document) para. 31: "The participating States acknowledge the extensive experience and expertise of the Council of Europe in the field of human rights." Available at <http://www.osce.org/documents>.

6 See for example, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990 Copenhagen Document), Preamble. Available at <http://www.osce.org/documents>.

PART I

Introduction to the International Framework
to Counter Terrorism and Protect Human Rights

Human Rights and Counter-terrorism: The Essential Relationship

The link between the guarantee of human rights and protection from terrorism cannot be over-emphasized. Combating and ultimately overcoming terrorism will not succeed if the means to secure that society are not consistent with human rights standards. The OSCE is built on the principle that the guarantee of security requires a multi-dimensional approach. Such an approach does not call for the balancing of liberty and security or suggest that liberty, or aspects of it, must be sacrificed to achieve security. On the contrary, the OSCE regards protection of human rights as an integral element of security. Counter-terrorism tactics that do not comply with human rights law may ultimately be declared unlawful, resulting in failed prosecutions or overturned convictions. Counter-terrorism tools that do not comply with human rights are therefore liable to be ineffective.

In the Charter on Preventing and Combating Terrorism, OSCE participating States confirmed that they:

[...] 5. Consider of utmost importance to complement the ongoing implementation of OSCE commitments on terrorism with a reaffirmation of the fundamental and timeless principles on which OSCE action has been undertaken and will continue to be based in the future, and to which participating States fully subscribe;

6. Reaffirm their commitment to take the measures needed to protect human rights and fundamental freedoms, especially the right to life, of everyone within their jurisdiction against terrorist acts;

7. Undertake to implement effective and resolute measures against terrorism and to conduct all counter-terrorism measures and co-operation in accordance with the rule of law, the United Nations Charter and the relevant provisions of international law, international standards of human rights and, where applicable, international humanitarian law;[...]⁷

From the case law of international courts and tribunals, as well as domestic courts, and the work of UN mechanisms, we know that some counter-terrorism measures have resulted in:

- prolonged detention without charge;
- denial of the right to challenge the lawfulness of detention;
- denial of access to legal representation;
- monitoring of conversations with lawyers;
- incommunicado detention; and

⁷ The Charter was adopted at the Tenth Meeting of the Ministerial Council (2002 Porto Charter). Available at www.osce.org/documents.

- ill-treatment, even torture, of detainees as well as inhuman and degrading conditions of detention.

Measures have also been adopted that have unlawfully denied freedom of expression, freedom of assembly and freedom of association, thus resulting in the criminalization of protest and the stifling of public debate. Asylum and refugee law and practice have been particularly affected, with individuals being illegally deported and refugee claims being improperly considered. Racial profiling has been used in discriminatory ways. Overall, the result of such measures has not led to a diminution of the terrorist threat, but it has undermined the values of democracy, the rule of law and a civil society.

Counter-terrorism, security, human rights and law enforcement are not mutually exclusive. In the context of the threat of terrorism, they should be designed to work together. In most circumstances, they cannot work effectively independently of each other. Counter-terrorism measures need human rights standards to ensure that their implementation does not undermine their very purpose, which is to protect and maintain a democratic society. At the same time, human rights standards may need counter-terrorism measures to ensure that human rights can thrive. What is certain is that human rights are not an optional extra or luxury to any counter-terrorism strategy; human rights must be at the core of that strategy.

In November 2001, a joint statement by the OSCE's Office for Democratic Institutions and Human Rights (ODIHR), the UN High Commissioner for Human Rights, and the Council of Europe reminded governments that:

While we recognise that the threat of terrorism requires specific measures, we call on all governments to refrain from any excessive steps which would violate fundamental freedoms and undermine legitimate dissent. In pursuing the objective of eradicating terrorism, it is essential that States strictly adhere to their international obligations to uphold human rights and fundamental freedoms.⁸

Acts of terrorism can be countered in ways that uphold human rights standards. In 2005, UN Secretary General, Kofi Annan emphasized that:

Human rights law makes ample provision for counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective — by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element.⁹

8 Joint statement by Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights, 29 November 2001, at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/4E59333FFC5341A7C1256B13004C58F5>.

9 UN (former) Secretary General Kofi Annan, "A Global Strategy for Fighting Terrorism", Keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, 8-11 March 2005, Madrid, available at <http://summit.clubmadrid.org/keynotes>.

Senior judicial figures have also acknowledged the importance of human rights values in combating terrorism. For example, US Supreme Court Justice Sandra Day O'Connor, commented in 2004:

It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.¹⁰

In 2002, the Council of Europe Secretary General, Walter Schwimmer, pointed out:

The temptation for governments and parliaments in countries suffering from terrorist action is to fight fire with fire, setting aside the legal safeguards that exist in a democratic state. But let us be clear about this: while the State has the right to employ its full arsenal of legal weapons to repress and prevent terrorist activities, it may not use indiscriminate measures which would only undermine the fundamental values they seek to protect. For a State to react in such a way would be to fall into the trap set by terrorism for democracy and the rule of law. It is precisely in situations of crisis, such as those brought about by terrorism, that respect for human rights is even more important and that even greater vigilance is called for.¹¹

What is terrorism?

Although the international community has adopted a number of international treaties that are designed to combat specific types of terrorism, such as the hijacking of aircraft, at the UN level to date there has been no agreement on a definition of terrorism.¹² There is no settled definition of terrorism in international law, despite many attempts to achieve one by intergovernmental organizations, governments, and academics.¹³ One International Court of Justice judge has observed, "terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both."¹⁴ However, as such, much is at stake in the definition of terrorism.¹⁵ To call an act terrorism is to assert not just that it possesses certain characteristics, but that it is wrong. To define an act as a terrorist act also has significant consequences with regard to co-operation between states, such as intelligence sharing, mutual legal assistance, asset freezing and confiscation and extradition.

10 US Supreme Court, *Hamdi v. Rumsfeld*, (03-6696) 542 U.S. 507 (2004), Opinion of O'Connor, J. also at <http://www.supremecourtus.gov/opinions/03pdf/03-6696.pdf>.

11 Preface to the CoE *Guidelines on human rights and the fight against terrorism*, (Council of Europe Publishing, Strasbourg, June 2004).

12 The Rome Statute of the International Criminal Court does not contain express reference to acts of terrorism, despite a number of proposals in earlier drafts. However the Statute does apply to and define a number of crimes including crimes against humanity and other offences that can include acts of terrorism. Terrorist acts can, in certain circumstances, constitute crimes against humanity. For details and further references, see A. Cassese, *International criminal law* (Oxford, 2003), pp. 120-132.

13 Although see the core elements agreed in the Declaration on Measures to Eliminate International Terrorism, in the annex to UN General Assembly Resolution A/RES/49/60, 9 December 1994. The Declaration states (para. 3) that terrorism includes "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."

14 R. Higgins, *The general international law of terrorism*, in R Higgins, M. Flory, (Eds.), *Terrorism and international law* (London, 1997), p. 24.

15 S. Marks, A. Clapham, *International Human Rights Lexicon* (Oxford, 2005), p. 345.

The difficulty in defining terrorism is that it is caught up with the notion that it can be, in particular circumstances, legitimate to use violence. From George Washington to Nelson Mandela, most struggles for independence from colonialism and claims of self-determination have resulted in some form of violence that can be (and have been) described as terrorism. At the same time, an overly broad definition of terrorism can be used to shut down non-violent dissent and undermine democratic society.

The first ill-fated attempt to define terrorism in an international instrument was in the 1937 Geneva Convention for the Prevention and Punishment of Genocide, which defined terrorism as “all criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.” This definition was criticized for its lack of precision, and the Convention never entered into force as it did not receive the necessary number of ratifications. Nonetheless, ensuring an appropriate definition of terrorism is key to an effective international approach to combating terrorism. This is not just because of the political and moral connotations that accompany the term, but also because there are significant legal consequences.

Terrorism occurs in many different contexts and takes different forms. Without seeking to define terrorism here, we can consider some of its consistent features including:

- its organized nature (whether the organization involved is large or small);
- its dangerousness (to life, limb and property);
- its attempt to undermine government in particular (by seeking to influence policy and law-makers);
- its randomness and consequential spreading of fear/terror among a population.

A prevailing characteristic of acts of terrorism is that they are crimes even if they have an additional quality that requires that they be considered “terrorist” in nature. Terrorist acts are criminal acts and subject therefore to the normal rigours of criminal law. It does not make a difference to the applicability of human rights standards whether the issue under review is deemed to be a terrorist act as opposed to any other serious criminal act.

The draft Comprehensive Convention on Terrorism

The draft Comprehensive Convention on Terrorism currently being considered by the UN attempts to define terrorist action. The definition of terrorism in the current draft of the Convention is controversial. It states in Article 2:¹⁶

Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:

- (a) death or serious bodily injury to any person; or
- (b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
- (c) damage to property, places, facilities, or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by

¹⁶ UN General Assembly, Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Sixth session (28 January-1 February 2002), doc. A/57/37.

its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or abstain from doing any act.

This is a wide definition, which has been criticised for its lack of precision.¹⁷ Under the definition, terrorism includes not only action causing death or serious bodily injury, but also “*serious damage* to public or private property” and *any* (not only serious) damage that is likely to result in “major economic loss.” This is qualified by a requirement of intent either to intimidate a population, or to “compel a Government or an international organisation to do or abstain from doing any act.” The threat of any such action, where it is “credible or serious,” is also an offence, and it is an offence to attempt terrorist action or to “contribute” to the commission of terrorist offences.¹⁸

Some have argued that in relation to armed conflict, the draft Convention, also fails to properly protect those in a legitimate liberation struggle, whilst providing legal protection to those exercising the use of force unlawfully.¹⁹

Under the draft Convention, states would be obliged:

- to criminalize conduct within the definition;
- to prosecute or extradite; and
- to co-operate in crime prevention and investigation.

The draft Convention also requires states to deny refugee status (in conformity with international human rights law) to those who “there are serious reasons for considering” have been involved in activity within the definition of terrorism contained in the Convention.

Other matters related to defining terrorism

A solution to the difficulty in defining terrorism may be to focus instead on preventing and/or punishing conduct that is of a genuinely terrorist nature. In this regard, the international community, although unable to agree on a definition of terrorism, has agreed that certain acts constitute terrorist offences.²⁰ These offences, such as airline hijacking, are now the subject of international treaties.

Another example is the 2005 Council of Europe Convention on the Prevention of Terrorism. Although it does not define terrorism, it requires member states to create new criminal offences in relation to acts that may lead to terrorism offences already established by the UN treaties and protocols on terrorism. Under the Council of Europe Convention, states have to extradite and/or prosecute in relation to the new preparatory offences created under the Convention.

17 F. Andreu-Guzmán, *Terrorism and human rights No. 2 - New challenges and old dangers*, International Commission of Jurists Occasional Papers No. 3 (Geneva, 2003), p. 34.

18 The scope of these provisions is problematic from a human rights point of view, in particular as concerns the principle of legality enshrined in Article 15 ICCPR and Article 7 ECHR. Draft Article 2 highlights the tension between the security and the human rights approach: the broad definition of terrorism creates potential difficulties with freedom of expression, freedom of association, fair trial rights and private life.

19 See, for example, *op. cit.*, note 17, Andreu-Guzmán, pp. 34-35.

20 See Chapter 4 below.

At European Union level, member states have agreed on a minimum definition in the EU Framework Decision on Combating Terrorism. This definition sets out a list of criminal acts, which must be considered as terrorist acts for the purposes of international co-operation between EU member states if they have any of the following objectives:

- to seriously intimidate a population; or
- to unduly compel a government or international organization to perform or abstain from performing any act; or
- to seriously destabilize or destroy the fundamental structures of a country or an international organization.²¹

While the Framework Decision seeks to harmonize a minimum threshold for offences to be classified as terrorist offences, it does not prevent EU member states from having a more extensive definition of terrorism in their national laws.

The United Nations Working Group on Arbitrary Detention said that it is “concerned at the extremely vague and broad definitions of terrorism in national legislation. On several occasions it has noted that ‘either *per se* or in their application, (these definitions) bring within their fold the innocent and the suspect alike and thereby increase the risk of arbitrary detention, disproportionately reducing the level of guarantees enjoyed by ordinary persons in normal circumstances.’”²² The problem of vague definitions of terrorism is exacerbated in national legislation referring to the extremely vague notion of “extremism”.

Conditions conducive to terrorism and terrorism’s root causes

The OSCE Action Plan on Combating Terrorism states that:

No circumstance or cause can justify acts of terrorism. At the same time, there are various social, economic, political and other factors, including violent separatism and extremism, which engender conditions in which terrorist organizations are able to recruit and win support. The OSCE’s comprehensive approach to security provides comparative advantages in combating terrorism by identifying and addressing these factors through all relevant OSCE instruments and structures.²³

And, the OSCE Charter on Preventing and Combating Terrorism points out that OSCE participating States:

Are convinced of the need to address conditions that may foster and sustain terrorism, in particular by fully respecting democracy and the rule of law, by allowing all citizens to participate fully in political life, by preventing discrimination and encouraging intercultural and inter-religious dialogue in their societies, by engaging civil society in finding common po-

21 EU Council Framework Decision of 13 June 2002 on combating terrorism, (2002/475/JHA), OJ L 164, 22/06/2002, Art. 1(1).

22 Report of the Working Group on Arbitrary Detention to the UN Commission on Human Rights, doc. E/CN.4/2004/3, 15 December 2003, para. 64.

23 Bucharest Plan of Action for Combating Terrorism, para. 9, annexed to 2001 Bucharest Ministerial Council Decision No. 1, Combating terrorism, Document of the Ninth Meeting of the Ministerial Council (2001 Bucharest Document).

litical settlement for conflicts, by promoting human rights and tolerance and by combating poverty [...] ²⁴

The UN High Level Panel on Threats, Challenges and Change identified in its report to the UN Secretary General that:

A thread that runs through all such concerns is the imperative to develop a global strategy of fighting terrorism that addresses root causes and strengthens responsible States and the rule of law and fundamental human rights. What is required is a comprehensive strategy that incorporates but is broader than coercive measures.

The United Nations, with the Secretary-General taking a leading role, should promote such a comprehensive strategy, which includes: [...]

C. Development of better instruments for global counter-terrorism cooperation, all within a legal framework that is respectful of civil liberties and human rights, including in the areas of law enforcement; intelligence-sharing, where possible; denial and interdiction, when required; and financial control [...]. ²⁵

As noted above, the primary objective of this manual is to explain how the effective application of human rights will contribute to the success of counter-terrorism strategies. In this regard, it must be emphasized that human rights do not exist in isolation. A human rights compliant state does not pick and choose the rights that apply to it, but must apply all human rights to all persons within its jurisdiction. History is littered with examples of the denial or partial application of human rights leading to conflicts and terrorist acts. States must acknowledge that human rights exist as a whole and include economic, social and cultural rights, as well as civil and political rights.

²⁴ *Op. cit.*, note 7, 2002 Porto Charter, para. 20.

²⁵ Report of the UN Secretary General's High-level Panel on Threats, Challenges and Change, "A more secure world: our shared responsibility" (December 2004), para. 148.

Protecting the Rights of Victims of Terrorist Attacks

The rights of victims of terrorism are protected by human rights law. The specific rights outlined later in this manual will therefore apply, where relevant, to victims of terrorism. Under international human rights law states have a general duty to protect human rights. This may mean putting into place a proper legal framework for criminalizing certain activity that violates human rights²⁶ and for dealing with victims of terrorism.²⁷ States have a duty to provide protection for victims of crime, including acts of terrorism.

There is a positive obligation on the state to protect identifiable potential victims who are at a real and immediate risk of serious crime or terrorist acts, which the law-enforcement agencies know about or ought to have known about.²⁸ Under these circumstances, the state must take all reasonable measures to put in place procedures and practices to prevent terrorist activity and to minimize the collateral impact of counter-terrorism activities.

Victims of terrorism and their families have the right to an effective remedy when their rights have been violated in relation to terrorist acts. OSCE participating States have agreed that those who claim that their rights have been violated have the right to a public hearing before an independent and impartial tribunal.²⁹ This means that there must be effective access to court for such victims. The right to an effective remedy for violation of human rights is a key protection for victims of human rights violations. It requires that a range of remedies is available to victims of serious crime, which includes an effective investigation and prosecution of alleged offenders.³⁰

Although the right to a fair trial is principally concerned with defendants, it also acknowledges that the rights of witnesses must be respected. For example, if necessary, screens and other equipment can be used in court to protect vulnerable witnesses.³¹ However, if a less restrictive measure can suffice then that measure should be applied.³² Victims' rights to privacy

26 ECtHR, *X. and Y. v. The Netherlands*, Application no. 8978/80, 26 March 1985, paras. 24-30.

27 The Recommendation of the Committee of Ministers of the Council of Europe to member states on assistance to crime victims of 14 June 2006, Rec(2006)8, helpfully explains what this duty requires.

28 "The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction [...]. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual [...]", ECtHR, *Osman v. UK*, Case no. 87/1997/871/1083, 28 October 1998, para. 115.

29 Concluding Document of the Vienna Meeting (Third Follow-up Meeting to the Helsinki Conference) (1989 Vienna Document), *Principles*, para. 13. Available at <http://www.osce.org/documents>.

30 ECtHR, *Aydin v. Turkey*, Case no. 57/1996/676/866, 25 September 1997, paras. 103-109.

31 ECtHR, *X. v. UK*, (1992) 15 EHRR CD 113.

32 ECtHR, *Van Mechelen and Others v. the Netherlands*, Cases nos. 55/1996/674/861-864, 18 March 1997, para. 58.

should also be respected, especially where this relates to medical confidentiality.³³ Effective prosecution of terrorist offenders is a key to protecting the rights of victims; miscarriages of justice do nothing to protect the rights of victims and may lead to impunity for the real offenders. The guarantee of the right to a fair trial is essential, therefore, to the protection both of the rights of the suspect and of the rights of victims. Impunity for those alleged to have committed serious violations of human rights standards is an affront to the victims of those violations. From the perspective of victims' rights, therefore, impunity is a key issue.

Compensation for victims and their families may form an essential part of any counter-terrorism strategy that is human rights compliant. The Council of Europe Guidelines on Human Rights and the Fight against Terrorism acknowledge that:

When compensation is not fully available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State must contribute to the compensation of the victims of attacks that took place on its territory, as far as their person or their health is concerned.³⁴

In the Council of Europe context, additional Guidelines on the Protection of Victims of Terrorist Acts³⁵ address:

- emergency assistance;
- continuing assistance;
- investigation and prosecution;
- effective access to the law and to justice;
- administration of justice;
- compensation;
- protection of the private and family life of victims;
- protection of the dignity and security of victims;
- information for victims; and
- specific training for those responsible for assisting victims.

The European Union has also adopted legislation on the standing of victims in criminal proceedings in general, which apply equally to the victims of terrorist acts.³⁶ This legislation is binding on EU member states and deals with issues such as compensation, access to courts and protection of witnesses. It also covers victims who are not resident in the state in question.

33 "In this connection, the Court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community [...]", ECtHR, *Z. v. Finland*, Case no. 9/1996/627/811, 25 January 1997, para. 95.

34 Guideline XVII (Compensation for victims of terrorist acts), *op. cit.*, note 11, *Human rights and the fight against terrorism*, p. 12.

35 Adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers' Deputies.

36 EU Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), OJ L 082/1, 22/03/01, pp. 1-4.

OSCE participating States are committed to allowing victims of unlawful arrest or detention to seek compensation.³⁷ While they have not adopted commitments relating specifically to compensation for victims of terrorism, they are committed to solidarity with the victims of terrorism.³⁸

37 *Op. cit.*, note 5, 1991 Moscow Document, para. 21.2.

38 OSCE Permanent Council decision No. 618 of 1 July 2004 underlined the need to strengthen solidarity among participating States for the victims of terrorism. In particular, States were invited to explore the possibility of introducing or enhancing appropriate measures, subject to domestic legislation, for support, including financial support, to victims of terrorism and their families.

Counter-terrorism, Human Rights, Good Governance and Good Administration

While this manual is primarily concerned with implementing international human rights standards within counter-terrorism policies and, as such, its focus is the relevant standards in international human rights law, it is also concerned with ensuring that there are effective mechanisms of implementation and accountability not only at the international level but, in particular, domestically.

Good or just administration is essential to the functioning of a democratic society. A guarantee of good administration fundamentally alters the notion and concept of government; it shifts the culture of authority in relation to administrative acts to a culture of justification. This is reflected in the establishment of a right to good administration contained in the Charter of Fundamental Rights of the European Union,³⁹ which demonstrates a growing international awareness of good administration as a fundamental building block of democracy.

The establishment of monitoring bodies and mechanisms to oversee government enhances public confidence in the integrity and acceptability of governments' activities. These include ombudsmen and human rights commissions, which can be especially effective when they have a dispute resolution function. OSCE participating States are committed to "[...] facilitat[ing] the establishment and strengthening of independent national institutions in the area of human rights and the rule of law, which may also serve as focal points for co-ordination and collaboration between such institutions in the participating States [...]".⁴⁰

Government transparency and accountability are also promoted by an independent and active media that is responsible, objective and impartial, and whose freedom to report and comment upon public affairs, including issues of counter-terrorism policy, is protected by law. A free and active civil society can also contribute to ensuring government transparency and accountability.

What is good governance?

To ensure that human rights are effectively protected at the domestic level there must be in place proper systems of government, as well as good administration. The following are some elements of good governance:

- legality and the rule of law;
- absence of corruption;
- absence of discrimination;
- procedural fairness in the decision-making process;

³⁹ Charter of Fundamental Rights of the European Union (CFR), OJ C 364/1 (2000/C 364/01), Article 41

⁴⁰ *Op. cit.*, note 6, 1990 Copenhagen Document, para. 27.

- substantive fairness in the decision-making process;
- efficiency;
- civil service independence;
- the right to judicial review before an independent and impartial tribunal;
- access to information.

At the heart of good governance, therefore, is accountability, and ultimately that accountability is guaranteed before an independent, impartial and informed judiciary. These are also the bedrock principles of good administration. As such, good governance cannot be delivered without good administration. Best democratic practice requires that the actions of governments may be scrutinized by the courts. This includes counter-terrorism policy as well as the practice of those implementing it. Those taking decisions in relation to countering terrorism should ensure that their actions and administrative practices comply in all respects with international human rights law.

The essential requirements of administrative law are:

- that administrative action is confined to areas authorized by the law;
- that each case be dealt with on its merits and without taking account of extraneous factors;
- that similar cases be treated consistently; and
- that persons taking decisions should not have any personal or other interest in the outcome.

Access to judicial review is key to ensuring good governance and good administration. Judicial independence is a prerequisite to effective judicial review. An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. One of the functions of the judiciary is to interpret and apply national constitutions and law consistently with international human rights standards.

To secure the independence of the judiciary the following principles need to be observed:

- judicial appointments should be made on the basis of clearly defined criteria and through a public process. The process should ensure:
 - * equality of opportunity for all those who are eligible for judicial office;
 - * appointment on merit; and
 - * that appropriate consideration is given to the progressive attainment of gender equality and the removal of other historic factors leading to discrimination;
- arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;
- adequate resources should be in place for the judicial system to operate effectively without any undue restraints;
- any interaction between the executive and the judiciary must not compromise judicial independence;
- judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly render them unfit to discharge their judicial duties. If disciplinary proceedings are brought that might lead to the removal of a judicial officer these must include appropriate safeguards to ensure fairness;

- the criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.

Good governance as efficient decision making: guiding principles

From an examination of the current state of international law, the following principles can be drawn in relation to what is meant by good administration.

An administrative authority when exercising discretionary power should:

- pursue only the purposes for which the power has been conferred;
- be unbiased and observe objectivity and impartiality, only taking into account factors relevant to a particular case;
- observe the principle of equality before the law;
- avoid discrimination;
- maintain a proper balance between any adverse effects that its decision may have on the rights, liberties or interests of persons and the purpose that it pursues;
- take decisions within a time that is reasonable with regard to the matters at stake;
- apply any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case.

Procedure

In relation to procedures, good administrative practices include:

- *Availability of guidelines*: any general administrative guidelines that govern the exercise of a discretionary power should be made public and communicated to the person concerned at his or her request;
- *The right to be heard*: in respect of any administrative act that affects individual rights and liberties, a person so affected should be entitled to put facts, arguments and evidence, which should be taken into account by the administrative authority. This includes the right to be informed of the right to be heard;
- *Access to information*: upon request, the person concerned should be informed before an administrative act is taken of all the relevant information;
- *Reasons*: where an administrative act adversely affects an individual's rights or liberties, that person should be informed of the reasons on which it was based. Reasons should be communicated to the person concerned within a reasonable time;
- *Indication of remedies*: where an administrative act could adversely affect individual rights, the administration should indicate the specific remedies available to affected individuals as well as any time limits.

Review

Finally, good administration entails the availability of review procedures:

- the exercise of discretionary powers should be subject to judicial review by a court;
- failure to reach a decision within a reasonable time should be subject to such review;
- the powers of the reviewing court should include the power to obtain information that is relevant to ensure it can carry out its functions properly;

- the reviewing court or tribunal must be able to give a binding decision that will be followed by the relevant administrative body;
- good and efficient administration needs to be flexible; however, this notion of flexibility must not undermine principles of fairness.

Civilian oversight

Civilian oversight of the police and security forces in the context of counter-terrorism will ensure greater transparency of counter-terrorism policies and enhance public trust in the efficacy of those strategies. Civilian oversight promotes transparent and accountable government.

The OSCE participating States have recognized civilian control of the military and police as “[...] among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings [...]”⁴¹ As a consequence of this, they have agreed that participating States will:

[...] 25.1 - ensure that their military and paramilitary forces, internal security and intelligence services, and the police are subject to the effective direction and control of the appropriate civil authorities;

25.2 - maintain and, where necessary, strengthen executive control over the use of military and paramilitary forces as well as the activities of the internal security and intelligence services and the police;

25.3 - take appropriate steps to create, wherever they do not already exist, and maintain effective arrangements for legislative supervision of all such forces, services and activities.⁴²

⁴¹ *Ibid.*, para. 5.

⁴² *Op. cit.*, note 5, 1991 Moscow Document.

The International Framework to Combat Terrorism: An Overview

The notion of terrorism is not new. Already in the 1930s, the League of Nations attempted to draw up anti-terrorism conventions. Throughout the twentieth century, domestic liberation movements across the globe frequently resorted to tactics of terror in the pursuit of self-determination.

The current legal framework

Thirteen global conventions have been adopted under the auspices of the UN, or its agencies, to combat specific aspects of terrorism. These have tended to be in response to a particular event or atrocity. They are:⁴³

- Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963;
- Convention for the Suppression of Unlawful Seizure of Aircraft, 1970;
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971;
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973;
- International Convention against the Taking of Hostages, 1979;
- Convention on the Physical Protection of Nuclear Material, 1980;
- Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988;
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988;
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988;
- Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991;
- International Convention for the Suppression of Terrorist Bombings, 1997;
- International Convention for the Suppression of the Financing of Terrorism, 1999;
- Convention on the Suppression of Acts of Nuclear Terrorism, 2005.

Each of these treaties, once ratified by a state, imposes slightly different obligations. As a general rule these include:

- establishing their jurisdiction over the offences described;
- making the offences punishable by appropriate penalties;
- taking alleged offenders into custody;
- prosecuting or extraditing alleged offenders;
- co-operating in preventive measures; and

⁴³ For a full explanation of each treaty see http://www.unodc.org/unodc/terrorism_conventions.html.

- exchanging information and evidence needed in related criminal proceedings.

At the same time, the offences referred to in each of the conventions are deemed to be extraditable offences between states parties under existing extradition treaties, and under the convention itself.

While the UN has been concerned with issues arising out of terrorism for many years, there has been an urgency to ensure an effective and co-ordinated international response since the events of 11 September 2001. These initiatives have mainly been taken in the UN Security Council, but the General Assembly and the Commission on Human Rights have become increasingly involved.⁴⁴

The UN Commission on Human Rights has now been replaced by the Human Rights Council. The procedures used by the Commission to promote and protect human rights, such as the work of the Sub-Commission and the special rapporteurs are to continue under the new Council. This manual therefore focuses on the procedures and approach of the old Commission, which retain their status.

The following are the key resolutions that form the basis of the UN's current approach:⁴⁵

- Security Council Resolution 1269 (1999), obliging states to co-operate to prevent and suppress terrorist attacks and to bring perpetrators to justice;
- Security Council Resolution 1373 (2001), obliging states to implement more effective counter-terrorism measures at national level and to increase international co-operation in the struggle against terrorism, and creating a Counter-Terrorism Committee to monitor action;
- Security Council Resolution 1456 (2003), obliging states to ensure that “any measure taken to combat terrorism comply with all their obligations under international law, and [to] adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law”;
- Security Council Resolution 1624 (2005), calling on states “to prohibit by law incitement to commit a terrorist act or acts” as well as prevention of such acts and the denial of safe haven to perpetrators. It also calls upon states to “continue international efforts to enhance dialogue and broaden understanding between civilisations in an effort to prevent the indiscriminate targeting of different religions and cultures [...]”;
- General Assembly Resolution 58/187 (2004): “States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law [and] raise awareness about the importance of these obligations among national authorities involved in combating terrorism.”

Of these resolutions, UN Security Council Resolution 1373 is of particular importance in that it provides a basis for domestic legal action against terrorism and a new basis for the UN's law-enforcement approach to anti-terrorist measures. The resolution, adopted under Chapter VII of the UN Charter, “decides that all states shall” take specific action to suppress the financing of terrorist acts, including criminalizing fundraising for terrorist groups,

⁴⁴ See, for instance, UN Commission on Human Rights, Resolution 2004/87, doc. E/CN.4/RES/2004/87, 21 April 2004.

⁴⁵ Each document and further details may be found at <http://www.un.org/terrorism>.

and freezing terrorists' assets. It also requires states to take law-enforcement steps to ensure that terrorist activity is prevented, and to co-operate and provide assistance in terrorist investigations.

Resolution 1373 requires that states shall:

Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.⁴⁶

The resolution requires all states to “exchange information in accordance with international and domestic law and co-operate on administrative and judicial matters to prevent the commission of terrorist acts”. The resolution also has consequences for asylum law. States are urged to “ensure, in accordance with international law, that refugee status is not abused by the perpetrators, organisers or facilitators of terrorist acts”. Finally, the resolution calls on all states to become party as soon as possible to the relevant international instruments on terrorism.

Resolution 1373 seeks to influence national law and practice in requiring particular domestic action, including legislative measures. The resolution established a committee of the Security Council, the Counter-terrorism Committee (CTC), to monitor compliance with and implementation of the resolution. States are required to submit reports to the Committee detailing their compliance with Resolution 1373 within 90 days of its adoption.

Resolution 1373 does not attempt to define terrorism. Instead, the obligation is on each member state of the UN to apply its own laws against terrorism effectively and therefore maintains member states' sovereignty in their own jurisdiction to establish a definition of terrorism.

Additionally, in 1999 the UN introduced “designation” as part of its sanctions framework against the Taliban. “Designation” is a mechanism whereby organizations and people can be listed, with consequent restrictions such as travel bans and asset freezing, if they are considered to be engaged with terrorism or its promotion. After 11 September 2001, the UN extended its sanctions framework against the Taliban to all groups and individuals associated with Al Qaida. The UN list requires the freezing of assets and resources connected to the designated groups and individuals. States are obliged to refrain from “providing any form of support, active or passive” to “entities or persons involved in terrorist acts.”⁴⁷

The role of human rights at the Counter-terrorism Committee

The CTC is composed of the members of the Security Council and is mandated to review measures taken by states to prevent and to punish acts of terrorism. The Security Council is not a human rights body, but as an organ of the UN it is required to act compatibly with the UN Charter and human rights standards, and including with *ius cogens* norms. Resolution

⁴⁶ UN Security Council Resolution 1373 of 28 September 2001, doc. S/RES/1373 (2001), para. 2(e).

⁴⁷ This issue of the freezing of assets, proscription and the designation of entities is dealt with below in detail at pages 77, 191-195 and 249-250.

1373 gave very little attention to human rights.⁴⁸ However, Security Council Resolution 1456, adopted eighteen months later, requires that “States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”⁴⁹

There is therefore an obligation to ensure that all domestic counter-terrorism measures are human rights compliant. There are doubts that this obligation is being met. For example, the High Commissioner for Human Rights has expressed “profound concern at the multiplication of policies, legislations and practices increasingly being adopted by many countries in the name of the fight against terrorism, which negatively affect the enjoyment of virtually all human rights – civil, cultural, economic, political and social.”⁵⁰ As will be seen below, similar concern has also been expressed by the UN Secretary General.

As part of the CTC’s efforts to ensure that human rights are taken seriously by states when implementing Security Council Resolution 1373, the Committee has now created an Executive Directorate (CTED). That Directorate, which includes human rights experts, liaises directly with the High Commissioner for Human Rights.

The CTED is also required to ensure that the CTC incorporates human rights into its work, as appropriate, noting the importance of states ensuring that counter-terrorism measures are consistent with their obligations under international law, in particular human rights law, refugee law and humanitarian law.

Human rights and counter-terrorism at the UN

Elsewhere within the UN structure, there have been additional developments from a human rights perspective. For example, since 1998, the Sub-Commission on the Promotion and Protection of Human Rights has appointed an expert on human rights and counter-terrorism. In 2005, a United Nations Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism was appointed. His term runs for three years.

Since 11 September 2001, resolutions have been adopted by the General Assembly and Commission on Human Rights explicitly calling on the relevant United Nations human rights mechanisms “to consider, within their mandates, the protection of human rights and fundamental freedoms in the context of measures to combat terrorism and to coordinate their efforts, as appropriate, in order to promote a consistent approach on this subject.”⁵¹ Since the Human Rights Council came into being in June 2006, it has endorsed the approach of the now defunct Commission for Human Rights in these respects.

48 The exception is a provision calling on states to ensure that measures to prevent abuse of asylum procedures take place “in conformity with the relevant provisions of national and international law, including international standards of human rights”, Security Council Resolution 1373, para. 3(f).

49 UN Security Council Resolution 1456 of 20 January 2003, doc. S/RES/1456 (2003), para. 6.

50 Report of the United Nations High Commissioner for Human Rights and follow-up to the World Conference on Human Rights: *Effective Functioning of Human Rights Mechanisms*, doc. E/CN.4/2004/4, 5 August 2003, p. 22 (report of the tenth meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups of the special procedures of the Commission on Human Rights and of the advisory services programme, which took place in Geneva from 23 to 27 June 2003).

51 See for example UN General Assembly, Resolution 58/187 of 22 March 2004, doc. A/RES/58/187, para. 7, and UN Commission on Human Rights, Resolution 2004/87, 21 April 2004, para. 6.

The High Commissioner for Human Rights is required to take an active role in examining the issue, and in particular, to make general recommendations and to provide relevant assistance and advice to states, upon their request.⁵² In April 2004 the Commission approved the appointment of an independent expert to assist the High Commissioner in implementing the resolution.⁵³

The UN Sub-Commission on the Promotion and Protection of Human Rights has also produced a study on the question of terrorism and human rights.⁵⁴ The Sub-Commission decided “to establish [...] a working group [...] with the mandate to elaborate detailed principles and guidelines, with relevant commentary, concerning the promotion and protection of human rights when combating terrorism, based, *inter alia*, on the preliminary framework draft of principles and guidelines contained in the working paper prepared by Ms. Koufa.”⁵⁵ These draft guidelines have not yet been approved but will provide an assessment of counter-terrorism measures, human rights standards and international humanitarian law.⁵⁶

Most significant, perhaps, in relation to the UN commitment to countering terrorism from a multi-disciplinary perspective is the launching of its Global Strategy for Fighting Terrorism.⁵⁷ The main elements of that strategy, and the role of the United Nations within it are:

- first, to dissuade disaffected groups from choosing terrorism as a tactic to achieve their goals;
- second, to deny terrorists the means to carry out their attacks;
- third, to deter states from supporting terrorists;
- fourth, to develop state capacity to prevent terrorism; and
- fifth, to defend human rights in the struggle against terrorism.

In relation to the last point, the then UN Secretary General Kofi Annan, in launching the strategy, emphasized the importance of human rights in combating terrorism. He regretted that

[...] international human rights experts, including those of the UN system, are unanimous in finding that many measures which States are currently adopting to counter-terrorism infringe on human rights and fundamental freedoms.⁵⁸

52 The work of the UN OHCHR in this area includes, among other things: the Report of the High Commissioner for Human Rights to the 58th session of the Commission on Human Rights, “Human Rights: A Uniting Framework”, doc. E/CN.4/2002/18, 27 February 2002; the *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism*, doc. HR/PUB/03/1 (New York and Geneva, 2003). Moreover, “former High Commissioner Mary Robinson and the late High Commissioner Sergio Vieira de Mello both addressed the CTC, urging it to take account of human rights in its review of counter-terrorism measures [...] Since then, the CTC and the UN Human Rights Committee have exchanged briefings on their working methods and areas of concern”, see <http://www.ohchr.org/english/issues/terrorism/index.htm>.

53 UN Resolution 2004/87, para. 10.

54 The study consists of a series of papers prepared between 1997 and 2004 by the Special Rapporteur on Human Rights and Terrorism of the Sub-Commission on the Promotion and Protection of Human Rights, Prof. Kalliopi K. Koufa. All the papers are available at <http://www.ohchr.org/english/issues/terrorism/rapporteur/index.htm>. Despite the abolition of the Commission and its replacement with the Human Rights Council, the Sub-Commission’s work continues.

55 Sub-Commission on the Promotion and Protection of Human Rights, Decision 2004/109 of 12 August 2004, doc. E/CN.4/Sub.2/DEC/2004/109, para. (a).

56 See the UN Sub-Commission on Human Rights, “Updated framework draft of principles and guidelines concerning human rights and terrorism”, Second expanded working paper prepared by Kalliopi K. Koufa, doc. A/HRC/Sub.1/58/30*, 3 August 2006.

57 *Op. cit.*, note 9, Kofi Annan, “A Global Strategy for Fighting Terrorism”.

58 *Ibid.*

UN member states subsequently endorsed a global counter-terrorism strategy in the form of a resolution. An annexed plan of action includes a section on the importance of ensuring respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.⁵⁹

The significance of the strategy is that it is the first time that all member states have agreed to a common strategic approach to fighting terrorism, not only sending a clear message that terrorism is unacceptable in all its forms and manifestations, but also resolving to take practical steps individually and collectively to ensure that human rights for all and the rule of law are at the heart of combating and preventing terrorism.

Regional approaches to counter-terrorism

Regional inter-governmental organizations have also committed themselves to defeating terrorism.⁶⁰

Organization for Security and Co-operation in Europe

The OSCE, as a regional inter-governmental organization concerned principally with collective security, has made a number of politically binding commitments in relation to counter-terroring terrorism. The objective of the OSCE is to create a comprehensive framework for peace and stability within the region. As such, OSCE states have recognized through commitments in what is known as the “human dimension” that pluralistic democracy based on the rule of law and the guarantee of human rights is the only system of government capable of guaranteeing such a comprehensive framework for security, peace and stability.

While the OSCE commitments in relation to counter-terrorism are wide-ranging and include, for example, a commitment for all OSCE states to ratify all the UN conventions and protocols relating to terrorism, the OSCE strategy is based on the Bucharest Plan of Action for Combating Terrorism.

As part of that action plan the following was agreed:

[...] Promoting human rights, tolerance and multi-culturalism: Participating States/Permanent Council/ODIHR/High Commissioner on National Minorities (HCNM)/Representative on Freedom of the Media:

59 UN General Assembly, Resolution 60/288 of 20 September 2006, doc. A/RES/60/288; see also <http://www.un.org/terrorism/strategy-counter-terrorism.html>.

60 Regional arrangements beyond the OSCE region include:

- Commonwealth of Independent States: Treaty on Co-operation among States Members of the Commonwealth of Independent States in Combating Terrorism, 1999;
- League of Arab States: Arab Convention on the Suppression of Terrorism, 1998;
- Organisation of the Islamic Conference: Convention of the Organisation of the Islamic Conference on Combating International Terrorism, 1999;
- Organisation of American States: OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, 1971;
- Organisation of African Unity: OAU Convention on the Prevention and Combating of Terrorism, 1999;
- South Asian Association for Regional Cooperation: SAARC Regional Convention on Suppression of Terrorism, 1987.

- Will promote and enhance tolerance, co-existence and harmonious relations between ethnic, religious, linguistic and other groups as well as constructive co-operation among participating States in this regard.
- Will provide early warning of and appropriate responses to violence, intolerance, extremism and discrimination against these groups and, at the same time, promote their respect for the rule of law, democratic values and individual freedoms.
- Will work to ensure that persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity.⁶¹

Subsequent to adopting this obligation, further and more-detailed human rights commitments have been undertaken.⁶²

Council of Europe

As the majority of OSCE participating States are also members of the Council of Europe, for the purpose of this manual, the Council of Europe legal mechanisms (both hard and soft law) are especially relevant. These include:

- The European Convention on the Suppression of Terrorism (1977) and Protocol thereto (2003);⁶³
- The European Convention on the Prevention of Terrorism (2005);⁶⁴
- Conventions relating to cyber crime and money laundering.⁶⁵

The Committee of Ministers of the Council of Europe has also produced a set of Guidelines on Human Rights and the Fight against Terrorism (2002). These are essential reading, and will be relied upon throughout this manual. The guidelines seek to reconcile legitimate national security concerns with the protection of fundamental freedoms in the context of the European system. They also stress the duty on states to protect human rights. The seventeen guidelines include the following:

- prohibition on arbitrariness and discrimination;
- prohibition on torture;
- regulation of surveillance;
- right to due process;
- prohibition on the death penalty;
- provision for surveillance of detainee's communications with legal representatives.

Each guideline, which places each right in the counter-terrorism context, is supported by law, case law and principle from international human rights institutions, in particular the European Court of Human Rights. These guidelines were supplemented in 2005 in relation to the rights of victims of terrorist acts.⁶⁶

61 *Op. cit.*, note 23, Bucharest Plan of Action.

62 *Op. cit.*, note 7, 2002 Porto Charter.

63 In its original form it was designed to facilitate prosecution or extradition between contracting parties and to eliminate the availability of political offence exceptions from certain offences.

64 The Treaty (CETS 196) was opened for signatures in Warsaw on 16 May 2005 and entered into force on 1 June 2007.

65 These are: The Convention on Cybercrime (CETS 185 and its Protocol), the Conventions on Corruption (CETS 173 and CETS 174) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198, not yet entered into force).

66 See Chapter 2 above.

A further example of the Council of Europe's work on counter-terrorism is the publication of the European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 8 on Combating Racism while Fighting Terrorism. That recommendation advises states, *inter alia*, to "review legislation and regulations adopted in connection with the fight against terrorism to ensure that these do not discriminate directly or indirectly against persons or groups of persons notably on grounds of race, colour, language, religion, nationality or national or ethnic origin."⁶⁷ Another monitoring mechanism within the Council of Europe, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), also regularly addresses human rights abuses in the fight against terrorism in its reports and recommendations.⁶⁸

European Union

An EU Council common position adopted in the aftermath of the attacks of 11 September 2001 defines "terrorist group" as a structured group of persons, acting in concert to commit terrorist acts, regardless of its composition or the level of development of its structure.⁶⁹

The EU Council Framework Decision on Combating Terrorism was adopted few months later and requires the creation of, and prosecution for, specified offences on a state's territory. It provides for states to establish extra-territorial jurisdiction over nationals or residents wherever a terrorist act is committed.⁷⁰ Threatening to commit any of these criminal acts is also to be treated as a terrorist offence. The Framework Decision contains an express recognition and commitment to implementation within a human rights context. It expressly states that "This Framework Decision respects fundamental rights as guaranteed by the [ECHR] and as they emerge from the constitutional traditions common to the Member States".

The EU has also established its own listing procedures for dealing with terrorist individuals and entities through a series of common positions in the context of the EU's common foreign and security policy.⁷¹ These give rise to a number of consequences ranging from the freezing of assets to a commitment to enhanced police and judicial co-operation in relation to those persons and entities.

As part of the EU's response to terrorism, a counter-terrorism co-ordinator has been appointed and a counter-terrorism strategy agreed for the EU. That strategy has four component parts:⁷²

67 ECRI, General Policy Recommendation No. 8 on combating racism while fighting terrorism, 17 March 2004, p. 2.

68 All public CPT documents are available at <http://www.cpt.coe.int>.

69 EU Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism. The extraordinary European Council of 21 September 2001 defined terrorism as one of the main challenges facing the world and identified the fight against terrorism as one of the European Union's priority objectives. The common position was intended to implement additional measures further to UN Security Council Resolution 1373 (2001). Specifically, it draws up a list of individuals, groups and entities involved in terrorism whose funds and other financial assets are to be frozen as part of the fight against the financing of terrorism.

70 EU Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164/3. In Article 1 of the Framework Decision, the definition of terrorism offences combines two elements: (1) an objective element drawing from a list of serious offences (e.g., attacks on person's life, kidnapping, hostage taking, seizure of aircraft, etc.); and (2) a subjective element in that the acts will be considered as terrorist offences only if intentionally committed with a specific terrorist aim as described in the Decision.

71 E.g. *op. cit.* note 69, EU Council Common Position 931, and EU Council Common Position 96/746/CFSP of 26 February 2001 concerning additional restrictive measures against the Taliban and amending Common Position.

72 The EU Counter-Terrorism Strategy was adopted by the Justice and Home Affairs Council in December 2005.

- *Prevent*: to prevent people turning to terrorism by tackling the factors and root causes that can lead to radicalization and recruitment in Europe and internationally;
- *Protect*: to protect citizens and infrastructure and reduce vulnerability to attack, including improved security of borders, transport and critical infrastructure;
- *Disrupt*: to pursue and investigate terrorists within the EU and globally; to impede planning; to disrupt support networks; asset freezing and cutting off funding; and bringing terrorists to justice;
- *Respond*: to prepare to manage and minimize the consequences of a terrorist attack by improving capacity to deal with: the aftermath; the co-ordination of the response; and the needs of victims.

This strategy correlates to human rights standards and principles, although the obligation to promote and protect human rights while countering terrorism is not specifically articulated within the strategy. This can be contrasted with the UN's commitment as identified above.

The International Framework to Promote and Protect Human Rights: An Overview

The United Nations and the birth of the universal human rights system

Human rights, as they are now commonly understood, emerged from the creation of the United Nations. In the aftermath of World War II, governments committed themselves to establishing the UN with the primary goal of promoting international peace and preventing conflict. Human rights were held to be key to achieving those aims. The preamble to the Charter of the United Nations asserts that the main objectives of the organization are, among other things, to:

save succeeding generations from the scourge of war [...and] reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small [...]⁷³

The Universal Declaration of Human Rights

Almost immediately, the UN established a Commission on Human Rights, which was charged with the task of submitting proposals on an International Bill of Rights. The Draft declaration was adopted by the General Assembly in 1948 and came to be known as the Universal Declaration of Human Rights (UDHR). This instrument has had a profound impact on the development of regional and global standards for the protection of general or specific human rights.

The UDHR established a universal language of human rights. Their source is the international community and they originate from the UN as an expression of global values.⁷⁴ It is now the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The Universal Declaration of Human Rights is built on the fundamental principle that human rights are based on the “inherent dignity of all members of the human family” and are

73 Article 1(3) of the Charter states that one of the purposes of the UN is to achieve international co-operation in “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”. What the UN Charter does not do is to specify the contents of any “human rights”, nor does it establish any mechanisms for the protection of human rights in the members of the United Nations.

74 These values have been repeatedly reaffirmed, e.g., at the 1993 Vienna UN World Conference on Human Rights (14-25 June 1993), which pledged “universal respect for and observance of human rights and fundamental freedoms for all [...] the universal nature of these freedoms is beyond question [...]” and also that “while the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”, see Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, doc. A/CONF.157/23, 12 July 1993.

the “foundation of freedom, justice and peace in the world.”⁷⁵ It recognizes that to be able to guarantee human dignity, economic and social, as well as civil and political, rights need to be observed. It contains a long list of rights to which all people are entitled, among them:

- the right to life, liberty and security of person;
- the right to freedom from torture and degrading treatment;
- the right to seek and to enjoy in other countries asylum from persecution;
- the right to own property;
- freedom of thought, conscience and religion;
- the right to freedom of opinion and expression;
- the right to an adequate standard of living;
- the right to education.

Although the UDHR is not a legally binding document, it has inspired more than 20 major human rights instruments, which together constitute an international standard of human rights. The principles in the UDHR have also been incorporated into the constitutions and laws of many states in the form of fundamental rights or basic laws. Many of its provisions are also considered to be reflective of customary international law, and therefore binding on states that have not signed some of the instruments subsequently adopted.

The human rights covenants

The two principal instruments deriving from the UDHR are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both were adopted in 1966 and entered into force in 1976. Unlike the UDHR, both of these treaties are legally binding on states that have ratified them. Together with the Universal Declaration, they constitute the International Bill of Human Rights.

The ICCPR details the basic civil and political rights of individuals, and duties attached to the state. Among the rights of the individual are:

- the right to life;
- the right to liberty and freedom of movement;
- the right to equality before the law;
- the right to presumption of innocence until proven guilty;
- the right to be recognized as a person before the law;
- the right to privacy and protection of that privacy by law;
- the right to legal recourse when rights are violated;
- freedom of thought, conscience, and religion or belief;
- freedom of opinion and expression;
- freedom of assembly and association.

The ICCPR forbids, *inter alia*, torture and inhuman or degrading treatment, slavery, arbitrary arrest and detention, propaganda advocating either war or hatred based on race, religion, national origin or language.

⁷⁵ The Universal Declaration of Human Rights was adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, by 56 members of the United Nations “as a common standard of achievement for all people and nations”. Forty-eight states voted in favour, none against, and eight abstained (including Saudi Arabia, South Africa, the USSR and Yugoslavia).

It guarantees the rights of children and prohibits discrimination on any basis, such as race, sex, colour, national origin, or language. The covenant permits governments to temporarily suspend some of these rights in cases of civil emergency only, and lists those rights that cannot be suspended for any reason (this issue will be dealt with below).

The ICCPR is given practical value because it also establishes the UN Human Rights Committee (HRC) to consider reports submitted by parties on the measures they have adopted that give effect to the rights set forth in the covenant. The HRC can also receive and consider communications from individuals claiming to be victims of violations of the rights set forth in the covenant, if the country under consideration has ratified the Optional Protocol, which permits such petitions.⁷⁶

For the purposes of this manual, the ICCPR will be considered as the guiding treaty in establishing international human rights law. This is because all OSCE participating States have ratified it. That treaty therefore creates obligations across the OSCE region. The prominence of the ICCPR within the OSCE has been recognized by the Organization itself.⁷⁷ It will, however, be interpreted also in the light of the standards identified in the European Convention on Human Rights and Fundamental Freedoms as the jurisprudence of the European Court of Human Rights has more fully developed the fundamental human rights principles.

The rights in the International Covenant on Economic, Social and Cultural Rights include the:

- right to work;
- right to equal pay for equal work;
- right to equal opportunity for advancement;
- right to form and join trade unions;
- right to strike;
- right to social security;
- right to special protection to the family, mothers and children;
- right to a standard of living adequate to the health and well-being of persons and their families including food, clothing and housing;
- right to education;
- right to a scientific and cultural life.

Like the ICCPR, the ICESCR recognizes the right of peoples to self-determination.

As with all the main UN human rights treaties, each nation that has ratified the covenant is required to submit periodic reports on its implementation of the rights contained within it. Some OSCE participating States have entered reservations or interpretative declarations to particular clauses of the ICCPR and ICESCR.⁷⁸

76 The status of signatures and ratifications of the First Optional Protocol may be found at <http://www.ohchr.org/english/countries/ratification/5.htm>.

77 Human rights “will not be subject to any restrictions except those provided for by the law and consistent with other obligations under international law, such as the International Covenant on Civil and Political Rights”, *op. cit.*, note 6, 1990 Copenhagen Document, para. 24.

78 The list of reservations and interpretative declarations to the ICCPR and ICESCR may be found at http://ohchr.org/english/countries/ratification/4_1.htm and <http://ohchr.org/english/countries/ratification/3.htm#ratifications> respectively.

Human rights treaties on specific issues

The UDHR has inspired a number of other human rights conventions. These include conventions to prevent and prohibit specific abuses, such as:

- genocide;⁷⁹
- racism (ICERD)⁸⁰ and
- torture (CAT).⁸¹

Other instruments have been adopted to protect especially vulnerable populations or classes of persons, such as:

- refugees;⁸²
- women (CEDAW)⁸³ and
- children (CRC).⁸⁴

These treaties are given a practical value in some cases through the establishment of committees to monitor compliance with their obligations, usually by receiving reports from states or, in some cases (and subject to specific acceptance by states) through a system of individual petition or complaint. These committees include:

- The Human Rights Committee (ICCPR);
- The Committee on Economic, Social and Cultural Rights (ICESCR);
- The Committee on the Elimination of Racial Discrimination (CERD);
- The Committee on the Elimination of Discrimination against Women (CEDAW);
- The Committee against Torture (CAT);
- The Committee on the Rights of the Child (CRC).

Additional UN mechanisms to protect and promote human rights

In addition to the treaty bodies, the UN has also developed special procedures to protect and promote human rights.⁸⁵ These procedures are important because they are applicable to all members of the UN without reference to whether they have become parties to particular treaties. However, the human rights principles that emerge under these special procedures do

79 Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature and ratification by General Assembly resolution 260 A (III) of 9 December 1948. It entered into force on 12 January 1951.

80 International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965. It entered into force on 4 January 1969.

81 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature and ratification by General Assembly resolution 39/46 of 10 December 1984. It entered into force on 26 June 1987.

82 Convention relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 and entered into force on 22 April 1954.

83 Convention on the Elimination of All Forms of Discrimination against Women, opened for signature and ratification by General Assembly resolution 34/180 of 18 December 1979. It entered into force on 3 September 1981.

84 Convention on the Rights of the Child, opened for signature and ratification by General Assembly resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990.

85 "Special procedures are either an individual (called 'Special Rapporteur', 'Special Representative of the Secretary-General', 'Representative of the Secretary-General', 'Representative of the Commission on Human Rights' or 'Independent Expert') or a working group usually composed of five members (one from each region). The mandates of the special procedures are established and defined by the resolution creating them. Mandate-holders of the special procedures serve in their personal capacity, and do not receive salaries or any other financial retribution for their work. The independent status of the mandate-holders is crucial in order to be able to fulfill their functions in all impartiality." UN OHCHR, *Seventeen frequently asked questions about United Nations Special Rapporteurs*, Fact Sheet No. 27 (Geneva, 2001).

not possess the same quality of law as the binding international human rights treaties. That said, the principles emerging from the special procedures are particularly valuable in relation to developing human rights and counter-terrorism policy, even if they do not have the force of law.⁸⁶

Of particular relevance to counter-terrorism is the establishment of thematic special procedures. These include special rapporteurs, experts, or working groups on torture; disappearances; summary or arbitrary executions; religious intolerance; mercenaries; internally displaced persons; violence against women; education; extreme poverty; and health. Most significantly, there is also now a special rapporteur on promoting and protecting human rights while countering terrorism.

Thematic rapporteurs have a broad mandate to investigate and report on the causes and consequences of the violations of the particular right in question. They thus attempt to identify commonalities in violations, draw broad conclusions, and make recommendations on conditions applicable to the right in issue. They may, however, also visit particular states and intervene with governments when they feel it appropriate.

A number of the UN's special rapporteurs and independent experts have made constructive comments and given in-depth analysis on the implication of counter-terrorism strategies on particular human rights. To assist member states, the UN has compiled a digest of jurisprudence of the UN and regional organizations on the protection of human rights while countering terrorism.⁸⁷ Additionally, further observations from the UN rapporteurs and independent experts can be found on the UN website.⁸⁸

In a forceful statement, the UN special rapporteurs and independent experts have expressed alarm at the growing threats against human rights in the counter-terrorism context and have called for a renewed resolve to defend and promote these rights. They have also noted the impact of this environment on the effectiveness and independence of the UN special procedures. They have pointed out that, although they share in the unequivocal condemnation of terrorism, they have profound concerns about the multiplication of policies, legislation and practices increasingly being adopted by many countries in the name of the fight against terrorism, which affect negatively the enjoyment of virtually all human rights — civil, cultural, economic, political and social.⁸⁹

Within the UN system, a variety of actions or procedures can be taken against states that violate human rights.⁹⁰ These include:

- deciding that the state in question should be subject to “advisory services”, which suggests concern over a human rights situation and offers UN assistance toward its resolution;
- adopting a resolution in the General Assembly or another UN body which might ask for further information, ask for a governmental response, criticize the government, or ask the government to take specified action;

⁸⁶ See, however, the section below on customary international law, pp. 55-57, 149.

⁸⁷ *Op. cit.*, note 52, *UN Digest of Jurisprudence*.

⁸⁸ <http://www.ohchr.org/english/bodies/index.htm>.

⁸⁹ See *op. cit.*, note 50, Report of the United Nations High Commissioner for Human Rights, doc. E/CN.4/2004/4.

⁹⁰ See for instance UN OHCHR, *The United Nations Human Rights Treaty System: an introduction to the core human rights treaties and the treaty bodies*, Fact Sheet No. 30 (Geneva, 2005).

- appointing a country-specific rapporteur, independent expert, envoy or delegation to consider the situation. There are special rapporteurs, for example, for the Democratic Peoples' Republic of Korea, Myanmar, the Palestinian territories occupied since 1967, and Sudan, as well as independent experts on Burundi, Democratic Republic of the Congo, Haiti, Liberia, and Somalia;⁹¹
- asking the UN Secretary-General to appoint a special representative to the state in question;
- calling upon the UN Security Council to take action as part of its Chapter VII mandate with respect to the maintenance of international peace and security. The Security Council has imposed economic sanctions and other specifically targeted sanctions (such as an arms embargo) or even authorized military action in response to some human rights violations.

The various mandates (rapporteurs, experts, working groups) have several main functions:⁹²

- fact-finding and documentation;
- providing advice and expert opinion;
- providing recommendations to governments;
- publicity; and
- conciliation.

Regional human rights instruments

The OSCE Human Dimension

The term “human dimension” is used in OSCE terminology to describe the set of norms and activities related to human rights, democracy, and the rule of law. The human dimension is regarded within the OSCE as one of three dimensions of its concept of comprehensive security, together with the politico-military and the economic and environmental dimensions. The term also indicates that the OSCE norms in this field cover a wider area than traditional human rights law.

The OSCE has created a large set of human rights commitments that are generally reflective of traditional human rights norms and concepts as enshrined in other international human rights treaties and declarations. Building on these, however, the OSCE has also developed a number of standards that are highly innovative both in terms of style and substance. This manual will highlight some relevant OSCE human dimension commitments

The OSCE process is essentially a political process that does not create legally binding norms or principles. Unlike many of the other human rights documents referred to in this manual, OSCE commitments are politically, rather than legally, binding. This is an important distinction since it limits the legal enforceability of OSCE standards. In other words, OSCE commitments cannot be enforced in a court of law. However, this should not be mistaken as indicating that the commitments lack binding force. The distinction is between legal and political and not between binding and non-binding. This means that OSCE commitments are more than a simple declaration of will or good intentions; rather they are a political promise

⁹¹ See <http://www.ohchr.org/english/bodies/chr/special/countries.htm>.

⁹² For an overview see *op. cit.*, note 85, UN OHCHR, Fact Sheet No. 27.

to comply with these standards. They may also, if reflective of general state practice and a concomitant *opinio iuris*, indicate the emergence of regional customary law.

A fundamental concept of the OSCE's human dimension is that human rights and pluralistic democracy are not considered the internal affair of a state. The participating States have stressed that issues relating to human rights, fundamental freedoms, democracy, and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order. The participating States "categorically and irrevocably" declared that the "commitments undertaken in the field of the human dimension of the OSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned."⁹³ Therefore, OSCE participating States are not in a position to invoke the non-intervention principle to avoid discussions about human rights problems within their own borders. This explains why the OSCE is not only a community of values but also a community of responsibility among peers. Within the OSCE, this responsibility focuses not only on the right to criticize other states for violations of human dimension commitments but also on the duty to assist each other in solving specific problems.

Human rights start with an element of empowerment, or with the "right to know your rights." When the Helsinki Final Act was adopted, participating States committed themselves to making the document widely accessible. This manual forms a part of the OSCE ideal of facilitating access to information about OSCE commitments and best practice in relation to human rights.

The formulation and implementation of human rights commitments in the OSCE is managed through a refined system of political summits and other conferences where the implementation of OSCE commitments is discussed. In addition, its Permanent Council oversees the day-to-day implementation of commitments.

The human dimension mechanism

In addition to regular implementation meetings, the OSCE has also created so-called human dimension mechanisms, the Vienna Mechanism⁹⁴ and the Moscow Mechanism,⁹⁵ the latter partly constituting a further elaboration of the Vienna Mechanism. Together, they set out a process for supervising the implementation of human dimension commitments to be invoked on an *ad hoc* basis by OSCE participating States. The Vienna Mechanism allows a participating State, through a set of procedures, to raise questions relating to the human dimension in another OSCE participating State. The Moscow Mechanism builds on this and provides for the additional possibility to establish *ad hoc* missions of independent experts to assist in the resolution of a specific human dimension problem. This includes the right to investigate alleged violations of human dimension commitments, in exceptional circumstances even without the consent of the accused state.

93 *Op. cit.*, note 5, 1991 Moscow Document.

94 As established in Vienna in 1989, see *op. cit.*, note 29, 1989 Vienna Document.

95 The Moscow Mechanism was agreed upon at the last meeting of the Conference on the Human Dimension of the CSCE, see *op. cit.*, note 5, 1991 Moscow Document.

In practice, the human dimension mechanism is only rarely applied, partly due to the development of the OSCE into a permanently functioning organization and partly due to the political considerations involved in invoking such *ad hoc* mechanisms.⁹⁶

OSCE institutions with relevance to the human dimension

The OSCE has established a number of permanent institutions to assist participating States with the implementation of OSCE human dimension commitments. The Office for Democratic Institutions and Human Rights (ODIHR), based in Warsaw, is the main institution of the OSCE's human dimension. The 1992 Helsinki Document mandated the ODIHR to help OSCE participating States “ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and [...] to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society.” Numerous other decisions have added tasks to this mandate.

The ODIHR also assists participating States with the implementation of international legal obligations and OSCE commitments on anti-terrorism in compliance with international human rights standards. It organizes regular meetings that take stock of OSCE human dimension commitments and recommends follow-up. In all its activities, the ODIHR reaches out to a network of partners active in related areas, including international and local non-governmental human rights organizations, as well as international governmental organizations, in particular the United Nations Office of the High Commissioner for Human Rights and the Council of Europe.

The OSCE High Commissioner for National Minorities, established in 1992 and based in The Hague, is tasked to identify — and seek early resolution of — ethnic tensions that might endanger peace, stability, or friendly relations between OSCE participating States. In addition to seeking first-hand information, the High Commissioner seeks to promote dialogue, confidence, and co-operation.

The OSCE Representative on Freedom of the Media assists participating States in furthering free, independent, and pluralistic media as one of the basic elements of a functioning pluralistic democracy. The Representative, whose office is in Vienna, observes media developments in all participating States and advocates and promotes compliance with relevant OSCE principles and commitments.

Council of Europe

The Council of Europe provides a major source of relevant law for this manual, as a majority of OSCE participating States are also members of the Council of Europe (currently 46 Member States).

Council of Europe framework

The key human rights instruments of the Council of Europe are:

⁹⁶ The ODIHR continues to maintain a list of experts as required by the Moscow Mechanism.

- European Convention for the Protection of Fundamental Rights and Freedoms (ECHR), 1950 and its Protocols;⁹⁷
- European Social Charter (ESC), 1961 (including its Additional Protocol of 1988, Amending Protocol of 1991 and the Additional Protocol of 1995 providing for a system of collective complaints); the ESC is gradually being “replaced” (for those states that have ratified it) by the Revised European Social Charter (Strasbourg), 3 May 1996, which entered into force on 1 July 1999;⁹⁸
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987 and 2 Protocols of 1993;⁹⁹
- Framework Convention for the Protection of National Minorities, 1995.¹⁰⁰

The Council of Europe framework distinguishes between civil and political and economic and social rights. With some simplification it can be said that civil and political rights are contained within the ECHR while economic and social rights are in the European Social Charter.¹⁰¹

The European Convention for the Protection of Fundamental Rights and Freedoms

The ECHR is the cornerstone of the Council of Europe system for the protection of human rights. All member states of the Council of Europe must be parties to the ECHR. It contains a catalogue of the traditional civil and political rights, including:

- right to life (Article 2);
- prohibition of torture (Article 3);
- prohibition of slavery and forced labour (Article 4);
- right to liberty and security (Article 5);
- right to a fair trial (Article 6);
- no punishment without law (Article 7);
- right to respect for private and family life (Article 8);
- freedom of thought, conscience and religion (Article 9);
- freedom of expression (Article 10);
- freedom of assembly and association (Article 11);
- right to marry (Article 12);
- prohibition of discrimination (Article 14).

The rights guaranteed under the ECHR have been supplemented by subsequent protocols:

- Protocol No. 1, 1952: right to property, education and free elections;¹⁰²

97 CETS No. 5. The ECHR entered into force on 3 September 1953 and is important in several respects: it was the first comprehensive regional human rights treaty, it established the first international complaints procedure and the first international court for the determination of human rights issues and, last but not least, it has generated extensive jurisprudence.

98 CETS No. 35. The Charter was opened to signature in Turin on 18 October 1961 and entered into force on 26 February 1965. Further details about the Protocols and the revised ESC are available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/035.htm>.

99 CETS No. 126. The Convention was opened for signature on 26 November 1987 and entered into force on 1 February 1989.

100 CETS No. 157. The Convention was opened for signature on 1 February 1995 and entered into force on 1 February 1998.

101 It is clear that ECHR rights have a social dimension while some rights in the Social Charter may also be classified as civil or political rights.

102 CETS No. 9. It was opened for signature on 20 March 1952 and entered into force on 18 May 1954.

- Protocol No. 4, 1963: freedom of movement; freedom from expulsion from territory of which a national; prohibition of collective expulsion of aliens;¹⁰³
- Protocol No. 6, 1983: abolition of death penalty;¹⁰⁴
- Protocol No. 7, 1984: non-expulsion of aliens except in accordance with law; right to review of conviction or sentence for criminal offences by a higher court; compensation for conviction where subsequently reversed or pardoned through a miscarriage of justice; protection against double jeopardy; equality of spouses during and on dissolution of marriage;¹⁰⁵
- Protocol No. 12, 2000: non-discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status;¹⁰⁶
- Protocol No. 13, 2002: abolition of death penalty in all circumstances.¹⁰⁷

States are bound only by those protocols to which they have become parties.

Many of these rights are the same as those contained within the International Covenant on Civil and Political Rights. However, there are differences. These include:

- the ICCPR has a freestanding prohibition of discrimination (Article 26) while the ECHR does not. Although such a right is contained in ECHR Protocol 12, this Protocol has so far been ratified by only 14 countries;
- the ICCPR guarantees the right of peoples to self-determination (Article 1) and the individual rights of persons belonging to minorities (Article 27) while the ECHR does not;
- through the protocols, the ECHR has guaranteed the right to property and greater rights for aliens, and has abolished the death penalty, even in time of war. The right to education (Protocol No. 1) is more often seen as an economic and social right and is included in the International Covenant on Economic, Social and Cultural Rights rather than the ICCPR.

Procedures

The ECHR is now enforced through a permanent, full-time European Court of Human Rights (that court will be referred to throughout this manual as the European Court or the Court).¹⁰⁸

The Court consists of a number of judges equal to the number of states parties to the ECHR. The Court sits in committees of three judges, which can reject cases without a fully reasoned decision when they are clearly inadmissible. To rule on the admissibility of more complex cases or on the merits of admissible cases, the Court sits in chambers comprising seven judges. A grand chamber of seventeen judges sits in certain situations.

The European Court has jurisdiction in two types of cases:

103 CETS No. 44. It was opened for signature on 6 May 1963 and entered into force on 21 September 1970.

104 CETS No. 114. It was opened for signature on 28 April 1983 and entered into force on 1 March 1985.

105 CETS No. 117. It was opened for signature on 22 November 1984 and entered into force on 1 November 1988.

106 CETS No. 177. It was opened for signature on 4 November 2000 and entered into force on 1 April 2005.

107 CETS No. 187. It was opened for signature on 3 May 2002 and entered into force on 1 July 2003.

108 From the ECHR's entry into force in 1953 until 1 November 1998, enforcement was guaranteed through the institutional machinery of the Committee of Ministers, the European Commission on Human Rights (ECommHR) and the European Court of Human Rights in Strasbourg. This machinery was overhauled in 1994 by Protocol No. 11 (CETS No. 155, opened to signature on 11 May 1994 and entered into force on 1 November 1998).

a) *Inter-state complaint*: any state party may refer an alleged breach of the Convention or substantive Protocols by another state party.¹⁰⁹

b) *Individual complaints*: if a case can satisfy the admissibility criteria, then individuals within states parties have the right to make a complaint to the European Court.

Execution of the Court's judgments is overseen by the Committee of Ministers, a political body composed of government representatives of all the member states (see art. 46 ECHR).

Other Council of Europe human rights machinery

European Committee for the Prevention of Torture

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provides a mechanism for the prevention of torture, rather than for exercise of jurisdiction over those accused of torture. It establishes a European Committee for the Prevention of Torture (CPT) that, through visits to the penal and other institutions within states parties, examines the treatment of those deprived of their liberty with a view to strengthening (if necessary) the protection of such persons from torture. The Committee members are independent experts and states are required to allow such visits.

Visits to any state are normally scheduled in advance but occasional *ad hoc* visits may also take place. Once the CPT is in a state, it can visit any place where people are deprived of their liberty, without giving advance notice. Its meetings are private, as are its discussions and reports. The report may be published if the state fails to co-operate and the Committee decides by two-thirds majority to do so. Since this was done with respect to Turkey in 1992, most states have voluntarily allowed for publication. For instance, the CPT recently issued a public statement concerning the situation in the Chechen Republic of the Russian Federation.¹¹⁰

European Committee of Social Rights (ECSR)

The function of the ECSR is "to judge the conformity of national law and practice with the European Social Charter." It operates two monitoring procedures: a reporting system and a collective complaint system (e.g., by NGOs). In its constituent instruments, the Committee is called a Committee of experts or Committee of independent experts.

Council of Europe Commissioner for Human Rights

The Council of Europe Commissioner for Human Rights was established in 1999. The Commissioner is mandated to:

- foster the effective observance of human rights, and assist member states in the implementation of Council of Europe human rights standards;
- promote education in and awareness of human rights in Council of Europe member states;
- identify possible shortcomings in the law and practice concerning human rights;

109 This procedure has been little used, although cases have been brought, for example, by Ireland against the United Kingdom, by the Scandinavian states against Greece during the military regime, by Denmark against Turkey, and by Cyprus against Turkey.

110 On 13 March 2007, available at <http://cpt.coe.int/en/states/rus.htm>. The full list of state visits is available at <http://cpt.coe.int/en/visits.htm>.

- facilitate the activities of national ombudsperson institutions and other human rights structures; and
- provide advice and information regarding the protection of human rights across the region.¹¹¹

The Commissioner's work thus focuses on encouraging reform measures to achieve tangible improvement in the area of human rights promotion and protection. Being a non-judicial institution, the Commissioner's Office cannot take up individual complaints, but the Commissioner can draw conclusions and take wider initiatives on the basis of reliable information regarding human rights violations suffered by individuals. The Commissioner conducts country visits and publishes country and thematic reports.

The Commissioner co-operates with a broad range of international and national institutions, as well as human rights monitoring mechanisms. The Office's most important inter-governmental partners include the United Nations and its specialized offices, the European Union, and the OSCE.

European Union

All European Union member states are also participating States in the OSCE and are signatories to the ECHR. Almost half (27) of OSCE participating States are also members of the European Union.

The European Union has its own human rights framework. The Charter of Fundamental Rights of the European Union (EU Charter) contains the basic civil and political rights found in the ECHR and the ICCPR but builds on these, for example, incorporating an explicit right to diplomatic and consular protection (Art. 46) and the right to protection of personal data (Art. 8), which may be of relevance in the context of counter-terrorism, particularly on an international level.¹¹²

The Charter is not legally binding but it is taken into consideration by the Court of Justice of the European Communities (ECJ) and the Court of First Instance (CFI).

In 2002, the European Union established a Network of Independent Experts on Fundamental Rights (CFR-CDF)¹¹³ to report on the application of provisions in the Charter across the EU. That network reports annually on the situation in EU member states regarding the protection of fundamental rights and produces thematic comments. Of particular relevance to human rights and counter-terrorism, these have included, in 2002, a report on "The balance between freedom and security in the response by the European Union and its Member States to terrorist threats", and in 2003, a report on "Fundamental rights in the external activities of the European Union in the fields of justice and asylum and immigration". The Network

111 See Resolution (99) 50 on the CoE Commissioner for Human Rights, adopted by the CoE Committee of Ministers on 7 May 1999.

112 *Op. cit.*, note 39. The Charter was solemnly proclaimed and signed in Nice on 7 December 2000 by the Presidents of the European Parliament, the Council and the Commission, while the new Treaty known as the "Treaty of Nice" was being adopted. Further details at http://www.europarl.europa.eu/comparl/libe/elsj/charter/default_en.htm.

113 The network of fundamental rights experts was created by the European Commission in response to a recommendation in the European Parliament's report of 2000 on the state of fundamental rights in the EU. Further details (including reports) are available at http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm.

of Human Rights Experts also issues opinions on specific issues such as ethnic profiling,¹¹⁴ “extraordinary renditions”¹¹⁵ and the prevention of violent radicalization.¹¹⁶

The European Union established a Fundamental Rights Agency (FRA) in 2007, replacing the European Union Monitoring Centre on Racism and Xenophobia.

Other regional human rights instruments

There also exist other regional human rights systems, based on treaties whose membership is restricted to states within a particular region.¹¹⁷ These are:

- American Convention on Human Rights (ACHR) (1969) adopted by the Organization of American States;¹¹⁸
- African (Banjul) Charter of Human and People’s Rights (1981) adopted by the Organization of African Unity (now the African Union).¹¹⁹

Customary international law

Before turning to how international human rights standards work and why they are relevant to counter-terrorism, it is first necessary to understand the relevance of customary international law and its importance as a source of guidance.

Customary international law consists of rules of law derived from the consistent conduct of states acting out of the belief that the law required them to act that way. It results from a general and consistent practice of states followed out of a sense of legal obligation, so much so that it becomes custom. Customary international law must be derived from a clear consensus

114 Opinion No. 4, December 2006, “Ethnic profiling”, (CFR-CDF.Opinion4.2006).

115 Opinion No. 3, May 2006, “The human rights responsibilities of the EU member States in the context of the C.I.A. activities in Europe (‘extraordinary renditions’)”, (CFR-CDF.Opinion3.2006).

116 Opinion No. 3, August 2005, “The requirements of fundamental rights in the framework of the measures of prevention of violent radicalisation and recruitment of potential terrorists”, (CFR-CDF.Avis3-2005.doc).

117 In addition to European, American and African human rights intergovernmental organizations, there is also a largely dormant Arab one (the Arab Charter on Human Rights was adopted by the League of Arab States on 15 September 1994 but is not in force yet). There is no regional human rights mechanism within Asia.

118 Adopted at the Inter-American Specialized Conference on Human Rights, San José (Costa Rica) on 22 November 1969. The Organization of American States was created in 1948; not all member states, such as the USA and Canada, have ratified the Convention (the USA has signed it), although they remain committed to the founding American Declaration on the Rights and Duties of Man (1948). This declaration has the same status as the UDHR. The Inter-American Court of Human Rights has held that “the Declaration contains and defines the fundamental human rights referred to in the Charter (creating the OAS)”, IACtHR, Advisory Opinion OC-10/89 (Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the ACHR), 14 July 1989, (Ser. A) No. 10 (1989). While military and authoritarian governments in Europe have been relatively rare, in Latin America they were the norm until changes in the 1980s. A significant part of the Inter-American Commission’s work has addressed systematic violations of human rights in the absence of effective national mechanisms and a lack of co-operation with the governments concerned.

119 The Charter was adopted on 27 June 1981 [Organization of African Unity Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)] and entered into force on 21 October 1986. The Charter’s preamble sets it apart from other regional and universal rights instruments. It takes “into consideration the virtues of [African States’] historical tradition and the values of African civilization.” It was established to promote “human and peoples rights” and thus includes several collective or peoples’ rights referred to as “third generation” rights that include peoples’ rights to “national and international peace and security” and “to a generally satisfactory environment favourable to their development.” The Charter is the first human rights treaty to include a list of duties. These include duties to one’s “family and society, the state, and other legally recognised communities and the international community.” The Protocol establishing the African Court on Human and Peoples’ Rights entered into force in 2004 and the Court held its first session on 2-5 July 2006.

among states as exhibited both by widespread conduct and a discernible sense of obligation. As such, it is not necessary for a country to sign a treaty for customary international law to apply and it therefore applies in all OSCE participating States.

Customary international law cannot be declared by a majority of states for their own purposes; it can be discerned only through actual widespread practice. For example, laws of war were long a matter of customary law before they were codified in the Geneva Conventions and other treaties.

A particular category of customary international law, *ius cogens*, refers to a principle of international law so fundamental that no state may opt out by way of treaty or otherwise. The prohibitions of torture, slavery, genocide, racial discrimination and crimes against humanity are widely recognized as peremptory norms, as reflected in the International Law Commission's articles on state responsibility.¹²⁰

Customary international law is an important source of law. It is particularly relevant as it relates to human rights law as well as counter-terrorism. It is generally held that there are two essential elements to customary international law: general practice and *opinio iuris*. A custom may be said to exist only where there is a certain degree of concurrency of behaviour amongst the relevant actors. This is just as true for international custom as it is for local custom. According to the International Court of Justice, for a rule to become part of customary international law, evidence must be shown of a "constant and uniform usage practiced by States."¹²¹ State practice, in this respect, may include treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisors and the practice of international organizations. In some cases, a treaty provision might be regarded as becoming part of customary international law "even without the passage of any considerable period of time" if the treaty enjoyed a "very widespread and representative participation."¹²²

Concurrency of practice is clearly not sufficient, in and of itself, for a practice to be regarded as legally or morally obligatory (consider, e.g., the practice of "rolling out the red carpet" for foreign dignitaries). In addition, there must be evidence of the states concerned regarding themselves as being legally obliged to act in that manner. *Opinio iuris*, therefore, is the "subjective" or "mental" element of custom, and one that is critical for a concurrent practice to be regarded as legally binding.

In addition to these two elements, a third factor is frequently stressed: that the principle in question be of a "fundamentally norm-creating character"¹²³ such as to stipulate, in relatively clear terms, what is required of states. Some rights, such as the right to development, may well fail on this particular test.

It is not infrequently the case that certain rights are spoken of, not only in terms of their being part of customary international law, but as having the status of *ius cogens*. The term *ius cogens*

120 International Law Commission, Draft Articles on responsibility of states for internationally wrongful acts with commentaries, adopted 2001, (UN, 2005), p. 281 (footnote 675); see also International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Furundzija*, Case IT-95-17/1, judgment of 10 December 1998.

121 ICJ, *Asylum (Colombia v. Peru)*, 1950 I.C.J. Reports 266, para. 276-77.

122 ICJ, *North Sea Continental Shelf (F.R.G./Denmark; F.R.G./Netherlands)*, 1969 ICJ Reports 3, paras. 73-74.

123 *Ibid.*, para. 72.

is primarily used to refer to those rules or principles of general international law which are regarded as being “peremptory” in nature and as enjoying a non-derogable character.

Erga omnes obligations are those that are owed to the international community as a whole, rather than to other individual states.¹²⁴ If a rule gives rise to an obligation *erga omnes*, it will allow any other state to institute a claim against it before an international court or tribunal irrespective of whether or not it (or its nationals) might have been palpably “injured” by the action in question. It gives rise, in other words, to a general right of enforcement. Obligations *erga omnes* may well also justify the assertion of universal jurisdiction by national courts or tribunals.

124 For the original conceptualization of *erga omnes* obligations see *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, Second Phase, ICJ Reports [1970] 3, at 32: “[A]n essential distinction should be drawn between the obligation of a State towards the international community as a whole, and those arising vis-à-vis another State... By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.” The ICJ has affirmed its distinction between obligations of a state towards the international community as a whole, and those arising towards individual states in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports [2004] 136, paras. 155 *et seq.*

How Human Rights Work

Sources of human rights

Human rights are recognized as being inherent within all people and they are mainly identified and articulated through human rights treaties. Once these treaties have been adopted, signed and ratified they are binding upon the states parties to the treaty, and the rights contained within them have the force of law. As a legal principle, treaties are therefore the strongest assertion of rights,¹²⁵ with the exception of certain rights guaranteed through customary international law, such as the prohibition on torture and slavery, which are recognized as being peremptory norms and therefore the most fundamental.

Treaty law (due to its binding nature, often referred to as “hard law”) is, however, not the only source of human rights law. Other sources include declarations such as the Universal Declaration of Human Rights,¹²⁶ guidelines, rules and regulations. These latter sources are often referred to as “soft law”. Whilst these may be adopted under the auspices of an international organization, such as the UN or the Council of Europe, they are not intended to create legal obligations on states parties. They do, however, provide authoritative sources of rights and how they should be applied.

Further sources of soft law include statements from those responsible for implementing human rights treaties, such as the general comments and the decisions of the Human Rights Committee under the ICCPR. Although these are highly respected, they are technically not hard law. This is to be contrasted with decisions of international courts such as the European Court of Human Rights, whose judgements are binding on the state party to the litigation and whose case law has to be followed by all other parties to the European Convention on Human Rights. These judgments ought, therefore, to be considered as hard law.

The OSCE has a comprehensive collection of human rights commitments, which in many instances go well beyond what can be found in human rights treaties. These are not hard law, but are politically binding on all participating States. Since OSCE commitments are adopted through a process of consensus, each participating State has voluntarily pledged itself to honour and abide by each commitment.

This manual draws on all these sources of human rights. Their applicability in each particular OSCE participating State will depend upon that state’s membership of a particular organization and on the status of signature and/or ratification of treaties by that state. All of the

¹²⁵ What amounts to a treaty is itself a legal term of art. Other words for treaties include convention, covenant and charter. What is essential is that there is an intention to create a legal relationship among the parties in regard to subject matter of the treaty. For further information, see the *Vienna Convention on the Law of Treaties*, opened for signatures on 23 May 1969 and entered into force on 27 January 1980, United Nations Treaty Series, vol. 1155, p. 331, Art. 34.

¹²⁶ That Declaration although initially agreed as a non-binding instrument, over time is now considered to have assumed the quality of customary international law.

sources cited, whether or not legally binding on a particular state, provide guidance regarding good practice in the application of human rights in the OSCE region.

Human rights as the guarantor of human dignity

One rationale of human rights is the guarantee of human dignity. It was for this reason that the drafters of the UDHR highlighted human dignity in the first paragraph of its preamble. They were responding to some of the worst atrocities committed in the history of the world against human dignity. Therefore, the principles they set out were designed to guard against any potential future Holocaust or other carnage such as those that occurred across the globe throughout the 1930s and 1940s. The UDHR and the human rights instruments that were inspired by it are therefore designed to counter threats to democratic values, which would certainly include threats from terrorism.

As part of that guarantee of human dignity, human rights standards also aim to ensure that power is exercised in an accountable manner. Power, in this context, is generally taken to mean the state, that is, it is governments that are primarily responsible for ensuring human rights and that should be held accountable for violations. In other words, human rights principally concern the relationship between the individual and the state. They can only be derogated in time of public emergency that threatens the life of the nation, and only in a limited manner and in ways that do not involve discrimination. Moreover, where there is a reasonable assertion that an individual's human rights are violated, that individual is entitled to an effective remedy.

Enhancing human rights standards means that any response to an unlawful act must be carefully targeted to avoid violating human rights. If a particular violation is identified that needs to be addressed — for example, incitement to violence — the control imposed should address the specific problem, without undermining human rights. This applies to counter-terrorism proposals in the same way that it should apply to all public policy.

Counter-terrorism measures do not trump human rights. On the contrary, within democratic societies, including OSCE participating States, counter-terrorism proposals must be compatible with human rights. Under extreme circumstances there may be a requirement to lawfully derogate from human rights standards. At the same time, however, the requirement for a targeted or proportionate response may mean that it is inappropriate to adopt certain counter-terrorism or emergency measures. In fact, the normal workings of criminal law may be suitable to respond to the particular issue, even if the crime in question is alleged to have been committed by a group or individual thought to be terrorist.

The only effective counter-terrorism strategy compatible with OSCE commitments, therefore, will be one that has understood and integrated human rights. Developing such a strategy requires an understanding of how human rights work.

The application of human rights standards is not limited to citizens. Human rights are available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who find themselves in a state's territory or subject to its jurisdiction.¹²⁷

¹²⁷ Article 1, ECHR; Article 2(1) ICCPR. See also UN Human Rights Committee, General Comment No. 31. Certain rights, such as the right to vote and to be elected, may legitimately be limited to citizens.

Human rights standards are dependent on, and guaranteed through, a number of principles, including:

- legality;
- the rule of law;
- the right to an effective remedy; and
- non-retroactivity of criminal penalties.

Each of these obligations is dependent upon the other and is mutually re-enforcing. The right to an effective remedy and non-retroactive criminal penalties are specifically acknowledged within international human rights treaties, whereas principles of legality and the rule of law have been read into those treaties.

The requirement of legality

The first obligation imposed by human rights standards — including in regard to combating terrorism — is the requirement that any deviation from human rights standards must have a clear legal basis. This means that all the actions of law-enforcement agencies, including in response to the threat of terrorism, have to be prescribed by law. Within the OSCE region there are a variety of different legal systems, which means different jurisdictions may have different approaches to the notion of legality.

The OSCE participating States have agreed that:

(5.18) no one will be charged with, tried for or convicted of any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity and precision.
[...]

(24) The participating States will ensure that the exercise of all the human rights and fundamental freedoms [...] will not be subject to any restrictions except those which are provided by law and are consistent with their obligations under international law, in particular the International Covenant on Civil and Political Rights, and with their international commitments, in particular the Universal Declaration of Human Rights. These restrictions have the character of exceptions. The participating States will ensure that these restrictions are not abused and are not applied in an arbitrary manner, but in such a way that the effective exercise of these rights is ensured. Any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law.

(1990 Copenhagen Document)

There must therefore be a legal basis in national law for any deviation from human rights and the law must be accessible and precise. This requirement is intended to avoid any risk of arbitrariness on the part of the state.¹²⁸ What this means is that:

- an individual must be able to know or find out what the law is that permits an interference with their human rights and they must be able to regulate their conduct in accordance with it;
- in the context of terrorism, any powers that are assumed by law enforcement officers must have their basis in law;
- any power that is conferred must be precise. It cannot be general or loosely described;
- where agencies are expected to exercise their discretion, that discretion has to be effectively circumscribed by accessible law.

¹²⁸ ECtHR, *Amuur v. France*, Case no. 17/1995/523/609, 20 May 1996, para. 50.

The Human Rights Committee, as the main institution with responsibility for ensuring the implementation of the ICCPR, has confirmed that law should not be so vague as to permit too much discretion and unpredictability in its implementation.¹²⁹ This principle should also be recognized as forming a key element of customary international law.

In the context of terrorism, its definition, and the definition of terrorism-related crimes in national legislation, the Human Rights Committee has made a number of critical observations with regard to the obligation to respect the principle of legality.¹³⁰ For example, the Committee has found that the vague definitions in some counter-terrorism legislation and regulations “appear to run counter to the principle of legality in several aspects owing to the ambiguous wording of the provisions”.¹³¹ In its rulings in various cases, the Committee has also criticized very broad and general definitions of terrorism, as well as counter-terrorism legislation that is of “exceedingly broad scope.”¹³²

The rule of law

The OSCE participating States have agreed that they:

(2) [...] are determined to support and advance those principles of justice which form the basis of the rule of law. They consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.

(3) They reaffirm that democracy is an inherent element of the rule of law [...]

(5) They solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

[...] (5.3) the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law;

[...] (5.5) the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law. Respect for that system must be ensured;

[...] (5.8) legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability. Those texts will be accessible to everyone;

(5.9) all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground [...].

(1990 Copenhagen Document)

129 HRC, *Pinkney v. Canada*, Communication No. 27/1977, doc. CCPR/C/14/D/27/1977, 29 October 1981, para. 34, and HRC, General Comment 27, doc. CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 13 (“In adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right [...] the relation between right and restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution”).

130 See E.J. Flynn, “Counter-terrorism and Human Rights”, *European Human Rights Law Review*, 2005, Issue 1, p. 29.

131 Concluding observations of the Human Rights Committee: *Israel*, doc. CCPR/CO/78/ISR, 21 August 2003, para 14.

132 Cf. Concluding observations of the Human Rights Committee: *Egypt*, doc. CCPR/CO/76/EGY, 28 November 2002, para. 16; *the Philippines*, doc. CCPR/CO/7/PHL, 1 December 2003, para. 9; *Belarus*, doc. CCPR/C/79/Add.86, 19 November 1997, para. 15; *Estonia*, doc. CCPR/CO/77/EST, 15 April 2003, para. 8; *Belgium*, doc. CCPR/CO/81/BEL, 12 August 2004, para. 24; *Uganda*, doc. CCPR/CO/80/UGA, para. 8; *New Zealand*, doc. CCPR/CO/75/NZL, 7 August 2002, para. 11.

As a general principle of human rights law, the requirement for legality imports the rule of law (*nullum crimen, nulla poena sine lege* – no crime or penalty without a law). Human rights law and the rule of law are, as concepts, therefore inseparable. The rule of law also requires a clear legal basis for any deviation from human rights standards. Rule of law means that the law applies to everyone and that no one is exempt, or above the law, whoever they maybe, or for whatever reason they have acted. Once this principle is accepted, it acknowledges the supremacy of law and establishes that it is the law, not those in power, which provides the framework for government.

The rule of law requires both citizens and governments to be subject to known and accessible laws. In turn, this affirms the principle of equality before the law and fundamental guarantees such as the presumption of innocence. A primary feature of the rule of law is that laws should not be made in respect of particular persons. The rule of law presupposes the absence of wide discretionary authority in those that rule, so that they cannot make their own laws but must govern according to the established laws. Those laws ought not to be too easily changeable. Stable laws are a prerequisite to the certainty and confidence that form an essential part of individual freedom and security.

Separation of powers among the executive, legislative and judicial branches of government is at the heart of the rule of law. A failure to maintain the formal differences between these leads to a concept of law as nothing more than authorization for power, rather than the guarantee of liberty, equally to all.

Key elements of the rule of law include:

- the law must be accessible and so far as possible intelligible, clear and predictable;
- questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
- the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
- the law must afford adequate protection of fundamental human rights;
- means must be provided for resolving, without prohibitive cost or inordinate delay, *bona fide* civil disputes that the parties themselves are unable to resolve;
- ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers;
- adjudicative procedures provided by the state should be fair; and
- the state must comply with its obligations in international law.

The right to an effective remedy

To be meaningful, human rights include the right to an effective remedy in case human rights are violated.¹³³ The right to an effective remedy for human rights violations is contained in Article 2(3) ICCPR and Article 13 ECHR. This obligation is designed to combat impunity and to ensure that rights are practical and effective and not rendered worthless or insignificant because they can be ignored.

¹³³ Article 8 UDHR reads: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

OSCE participating States have committed themselves to:

(13.9) – ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; they will, inter alia, effectively apply the following remedies:

- the right of the individual to appeal to executive, legislative, judicial or administrative organs;
- the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice;
- the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies [..]

(1989 Vienna Document)

In addition:

[..] (5.21) - in order to supplement domestic remedies and better to ensure that the participating States respect the international obligations they have undertaken, the participating States will consider acceding to a regional or global international convention concerning the protection of human rights, such as the European Convention on Human Rights or the Optional Protocol to the International Covenant on Civil and Political Rights, which provide for procedures of individual recourse to international bodies.

(1990 Copenhagen Document)

Where a human right has been violated, or an aggrieved individual considers that a right has been violated, that person must be able to challenge the alleged violation. If it is established that there has been a breach, that person must be granted an appropriate resolution. This remedy may or may not involve compensation.

The right to claim an effective remedy is not dependent upon there having been a proven violation of a right. The right of challenge is autonomous. At the very least, this process must be before an independent and impartial body, whose decision can be reviewed by a fully functioning court, whose procedures satisfy the right to a fair trial.

In sum, the right to an effective remedy requires the provision of a domestic process to deal with the substance of a complaint and to grant appropriate relief. For example, in a case concerning the solitary confinement of a terrorist leader for over eight years, the right to an effective remedy was denied because he was not able to challenge the ongoing nature of his detention.¹³⁴ The European Court of Human Rights found, under the circumstances in that particular case, that the nature of the solitary confinement did not violate the applicant's substantive human rights; however, they went on to hold that having regard to the serious repercussions that solitary confinement has on the conditions of detention, an effective remedy before a judicial body is essential. Under the domestic law at the time it was not possible for the applicant to complain about the decisions to prolong his solitary confinement. Neither could the applicant challenge any procedural irregularities in relation to that detention. At the time of the applicant's detention, decisions to place a prisoner in solitary confinement were internal administrative measures in respect of which no appeal lay to the administrative courts. The European Court of Human Rights accordingly considered that there was a viola-

¹³⁴ ECtHR, *Ramirez Sanchez v. France*, Application no. 59450/00, 4 July 2006, paras. 157-166.

tion of the right to an effective remedy on account of the lack of a mechanism in domestic law that would have allowed the applicant to challenge the decisions to prolong his solitary confinement.

Other examples where the right to an effective remedy has been violated include:

- failing to provide adequate procedures to complain about, or obtain compensation for, killings by security forces;
- not carrying out thorough enquiries into alleged ill-treatment by security forces;
- not establishing complaints procedures regarding the interception of telephone calls.

Retroactivity

Article 15, ICCPR:

1. No one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 7, ECHR:

1. No one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

A key aspect of the principle of legality is the outlawing of retroactive criminal laws and penalties. Such absolute protection is found in all the major human rights treaties (see box above). Therefore, in a number of cases the Human Rights Committee has found a violation of the prohibition of retroactive criminal law where people were convicted and sentenced for membership of subversive organizations that were legal political parties but which were subsequently banned.¹³⁵

Importantly from a counter-terrorism perspective, this prohibition in international human rights law applies only to criminal proceedings resulting in a conviction, or the imposition of a criminal penalty. While other human rights standards will apply, the prohibition on retroactivity does not apply to internment or other forms of preventive detention that do not depend upon a criminal conviction or sentence. The prohibition does not generally apply to civil proceedings, although the definition of what is “criminal” is an autonomous concept. What is meant by an autonomous concept in international human rights law will be explained below.

¹³⁵ HRC, *Weinberger Weisz v. Uruguay*, Communication No. 28/1978, doc. CCPR/C/11/D/28/1978, 29 October 1980, para 16.

General Application of Human Rights Standards

In this chapter, the principles of interpretation for civil and political rights are explained. This is followed by a brief explanation of how economic and cultural rights should be understood and applied. While it is likely that civil and political rights will be of more direct relevance to combating terrorism, the indivisibility of civil and political rights and economic, social and cultural rights needs to be re-affirmed.¹³⁶ The two groups of rights are directly linked, and, as will be shown below, in the counter-terrorism context, both need to be guaranteed if counter-terrorism strategies are to be carried out in a manner consistent with democratic principles.

Civil and political rights

As has been set out above, the most relevant international human rights treaties containing mainly civil and political rights are the ICCPR and the ECHR. The ICCPR is applicable across the OSCE region. The methods of applying civil and political rights are the same for both treaties.

“Living instrument”

Essential to the understanding of how civil and political human rights work is the principle that they ought to be given an evolutive or a dynamic interpretation if they are to remain relevant. The European Court of Human Rights has therefore repeatedly referred to the fact that the ECHR is a “living instrument.”¹³⁷

How human rights are interpreted can therefore evolve over time. For example, although the ECHR contains no reference to a safe environment, the European Court has recognized that in order to protect private, family and home life an individual needs to have a safe environment, and therefore the Court has read such protections into the ECHR.¹³⁸ As a consequence, the Court (but also the Human Rights Committee) does not see itself as expressly bound by any doctrine of precedent.

What the European Court of Human Rights has done is, therefore, not to create new rights, but to develop the scope of existing rights. At the same time, human rights institutions are requiring an ever-higher standard of human rights interpretation and protection.

¹³⁶ See, for example, *op. cit.*, note 74, the Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993.

¹³⁷ ECtHR, *Tyler v. UK*, Application no. 5856/72, 25 April 1978, para. 31 (“The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions [...]”).

¹³⁸ ECtHR, *Guerra and Others v. Italy*, Case no. 116/1996/735/932, 19 February 1998, paras. 56-60.

“Practical and effective”

Human rights standards are not intended to guarantee rights that are theoretical or illusory, but rights that are “practical and effective.”¹³⁹ As far as international tribunals are concerned, merely asserting the existence of rights is not sufficient to satisfy this test of “practical and effective.”

Rights have to be genuinely accessible. For example, in a key case concerning access to court involving a particularly unpleasant divorce, the unavailability of legal aid for a woman with no ability to pay for legal advice meant that in reality she had no access to court, even though in theory such a right existed.¹⁴⁰

This obligation to ensure the practicality and effectiveness of rights is directly linked to the right to an effective remedy and the rule of law.

The nature of civil and political rights

In order to understand how rights work, it is essential to recognize that some types of rights may be qualified or limited under certain circumstances. Counter-terrorism policies have to be nuanced to respond to the particular type of rights at issue.

Civil and political rights can be categorized into different types of rights:

- *absolute rights*, which permit no qualification or interference under any circumstances;
- *limited rights*, that can be limited within constraints that are spelt out in the article of the ICCPR or ECHR that sets out the right;
- *qualified rights*, or those rights that permit restrictions intended to balance either between the individual and the community, or between two competing rights. Any restriction on these rights has to be for a specific purpose.¹⁴¹

In addition, some rights may be derogable under some circumstances in accordance with the human rights treaties.

139 “Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties’ establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy”, *op. cit.*, note 127, HRC, General Comment No. 31, para. 15.

140 “The Government contends that the application does enjoy access to the High Court since she is free to go before that court without the assistance of a lawyer. The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”, ECtHR, *Airey v. Ireland*, Application no. 6289/73, 9 October 1979, para. 24.

141 For this classification, see K. Starmer, *Human Rights Digest* (London, 2001), p. 2.

Absolute rights

The classic absolute right is freedom from torture, inhuman, or degrading treatment.¹⁴² There can never be a justification for violating this type of right.

For example, as will be explained in more detail below, interrogation techniques in relation to suspected terrorists in Northern Ireland were held to amount to inhuman and degrading treatment. As such, not even national security could justify exposing individuals to that level of treatment.¹⁴³

Another example of the obligation on the state to protect people from torture is the *Chahal* case.¹⁴⁴ The applicant was a Sikh terrorist from India who was in the United Kingdom. The UK authorities wanted to deport him. It was accepted by the Court that if he were to be deported to India he would be at serious risk of torture. The European Court therefore said that, due to the absolute nature of the right to protection from torture, the UK Government could not return someone to be exposed to likely torture even when national security issues were at stake and even where the Indian Government provided assurances it would not mistreat him as the Court found that the Indian Government did not have sufficient control over the security services in that particular area to enforce such assurances.

Other examples of absolute rights include protection from slavery and elements of the obligation to protect life.

Limited rights

The right to liberty, is a good example of a limited right.¹⁴⁵ The right is asserted in absolute terms in the first sentence of the relevant articles of the ICCPR and ECHR that guarantee it, but the articles go on to state that there may be limits to it. The articles then spell those specific limits out. For example, the right to liberty can be taken away from an individual following conviction by a competent court.

The right to a fair trial is absolute to the extent that the trial taken as a whole must be fair; however, there are certain specific and implied limits that have been read into it.¹⁴⁶

Qualified rights

Qualified rights are those rights where the right is first asserted — for example, the guarantee of freedom of expression or freedom of association — and then permissible restrictions can be applied. The relevant articles explain that it can be lawful to qualify a right if it is necessary in a democratic society to do so and that there is a legal basis for such limits. Therefore, it can be lawful to place limits on the right to freedom of expression, the right to private life, the right to protest, the right to join trade unions, and the right to manifest religious belief. The burden of proof is on the individual to establish that there has been an interference with his or her rights. The burden then shifts to the state to justify the interference.

142 Article 7 ICCPR. Protection against torture, inhuman or degrading treatment is also contained in Article 3 ECHR.

143 ECtHR, *Ireland v. UK*, Application no. 5310/71, 18 January 1978, paras. 162-164.

144 ECtHR, *Chahal v. UK*, Case no. 70/1995/576/662, 25 October 1996.

145 As contained in Article 9 ICCPR and Article 5 ECHR.

146 See Chapter 12 for further details.

Rights can conflict with each other, one obvious example being that one person's right to private life may conflict with another person's right to freedom of expression. A fair balance has to be struck between the two competing interests. Qualified rights can be lawfully restricted only if the tests of legality, necessity, proportionality and non-discrimination have been satisfied.¹⁴⁷ An understanding of how to lawfully qualify rights is essential to understanding how civil and political rights work as a whole.

Derogable and non-derogable rights

An additional way of categorizing rights is to divide them between those rights that can be lawfully derogated from in times of war or other public emergency threatening the life of the nation,¹⁴⁸ and those rights that permit no derogation under any circumstances. In the context of counter-terrorism measures, the power to derogate is significant.¹⁴⁹

Restricting rights

An individual may assert that a state policy, a certain course of conduct or a failure to act is an interference with a particular right. Once the interference is established the burden shifts to the state to justify its actions (or failure to act). To make lawful an interference with any qualified rights, the state must be able to satisfy five tests:

- legality;
- justification;
- necessity;
- proportionality; and
- non-discrimination.

The final test, the prohibition on discrimination, is relevant to all claims of human rights violations.

Legality: is there a legal basis for the interference?

As has already been discussed, what this means is that an individual must be able to know or find out what the law is that permits an interference with their rights and they must be able to regulate their conduct in accordance with it.¹⁵⁰ The test of legality therefore requires foreseeability, accessibility and precise laws.

Is there a recognized justification or ground for restricting rights?

The second test requires being able to justify the interference by reference to the recognized grounds — or aims and purposes — for restricting rights set out within the article that grants the rights. These grounds generally include national security, public order or safety, protecting the rights and freedoms of others, prevention of disorder and crime, and protecting health and morals.

147 In the text of the ICCPR a number of articles refer to limiting rights in different ways, such as if it is necessary in a democratic society or non-arbitrary. The test for both is ultimately the test of proportionality.

148 The same terminology is used in Article 4 ICCPR and Article 15 ECHR.

149 See pages 87-91 below.

150 For a detailed analysis of principles of legality, see pp. 60-64 above.

These aims or purposes are not to be interpreted loosely. The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR¹⁵¹ provide a helpful explanation of how these aims and purposes should be defined.

Public safety, for example should be characterized as “protection against danger to the safety of persons, to their life or physical integrity or serious damage to their property.”¹⁵² The same principles state that national security may be invoked by states to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or the threat of force.¹⁵³ National security cannot be invoked as a reason for imposing limitations on rights if the threats to law and order are local or relatively isolated.¹⁵⁴ By the same token, national security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.¹⁵⁵

Public order is defined as “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded.”¹⁵⁶ Limitations are permitted for the protection of the rights of others. This provision is to be read in the light of article 20(2) ICCPR, which prohibits any advocacy of national, racial or religious hatred, and Article 5, which excludes from the protection of the Covenant activities or acts “aimed at the destruction of any of the rights and freedoms recognised” in the Covenant.¹⁵⁷

To ensure the legality of any restrictions on rights, the state has to be able to justify that the restriction is in line with one or more of the grounds for the restriction listed in the article at issue.¹⁵⁸ Moreover, the state has the additional obligation to prove that the restriction is necessary in a democratic society.

Is it “necessary in a democratic society”?

The third test requires a balancing act between the rights of the individual on the one hand and state or community interests on the other. In order to make that assessment, the govern-

151 “Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights”, doc. E/CN.4/1985/4 (1985). These principles were developed in 1984 by a panel of 31 international experts who met in Siracusa (Italy) to adopt a uniform set of interpretations of the limitation clauses contained in the ICCPR. While they do not have the force of law, they offer important and authoritative guidance as to the meaning of the terms contained in the Covenant, especially in areas not covered by a general comment of the Human Rights Committee.

152 *Ibid.*, para. 33.

153 *Ibid.*, para. 29.

154 *Ibid.*, para. 30. “In contrast to public order, national security is endangered only in grave cases of political or military threat to the entire nation”, M. Nowak, *CCPR Commentary*, (2nd ed.) (Kehl-Strasbourg-Arlington, 2005), p. 506.

155 *Op. cit.*, note 151, Siracusa Principles, para. 31.

156 *Ibid.*, para. 22.

157 *Ibid.* See also HRC, *M. A. v. Italy*, Communication no. 117/1981, 10 April 1984, para. 13.3, where, in relation to the reorganization of the dissolved Italian fascist party, the HRC stated “the acts of which M. A. was convicted (reorganizing the dissolved fascist party) were of a kind which are removed from the protection of the Covenant by article 5 thereof and which were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of articles 18 (3), 19 (3), 22 (2) and 25 of the Covenant.”

158 See for example Article 19(3) ICCPR (freedom of expression) which points out that “[i]t may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary [...] for respect of the rights or reputations of others [or] for the protection of national security or of public order, or of public health or morals.”

ment should justify its actions by establishing that any restriction is necessary in a democratic society.

“Necessary” does not mean indispensable, but neither does it mean “reasonable” or “desirable.”¹⁵⁹ What it implies is a pressing social need for the restriction on the right, and that pressing social need must accord with the requirements of a democratic society. The hallmarks of such a society are tolerance, pluralism and broad-mindedness.

Of particular relevance to counter-terrorism, although individual interests must on occasion be subordinated to those of the perceived majority, democracy does not simply mean that the views of the majority must always prevail. A balance must be achieved that ensures the fair and proper treatment of minorities and avoids any abuse by those in a dominant position.

Is it proportionate?

The principle of proportionality is not mentioned in the text of human rights treaties but it is a major theme in the application of human rights. Proportionality requires that there is a reasonable relationship between the means employed and the aims to be achieved. It would not be acceptable, for example, for a restriction on a right to destroy the essence of the right in question. Ultimately, disputes over proportionality may require a court to determine whether a measure aimed at promoting a legitimate public policy is either:

- unacceptably broad in its application; or
- has imposed an excessive or unreasonable burden on certain individuals.¹⁶⁰

Factors to consider when assessing whether an action is disproportionate are:

- have relevant and sufficient reasons been advanced in support of it?
- was a less restrictive measure possible?
- has there been some measure of procedural fairness in the decision-making process?
- do safeguards against abuse exist?
- does the restriction in question destroy the “very essence” of the right in question?

A decision made taking into account proportionality principles should:

- impair as little as possible the right in question;
- be carefully designed to meet the objectives in question;¹⁶¹
- not be arbitrary, unfair or based on irrational considerations.

159 ECtHR, *Handyside v. UK*, Application no. 5493/72, 7 December 1976, para. 48. The concept is reiterated, amongst other judgments, in ECtHR, *The Sunday Times v. UK*, Application no. 6538/74, 26 April 1979, para. 59.

160 “States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right”, *op. cit.*, note 127, HRC, General Comment No. 31, para. 6.

161 Although in relation to some interferences with human rights, a certain degree of latitude will be given to the state party. For example in the *Hatton* case, the European Court found no violation of human rights in relation to the right to respect for privacy and home life in the context of aircraft noise and night flights. The Court accepted the economic imperative of such activity and therefore acknowledged that the interferences fell within the state’s margin of appreciation, see ECtHR, *Hatton and Others v. UK*, Application no. 36022/97, 8 July 2003, paras. 116-130.

To ensure that counter-terrorism measures are lawful, they not only have to be a proportionate response, but must also be applied proportionately on a case-by-case basis.¹⁶² Even in a counter-terrorism context, measures taken to limit qualified rights must be appropriate to achieve their protective function. The mere fact that the measure is sufficient to achieve the intended aim — for example protecting national security or public order — is not enough to satisfy proportionality. Proportionality requires that the way in which the right is being restricted is actually necessary to protect national security or public order, and that the approach adopted is the least restrictive method among those that might achieve the desired result of protecting national security or public order.

Finally, proportionality always requires that a balance is struck between the burden placed on the individual whose rights are being limited and the interests of the general public in achieving the aim that is being protected.

Is it discriminatory?

As part of the test for assessing the legality of any restrictions on human rights, the issue of discrimination must be addressed, even if there has been no violation of the substantive right at issue.¹⁶³ As a general principle, a distinction will be considered discriminatory if it has no objective and reasonable justification, and if it is disproportionate. If these tests cannot be met, a difference of treatment will amount to discrimination and will be unlawful. In the counter-terrorism context, particular attention has to be given to ensure that measures are not adopted, and/or applied, which discriminate on grounds of race, religion, nationality or ethnicity.

The OSCE has recognized the need to protect against discrimination if sustainable peace and security is to be established. Of particular concern to the Organization is the discriminatory treatment of national minorities.¹⁶⁴

Protection against discrimination is vital in devising counter-terrorism strategies. Guaranteeing protection from discrimination has proved increasingly problematic in some countries' responses to the events of 11 September 2001.¹⁶⁵

162 "1. All measures taken by States to combat terrorism must be lawful. 2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued", *op. cit.*, note 11, CoE, *Guidelines on Human Rights and the Fight against Terrorism, Guideline III* (Lawfulness of anti-terrorist measures).

163 The principle of equal treatment and its relationship with human rights in the counter-terrorism context is dealt with on pages 80-87, 135 and 242 below.

164 For an overview of OSCE commitments related to national minorities, see OSCE/ODIHR, *OSCE Human Dimension Commitments*, Volume 1 (thematic compilation), (Warsaw, 2005), pp. 139-155, available at http://www.osce.org/odihr/item_11_16237.html.

165 For example, the United Kingdom's emergency legislation, which permitted the administrative detention of non-UK nationals but not British citizens, was held to be discriminatory and therefore unlawful; see House of Lords, *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2004] UKHL 56, 16 December 2004.

CASE EXAMPLE: Lawful interference with a qualified right

A first step towards contesting that a right has been violated is for an individual or group to identify the right at issue and assert that there has been an interference with it. The burden then shifts to the state to justify its interference with the right.

The *Lustig-Prean* case¹⁶⁶ provides a useful example of how qualified rights work. While not directly related to terrorism, it demonstrates how the tests are applied, even within the context of national security.

The applicants, who were homosexuals, were dismissed from the armed forces in the United Kingdom because of their sexual orientation. There was a blanket policy in the armed forces that anyone of a homosexual orientation could not serve, regardless of their rank or the functions that they carried out.

As a matter of international human rights law, sexuality is protected under the right to respect for private life. This includes the recognition of a lesbian and gay identity.¹⁶⁷ Criminalizing consensual sexual activity, or other punitive sanctions based upon sexual orientation, will therefore be likely to violate the right to respect for private life.

The applicants in *Lustig-Prean* (altogether there were four cases brought under the ECHR) were therefore able to establish that the policy not only engaged their private life but also interfered with it. The fact that you could not be gay or lesbian in the armed forces was held to be a particularly serious interference with the applicants' private life rights. The question was, therefore, whether the British Government could justify the interference with privacy protected by Article 8(1), ECHR by relying upon Article 8(2) and therefore establish that there had been a lawful interference with the applicants' rights under the ECHR.

To do this, the British Government had to satisfy the standard tests for interfering with human rights: legality, justification, necessity, proportionality, and non-discrimination. For the interference to be lawful, each of these tests has to be satisfied.

166 ECtHR, *Lustig-Prean and Beckett v. UK*, Applications nos. 31417/96 and 32377/96, 27 September 1999.

167 ECtHR, *Dudgeon v. UK*, Application no. 7525/76, 22 October 1981, paras. 41-63; see also HRC, *Toonen v. Australia*, Communication no. 488/1992, doc. CCPR/C/50/D/488/1992, 4 April 1994, paras. 8.1-8.7 (para. 8.6 reads: "The Committee cannot accept either that for the purposes of article 17 of the Covenant [right to privacy], moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy. It further notes that with the exception of Tasmania, all laws criminalizing homosexuality have been repealed throughout Australia and that, even in Tasmania, it is apparent that there is no consensus as to whether sections 122 and 123 should not also be repealed. Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the 'reasonableness' test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen's right under article 17, paragraph 1"). On the issue see also *op. cit.*, note 154, Nowak, *CCPR Commentary*, pp. 391-392.

In *Lustig-Prean* the state was able to show that the policy had a clear legal basis by reference to various Acts of Parliament. It therefore passed the test of legality.

The second test requires being able to justify the interference by reference to the recognized grounds for restricting rights within the Article itself. The state, therefore, had to be able to justify that the interference with the Convention right was authorized by one or more of the stated grounds in the article at issue. For example, in *Lustig-Prean* the state was able to rely upon national security as a justification, since the issue involved the management of the armed forces.

The third test requires a balancing act to be made in assessing the rights of the individual on the one hand and state or community interests on the other. In order to satisfy this test, the government had to establish that its actions were "necessary in a democratic society". To satisfy this test, restrictions must not just have a pressing social need; there must also be a good reason for them. In *Lustig-Prean* it was accepted that the purpose of the restrictions, which was to facilitate the smooth running of the armed forces, constituted a pressing social need, and the Ministry of Defence's objective of ensuring morale and unit effectiveness was accepted as being a good reason for the blanket ban.

The Court accepted the UK Government's position that the British Army was not a conscript army but a professional army, and one that was required to maintain peace and stability around the world. Therefore, it recognized that how the armed forces were managed was a vital concern for the UK and the international community. However, even though the Court considered there to be a good reason for the interference with the applicants' privacy rights and a pressing social need for that interference, the further test of proportionality also had to be satisfied. The state interference had to be proportionate in relation to the stated objectives for it. In *Lustig-Prean*, the Court held that the blanket ban on homosexuals serving in the armed forces was disproportionate to the UK Government's legitimate public policy objective of ensuring that morale and unit effectiveness was maintained. In so finding, the Court held that less restrictive measures on the applicants' Article 8 rights could have been adopted, such as a code of conduct forbidding sexual activity within the armed forces.

The Court also was sensitive to the fact that most Council of Europe countries did not have comparable policies in relation to their armed forces. The Court often seeks to rely on evidence from other Council of Europe countries in relation to whether a restriction is proportionate or not.

In *Lustig-Prean*, the Court was also particularly concerned about the arbitrary and prejudicial nature of the blanket policy, which targeted people in relation to conduct, behaviour and/or identity, which was Convention protected.

Cross-cutting issues arising under civil and political rights

Autonomous concepts

Certain specific human rights terms are autonomous concepts. This means that the concept is fixed regardless of how a state may choose to define it in particular cases. The definition of “criminal charge” is, for example, an autonomous concept, as are notions of civil rights and obligations.¹⁶⁸ Therefore, a state cannot simply redefine detention as an administrative matter and non-criminal, thereby escaping the international human rights obligations applicable to criminal law. The courts must look behind the definition asserted by the state and decide for itself whether the matter in issue is criminal and whether criminal safeguards ought to apply. This issue of autonomous concepts has therefore to be considered carefully in the context of counter-terrorism.

Positive obligations

Human rights treaties impose a negative duty — that is for states not to interfere with rights — but they can also impose positive obligations to secure and guarantee rights. The extent of this obligation will vary according to such factors as the nature of the right at issue, the importance of the right for the individual and the nature of the activities involved.¹⁶⁹

A targeted and proportionate counter-terrorism strategy could be explained as satisfying a state’s positive obligation to protect against terrorism. The Council of Europe’s Guidelines emphasize that “States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States’ fight against terrorism in accordance with the present guidelines.”¹⁷⁰

Positive obligations tend to require the provision of resources. Positive obligations also impose a duty on the state to put in place a legal framework that provides effective protection for human rights. In certain circumstances, a positive obligation may require the authorities to take proactive steps to prevent breaches of human rights. This is particularly the case where rights such as the right to life or protection from torture are at stake.

168 “If the Contracting States were able at their discretion, by classifying an offence as ‘regulatory’ instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention”, ECtHR, *Öztürk v. Germany*, Application no. 8544/79, 21 February 1984, para. 49 (but see more generally paras. 46-58). The Court had already clarified the concept in *Engel and Others v. The Netherlands*, Applications nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976, paras. 80-85.

169 For instance the Court, elaborating on the right to peaceful assembly, stated that “in a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be [...]”, ECtHR, *Plattform “Ärzte für das Leben” v. Austria*, Application no. 10126/82, 21 June 1988, para. 32.

170 *Op. cit.*, note 11, CoE, *Guidelines on Human Rights and the Fight against Terrorism*, Guideline I. Cf. also *op. cit.*, note 28, ECtHR, *Osman v. UK*, para. 115 and ECtHR, *Kiliç v. Turkey*, Application no. 22492/93, 28 March 2000, paras. 62 (“The Court recalls that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction [...] This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual”) and 76.

However, such an obligation must not be interpreted in a way that imposes an impossible or disproportionate burden on the authorities. The doctrine of positive obligations cannot be used as a mechanism for restricting the human rights of others.

Horizontal application

In theory, human rights are designed to regulate conduct between the individual and the state. The reality is, however, that they have been held to apply on a number of occasions in relation to disputes between two private parties. The fact that a public authority is not directly responsible for a breach of an individual's human right does not render human rights irrelevant. However, such findings are not without controversy.¹⁷¹

In the counter-terrorism context, this issue is particularly significant. If human rights are only concerned with state accountability for violations of human rights, does this mean that those private entities that commit terrorist atrocities, such as Al Qaida, do not violate human rights? These questions are more than semantic, and in many ways go to the heart of the human rights compliant response to ensuring the control of terrorism. In his earliest reports, the UN Special Rapporteur on the Promotion and Protection of Human Rights while Combating Terrorism has sought to address this issue.¹⁷² There is, however, no international consensus on this point. For the purposes of this manual, the emphasis will be on the responsibilities of states and how human rights assist them in countering terrorism.

In certain circumstances, public authorities come under a duty to protect private individuals from breaches of their human rights by other private individuals.¹⁷³ This issue of applying human rights to non-state actors is dealt with in detail below.¹⁷⁴

Extra-territorial effect

Human rights treaties secure rights to all within the jurisdiction of a state. What amounts to jurisdiction for the purposes of these treaties depends upon the extent of control that a

171 For example compare the rulings in *op. cit.*, note 26, ECtHR, *X. and Y. v. The Netherlands*, paras. 21-30; ECtHR, *Costello-Roberts v. UK*, Application no. 13134/87, 25 March 1993, paras. 25-28; and ECommHR, *Rommelfanger v. the Federal Republic of Germany*, Application no. 12242/86, 6 September 1989.

172 Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, doc. E/CN.4/2006/98, 28 December 2005, paras. 67-71.

173 "The Court considers that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals [...]. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity", ECtHR, *A. v UK*, Case no. 100/1997/884/1096, 23 September 1998, para. 22). For additional references, see ECtHR, *M.C. v. Bulgaria*, Application no. 39272/98, 4 December 2003, paras. 148-153.

174 See pages 92-94 below.

state party has in relation to territory, even territory outside its geographic boundaries.¹⁷⁵ The HRC has made it clear that the ICCPR has extra-territorial reach where persons are within the power or effective control of the state party, even if not situated in the territory of the state party.¹⁷⁶ Similarly, the International Court of Justice held that the ICCPR extends to “acts done by a State in the exercise of its jurisdiction outside of its own territory.”¹⁷⁷ It is under these principles that the ICCPR and all other human rights treaties ratified by the United States were considered to extend to the actions of the United States in relation to those detained at Guantánamo Bay.¹⁷⁸

In taking counter-terrorism measures, therefore, a state must be aware that its obligations do not necessarily cease at its frontiers.¹⁷⁹ This is particularly the case where a state’s armed forces are deployed overseas, for example in a peacekeeping operation. It is now becoming standard practice for the UN treaty bodies to ask member states what measures are in place to ensure that their armed forces abroad act compatibly with their treaty obligations.

Prohibition of the abuse of rights

Rights such as freedom of expression cannot be exercised to destroy the rights of others.¹⁸⁰ Nevertheless, even if a person or group of persons is engaged in activities aimed at the destruction of human rights, it is not necessary to take away every one of the rights and freedoms guaranteed to those persons.

175 “As regards the question of imputability, the Court recalls in the first place that [...] under its established case-law the concept of ‘jurisdiction’ under Article 1 of the Convention is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration [...]”, ECtHR, *Loizidou v. Turkey*, Case no. 40/1993/435/514, 28 November 1996, para. 52. The concept of “jurisdiction” was also thoroughly examined in ECtHR, *Banković and Others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and UK*, Application no. 52207/99, paras. 54-73.

176 “States Parties are required by article 2(1), 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.”, *op. cit.*, note 127, HRC, General Comment No. 31, para. 10.

177 *Op. cit.*, note 124, ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, para. 111.

178 Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir; and the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, *Situation of detainees at Guantánamo Bay*, doc. E/CN.4/2006/120, 27 February 2006, paras. 10-11.

179 The ICCPR is more explicit than the ECHR in relation to jurisdiction and extra-territoriality. Article 2(1) ICCPR reads: “Each State Party to the present 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.”

180 This is contained in Article 5 ICCPR and Article 17 ECHR.

Any measure taken under this principle must be strictly proportionate to the threat to the rights of others.¹⁸¹ This issue is most relevant to freedom of expression and is addressed in detail in that section of this manual.

Impunity and amnesty

The Human Rights Committee has consistently condemned statutes or Acts of Parliament that provide for impunity or amnesties for state officials who commit human rights violations. Particularly where the right to life or protection from torture have been violated, there is a duty to investigate and punish offenders.

In their Concluding Observations on a number of states parties, the HRC and the CAT Committee have been critical of states with a culture of impunity.¹⁸² The CPT Committee adopted in 2004 general standards on combating impunity.¹⁸³ In recent Concluding Observations, the HRC was particularly critical of the availability of the defence of necessity to persons charged with using improper techniques for interrogating suspected terrorists. It stated that

The State party should review its recourse to the necessity defence [...] It should ensure that alleged instances of ill-treatment and torture are vigorously investigated by a genuinely independent mechanism, and that those that are responsible for such actions are prosecuted.¹⁸⁴

Additional concepts

In addition to the ideas described above, there are several other concepts relevant to limiting rights in connection with counter-terrorism. These include:

- *Absolute necessity*: This is the test to justify the use of lethal force under the right to life. It is the strictest test and requires the highest degree of supervision by the courts and justification on the part of those who exercise lethal force.
- *Strict necessity*: This is the test used to limit the right to a fair trial and the right to liberty where the articles of human rights treaties protecting those rights permit limits to them.
- *Reasonable in the public interest*: This test, often applied to property rights, requires states to show that any action limiting rights is both reasonable and in the public interest. This concept generally requires less judicial supervision than absolute necessity or strict necessity.

Economic, social and cultural rights¹⁸⁵

Civil and political rights are most often affected by counter-terrorism measures. However, the guarantee of economic, social and cultural rights is also of direct relevance. For example,

181 ECtHR, *Lehideux and Isorni v. France*, Case no. 55/1997/839/1045, 23 September 1998, para. 55.

182 CAT, Concluding Observations: *Colombia*, doc. CAT/C/CR/31/1, 4 February 2004, paras. 9-10. In its Concluding Observations regarding Spain in 1996, the HRC was concerned over the lenient sentences given to police officers convicted of human rights abuses. The Committee pointed out: "when members of the security forces are found guilty of [ill-treatment and even torture] and sentenced to deprivation of liberty, they are often pardoned or released early, or simply do not serve their sentences. Moreover, those who perpetrate such deeds are seldom suspended from their functions for any length of time", doc. CCPR/C/79/Add. 61, 3 April 1996, para. 10. See also HRC, Concluding observations: *Italy*, doc. CCPR/C/79/Add.94, 18 August 1998, paras. 12-15.

183 Available at <http://www.cpt.coe.int/en/docsstandards.htm>.

184 *Op. cit.*, note 131, Concluding observations of the Human Rights Committee: *Israel*, para. 18.

185 For further information, see A. Eide, C. Krause, A. Rosas (Eds.), *Economic, social and cultural rights. A textbook*, (2nd ed.) (Dordrecht-Boston-London, 2001).

aspects of the right to health are particularly relevant to detention conditions.¹⁸⁶ Certain counter-terrorism measures may also directly breach economic and social rights. This was graphically illustrated by the “Israeli wall case”, where a number of violations of the ICESCR were identified as a result of the building of a wall in the Occupied Palestinian Territories for the purpose of protecting Israeli security. Rights found to be violated included the right to education, health and an adequate standard of living.¹⁸⁷

Measures leading to asset freezing or confiscation may engage economic, social and cultural rights. States should also give consideration to the protection of the economic, social and cultural rights of victims of terrorism. Furthermore, the guarantee of economic, social and cultural rights may be a key element in preventing people from feeling alienated within their societies; such alienation may be a factor in people’s decisions to adopt the tactics of terrorism.

Therefore, those devising strategies to combat terrorism must also be aware of the issues arising out of economic, social and cultural rights and how they work, in particular through the application of the ICESCR and the European Social Charter.¹⁸⁸

CASE EXAMPLE: National security and the obligation to protect economic, social and cultural rights: the Israeli wall case¹⁸⁹

The construction by Israel of a wall on and through the Occupied Palestinian Territories raises a number of relevant issues and lessons. Although the case was chiefly resolved by reference to matters concerning self-determination, the International Court of Justice (ICJ), the main court of the United Nations, found Israel in breach of international law and made a number of other findings of interest in relation to human rights more broadly.

The ICJ considered the impact of the construction of the wall on the daily life of the inhabitants of the Occupied Palestinian Territories. The wall’s construction, the ICJ found, involved the destruction or requisition of private property, restrictions on freedom of movement, confiscation of agricultural land and cut-off of access to primary water sources, amongst other matters. As such, the ICJ found that the construction of the wall and its associated regime were not only contrary to international humanitarian law and aspects of the laws of war, but also a violation of the ICCPR and the economic, social and cultural rights contained in the ICESCR. The ICJ pointed out that the wall violated that Covenant because it impeded the exercise by the persons concerned of the right

to work, to health, to education and to an adequate standard of living.

Of particular relevance to counter-terrorism, the ICJ also put in context the circumstances in which a state may rely upon justifications for limiting, qualifying or more broadly interfering with human rights standards. The ICJ acknowledged that certain humanitarian law and human rights instruments include qualifying clauses or provisions for derogation that may be invoked by States Parties where military exigencies or the needs of national security or public order so require.

However, the Court pointed out that in this particular case, it was not convinced that the specific route Israel had chosen for the wall was necessary to attain its security objectives. When the ICJ reached this conclusion — that the limitation, qualification and derogation clauses were not relevant in the context of the stated justification for the wall — Israel was unable to rely upon a right of self-defence or on a state of necessity. The Court therefore went on to find that the construction of the wall constituted “breaches by Israel of several of its obligations under the applicable international humanitarian law and human rights instruments.”

186 See for example the work of the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, and specifically *op. cit.*, note 178, *Situation of detainees at Guantánamo Bay*, paras. 66-82.

187 *Op. cit.*, note 124, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 114-137.

188 Key treaties guaranteeing economic, social and cultural rights include the ICESCR and the Council of Europe’s Social Charter. Additionally, ICERD, CEDAW and CRC all contain certain ESC rights. The OSCE also has extensive commitments in relation to economic, social and cultural rights. For an overview see *op. cit.*, note 164, OSCE/ODIHR, *OSCE Human Dimension Commitments*, Volume 1, pp. 131-137.

189 *Op. cit.*, note 124, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

Principles applicable to the guarantee of economic, social and cultural rights under the ICESCR

The extent to which economic, social and cultural rights are justiciable is a controversial issue. A number of courts, such as the South African Constitutional Court, are confident in their approach to implementing such rights.¹⁹⁰ Other jurisdictions, most notably the US, consider economic, social and cultural rights to be more in the nature of political commitments and aspirations rather than rights that can be enforced through litigation.

Whether or not courts are the best fora to guarantee economic, social and cultural rights, it is clear is that these rights can be interpreted and applied. The approach to implementing economic, social and cultural rights differs from the way in which civil and political rights work, but they can be equally practical and understandable. The committee responsible for implementing the ICESCR has produced extensive analysis of the ways in which the Covenant guarantees are to be given substance.

States parties to the ICESCR are under three broad duties in relation to the rights protected under the Covenant: the duties to respect, to protect and to fulfil.

- *The obligation to respect* does not require positive state action, only that the state refrains from interference. So, for example, there would be a violation of the right to housing if the state engaged in arbitrary forced evictions.
- *The obligation to protect* can require that the state protect individuals from interference with socio-economic rights from non-state actors. This would apply, for example, where private companies were providing unsafe working conditions to employees.
- *The obligation to fulfil* can require that the state takes positive measures to ensure that Covenant rights are implemented, through legislation, administrative measures, or budgetary allocations. This could require, for example, that detailed policies and programmes be put in place to ensure adequate access to health care for all citizens.

Progressive realization of rights

Outside of certain core minimum obligations, economic, social and cultural rights are not required to be implemented in full immediately; rather, full implementation is dependent on the economic circumstances of the state. The notion of progressive realization is derived from Article 2(1) ICESCR which states:

Each state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

¹⁹⁰ See for example Constitutional Court of South Africa, *The Government of the Republic of South Africa and Others v. Irene Grootboom and Others*, Case CCT 11/00, 4 October 2000 and Constitutional Court of South Africa, *Minister of Health and Others v. Treatment Action Campaign and Others*, Case CCT 8/02, 5 July 2002.

Minimum core obligations

There are certain core obligations within economic, social and cultural rights that should be complied with immediately, regardless of economic resources, and which are not subject to the principle of progressive realization. These are:

- non-discrimination in the application of economic, social and cultural rights;
- right to freedom from arbitrary forced evictions.

Analysing the content of economic, social and cultural rights

The basic content of economic, social and cultural rights such as health care, education, benefits, etc., must be made available to all on a non-discriminatory basis.

Further relevant standards will be:

- sufficiency: e.g., sufficient levels of benefits; and
- quality: e.g., health care of an adequate quality.

Where services forming part of the basic content of economic, social and cultural rights are made available, they must be accessible to all. The concept of accessibility includes:

- physical accessibility: e.g., disabled access to schools; benefit offices within a reasonable geographic distance of claimants;
- economically accessible: e.g., medical care available free of charge where necessary or at a reasonable cost;
- non-discrimination and accessibility to vulnerable groups.

In addition, economic, social and cultural rights should be implemented in a manner that is culturally acceptable. For example, education must be broadly culturally acceptable and appropriate to parents and children.

From the counter-terrorism perspective, an assessment of particular proposals should be made to analyse the impact of those proposals on the economic, social and cultural rights of all those affected by the measures. For example, policies that may require the detention of those with irregular immigration status for security reasons should be assessed for their likely impact on the individuals concerned and also those dependent upon them. That impact assessment should be carried out in accordance with the interpretive principles in relation to economic, social and cultural rights identified above.

How Rights Work: Specific Issues for Counter-terrorism Strategies

In addition to applying the basic of human rights principles, those developing human rights compliant counter-terrorism strategies must also address a number of specific issues relevant to human rights and international law. These include:

- equality and non-discrimination;
- human rights within a state of emergency;
- international criminal law; and
- accountability of states for actions of non-state actors.

The aim of this chapter is to provide broad policy guidance on these issues and to identify how they apply in practice to concerns arising out of counter-terrorism strategies.

Equality before the law and protection from discrimination in international human rights law

Equal treatment before the law and non-discrimination are essential elements of democracy. These guiding principles need to be fully integrated into any counter-terrorism policy.

The OSCE participating States have recognized that:

12. Practices related to discrimination and intolerance both threaten the security of individuals and may give rise to wider-scale conflict and violence. They can have their root in issues such as ethnic and religious tensions, aggressive nationalism, chauvinism and xenophobia, and may also stem from racism, anti-Semitism and violent extremism, as well as lack of respect for the rights of persons belonging to national minorities [...]

36. Discrimination and intolerance are among the factors that can provoke conflicts, which undermine security and stability. Based on its human dimension commitments, the OSCE strives to promote conditions throughout its region in which all can fully enjoy their human rights and fundamental freedoms under the protection of effective democratic institutions, due judicial process and the rule of law.

2003 Maastricht Document

The OSCE has also firmly rejected the identification of terrorism with any nationality or religion.¹⁹¹

The UN human rights mechanisms have been particularly concerned about discriminatory responses to terrorism. They have drawn attention to the negative effect some counter-terrorism measures have had on equal treatment and freedom from discrimination. They have

¹⁹¹ *Op. cit.*, note 23, 2001 Bucharest Document, Decision no. 1, para 3.

emphasized that states should be proactive in guarding against discrimination in the post-11 September context. The following extracts highlight some of their concerns:

- “The Committee [HRC] expresses its concern regarding the effect of those measures on the situation of human rights in particular for certain persons of foreign extraction, because of an atmosphere of latent suspicion towards them ([ICCPR] Arts. 17, 19, 22 and 26).”¹⁹²
- “While it understands the security requirements relating to the events of 11 September 2001, the Committee [HRC] expresses its concern regarding the effect of this campaign on the situation of human rights, in particular for persons of foreign extraction.”¹⁹³
- “The Committee [CERD] is deeply concerned about provisions of the Anti-Terrorism Crime and Security Act, which provide for the indefinite detention without charge or trial, pending deportation, of non-nationals who are suspected of terrorism-related activities. While acknowledging the State party's national security concerns, the Committee recommends that the State party seek to balance those concerns with the protection of human rights and its international legal obligations [...] The Committee is [also] concerned about reported cases of ‘Islamophobia’ following the 11 September attacks.”¹⁹⁴

The Council of Europe Guidelines on Human Rights and the Fight against Terrorism make the point that discriminatory treatment is linked to arbitrary conduct. The second guideline explains, under the prohibition on arbitrariness, that “all measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.”¹⁹⁵

The Council of Europe’s Commission against Racism and Intolerance (ECRI) has also emphasized that “terrorism should be combated, but it should not become a pretext under which discrimination and intolerance are allowed to flourish”. In 2004, ECRI promulgated a recommendation on combating racism while fighting terrorism. That recommendation provides comprehensive guidance on the steps to be taken to ensure that counter-terrorism measures are not discriminatory.¹⁹⁶

Specifically, the recommendation emphasizes that particular attention must be paid to guaranteeing in a non-discriminatory way the freedoms of association, expression, religion and movement, and to ensuring that no discrimination ensues from legislation and regulations — or their implementation — notably governing the following areas:

- checks carried out by law-enforcement officials and border control personnel;
- administrative and pre-trial detention;
- conditions of detention;
- fair trial, criminal procedure;
- protection of personal data;
- protection of private and family life;
- expulsion, extradition, deportation and the principle of non-refoulement;

192 HRC, Concluding observations: *Germany*, doc. CCPR/CO/80/DEU, 4 May 2004, para. 20.

193 HRC, Concluding observations: *Sweden*, doc. CCPR/CO/74/SWE, 24 April 2002, para. 12.

194 CERD, Concluding observations: UK, doc. CERD/C/63/CO/11, 10 December 2003, paras. 17 and 21. See also CERD, Concluding observations: *Sweden*, doc. CERD/C/64/CO/8, 10 May 2004, para. 15.

195 *Op. cit.*, note 11, CoE, *Guidelines on Human Rights and the Fight against Terrorism*, Guideline II (Prohibition of arbitrariness).

196 *Op. cit.*, note 67, ECRI, General Policy Recommendation No. 8.

- issuance of visas;
- residence and work permits and family reunification; and
- acquisition and revocation of citizenship.

Why principles of equality and non-discrimination are essential to international human rights law and to combating terrorism effectively

Protection against discrimination is the cornerstone of the commitment to equal treatment in international human rights law. The following is a brief analysis of how human rights law strives to guarantee equal treatment. One of the main concerns for courts and tribunals in relation to human rights and countering terrorism is the discriminatory nature of some of the measures adopted. For example, a key plank of the UK strategy to combat terrorism was held to be discriminatory by the UK's highest courts. Not only was there the human cost of policies that violate human rights, but also the UK Government was obliged to redesign its counter-terrorism programme to ensure that it was human rights compliant and effective.¹⁹⁷

How is non-discrimination protected by international human rights law?

The first article of the United Nations Charter states that one of the purposes of the United Nations is “[...] promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹⁹⁸

The International Court of Justice has made it clear that “to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origins [...] is a flagrant violation of the purposes and principles of the [UN] Charter.”¹⁹⁹ With regard to racism, that Court has held that one of the fundamental norms of international law binding on all states includes protection from racial discrimination.²⁰⁰

Different approaches to protecting against discrimination

All human rights treaties include a non-discrimination clause, as do most domestic constitutional frameworks. Similarly at the national level, there are often comprehensive laws forbidding discrimination. However, there are various ways of seeking to ensure non-discrimination. Some of these are more effective than others. For example, all human rights treaties provide for consistency or formal equality in treatment by prohibiting unjustified differential treatment, which is known as “direct discrimination.” Others also impose an obligation on states to secure substantive equality by, in particular, prohibiting unjustified conditions, which, while neutral in appearance, disadvantage certain protected groups.²⁰¹ Such unjustified conditions are known as “indirect discrimination.” The non-discrimination guarantee in

197 United Kingdom House of Lords, *A and Others*, [2004] UKHL 56.

198 United Nations Charter, Article 1.

199 ICJ, Legal consequences for States of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, para. 57.

200 ICJ, Case concerning the Barcelona Traction, Light and Power Company Co. Ltd. (Belgium v. Spain), (second phase), Judgment of 5 February 1970, in “ICJ Reports” 1970, p. 3.

201 S. Fredman, (Ed.), *Discrimination and Human Rights: the Case of Racism* (Oxford, 2001), page 24.

the European Convention on Human Rights (Article 14), for example, is now understood to prohibit neutral measures that adversely affect certain minority groups.²⁰²

Some human rights treaties go even further and expressly require positive action on the part of states to eliminate discrimination on prohibited grounds (for instance the ICERD and the CEDAW²⁰³). However, certain treaties protect equality only in the enjoyment of identified substantive rights (commonly described as “ancillary” protection).²⁰⁴ This means that instead of a free-standing right to equal treatment, protection against discrimination is available only in relation to the application of the other rights protected by the relevant treaty. This can diminish the effect of non-discrimination provisions.

Is protection against direct discrimination enough?

It is generally understood that the mere fact of having a requirement that there be no difference in treatment between persons in like situations (or “direct discrimination”) is not sufficient to guarantee that some persons or groups will not be disadvantaged. Simple equality of treatment, without regard to the differences between the persons or groups of persons concerned, may operate so as to entrench existing disadvantages. For example, a prohibition on wearing head gear at work imposed on all employees would be equal treatment but would have an impact on groups for whom the wearing of head gear might have some religious or cultural significance.

Protecting against indirect discrimination

Protection against “indirect discrimination” provides a better opportunity to challenge entrenched discrimination arising out of cultural or other factors. Indirect discrimination is perhaps best explained as a policy, rule or practice that is essentially neutral on its face, in that it applies to everyone, but which may be indirectly discriminatory if it has a disparate impact on people belonging to a particular group.²⁰⁵ The concept of indirect discrimination is now well recognized, including in the sphere of race and ethnic discrimination, and is

202 “The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”, ECtHR, *Thlimmenos v. Greece*, Application no. 34369/97, 6 April 2000, para 44.

203 See below, note 209.

204 E.g. Article 2(2) ICESCR and Article 14 ECHR, as opposed to the general non-discrimination provisions in Article 26 ICCPR and Protocol No. 12 ECHR.

205 It is perhaps best explained by looking at the US Supreme Court case that formulated the principle, see U.S. Supreme Court, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), 8 March 1971. In *Griggs*, an employer had an open policy of excluding black applicants from employment. This was replaced by a requirement that candidates have high school qualifications or pass a literacy test. The employment concerned was in the main unskilled and the qualifications sought were not necessary for the carrying out of the work. The effect of applying the qualifications, however, was to disadvantage black candidates as against white. The reason for that was the continuing effects of discrimination in the education system against black pupils, such that a disproportionate number failed to achieve a high school qualification or reach a standard of literacy sufficient to pass the test imposed. Thus, whilst black candidates and white candidates were treated — in a formal sense — equally, black candidates were disadvantaged by the criterion applied and the workforce remained resolutely almost completely white. The US Supreme Court held that such treatment could be discriminatory if the result was such that fewer candidates could comply with the requirement, unless the requirement was necessary for the proper performance of the job.

reflected in EU legislative measures on, amongst other things, race, ethnicity and religious discrimination.²⁰⁶

Nevertheless, the concept of indirect discrimination has its limits. Though prohibiting conditions that disadvantage certain groups, it does not require positive measures to ensure that any existing disadvantage or difference is overcome or accommodated. Additionally, only “unjustified” discriminatory conditions are prohibited.

Racial profiling as indirect discrimination²⁰⁷

Racial profiling is the inclusion of race, ethnicity, nationality or religion in the profile of a person considered likely to commit a particular crime or type of crime. It occurs when police, or the security services, create databases, investigate, stop, frisk, search or use force against a person based on such characteristics rather than on evidence of a person’s criminal behaviour. Although historically associated with black communities, since 11 September 2001, other racial and ethnic groups have also been increasingly subjected to such profiling.

Racial profiling may be used in ways that are directly discriminatory, but it is more likely to be applied in an indirectly discriminatory manner. For example, police may have stop-and-search powers applicable to everyone; however, the practice of “stop and search” would be indirectly discriminatory if it were applied disproportionately to certain groups, say those perceived as Arab or South Asian.

The German Constitutional Court has held in a case challenging racial and other profiling that such profiling could be compatible with Germany’s basic law only if there is a “concrete” danger to highly protected rights such as the life and security of the German Federation, or the life of a specific person. The Court, therefore, held that racial profiling could not be used preventively to avert danger in the absence of a concrete and identifiable risk to either the person or the state. The Court went on to hold that the general level of threat since 11 September 2001 was not, in and of itself, sufficient to justify the use of racial profiling. The Court also held that the threat must be specific and relate to the preparation or realization of actual terrorist attacks.²⁰⁸

Using positive action to tackle entrenched discrimination

An obligation to bring about change by the imposition of a positive duty to tackle structural disadvantage goes further towards securing equality of treatment. Such an approach may be controversial because positive duties, or affirmative action, are sometimes regarded as “reverse discrimination” that violates conventional principles of equal treatment. However, a

206 Article 2.2(b), EU Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, OJ L 180, 19 July 2000, p. 22 and Article 2.2(b), Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation, OJ L 303, 2 December 2000, p. 16.

207 See CERD, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005).

208 BVerfG, 1 BvR 518/02 vom 4.4.2006, Absatz-Nr. (1-184), available at http://www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html (German only).

number of international human rights treaties²⁰⁹ specifically acknowledge the acceptability of temporary special measures to combat institutionalized discrimination in the short term.

In relation to national minorities, OSCE participating States have agreed to

adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms.²¹⁰

Inter-sectionality or multiple discrimination

Discrimination may occur on multiple grounds. People have many defining characteristics and it may not be clear whether a person has suffered discrimination because of their religion, or their ethnic identity or race, or their sex or gender, or for a mix of different prejudices. Further, a woman may experience discrimination in different ways from a man, or the same discriminatory act may have different consequences. “Double discrimination” can also occur, for example when women from minorities face discrimination from their own communities because of their sex in addition to discrimination from the majority society because of their minority status. Without awareness of so-called inter-sectionality, forms of discrimination may pass unnoticed, or be ignored because of an assumption that discrimination is based on one characteristic, when another — or a combination — may be the cause.

As another element of inter-sectionality, a clear link exists between non-discrimination on grounds of race and ethnicity and religious freedom. While the right to religious freedom is important as a free-standing right, experience demonstrates that those who most need the protection that religious freedom provides are members of religious minorities who are frequently also racial or ethnic minorities.

Minority rights

According to the OSCE 1990 Copenhagen Document, persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will.²¹¹ The Copenhagen Document contains a catalogue of minority rights aimed at the protection and promotion of the identity of minorities, which influenced the drafting of the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and of the 1995 Council of Europe Framework Convention for the Protection of National Minorities (FCNM). In fact, the FCNM, which is the first multilateral legally binding instrument containing minority rights, was drafted in order to transform the political commitments concerning the protec-

209 E.g., Art. 4 CEDAW (“1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved. 2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory”). See also Art. 2(2) ICERD.

210 *Op. cit.*, note 6, 1990 Copenhagen Document, para. 31.

211 *Ibid.*, para. 32.

tion of national minorities contained in the Copenhagen and other documents of the CSCE into legal obligations.²¹²

Until the adoption of these minority rights instruments in the 1990s, the approach was one of non-interference. Article 27 ICCPR is formulated in a negative way:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

However, in its General Comment No.23 on Article 27 ICCPR of 1994, the UN Human Rights Committee states:

Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a “right” and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.²¹³

Also the afore-mentioned minority rights instruments make clear that states need to take positive measures in order to protect and promote the identity of minorities. Article 5(1) of the FCNM, for example, states:

The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.²¹⁴

Positive measures, such as organizing education in the minority language or reserved seats for minority representatives in parliament, may entail differential treatment. However, this does not constitute discrimination if it is aimed at the protection and promotion of minority identity, is based on objective and reasonable criteria, and is proportional to the aim of minority protection.

The minority rights in the afore-mentioned minority rights instruments are phrased as individual rights of persons belonging to minorities. However, these instruments also make clear that these rights may be enjoyed individually as well as in community with others.²¹⁵ In fact, like many other human rights, such as freedom of association and freedom of religion, many of these minority rights only make sense if exercised in group. Finally, it is important to mention that persons belonging to minorities have the right freely to choose to be treated or not

212 See Appendix II of the First Summit of Heads of State and Government of the Council of Europe, Vienna, 8-9 October 1993.

213 HRC, General Comment No.23 on Article 27 ICCPR, adopted on 8 April 1994, para.6.1.

214 See also *op. cit.*, note 6, 1990 Copenhagen Document, para.31 and Article 1 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, adopted by General Assembly resolution 47/135 of 18 December 1992 (UN Declaration on Minorities).

215 See *ibid.* 1990 Copenhagen Document, para.32(6), *ibid.*, Article 3(1) UN Declaration on Minorities, and Article 3(2) CoE Framework Convention for the Protection of National Minorities (FCNM), Strasbourg 1995, CETS 157.

to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.²¹⁶

Human rights within a state of emergency

Article 4, ICCPR:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social class.

2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant through the intermediary of the Secretary General of the United Nations of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary on the date on which it terminates such derogation.

Article 15, ECHR:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Under exceptional circumstances, it may be possible to derogate from certain obligations under international human rights standards. Article 4 ICCPR and Article 15 ECHR (see box above) allow states to go beyond simply limiting rights where it is lawful to do so, to derogating from them or suspending them in times of emergency that threaten the life of the nation. In the context of countering terrorism, the circumstance under which such power can be relied upon needs to be carefully considered. Any policies that go beyond what is provided for by human rights standards need to be considered in the context of derogation and whether it is lawful to derogate under the circumstances. It is essential, therefore, to understand how and when it is permissible lawfully to derogate from international human rights standards.

Derogations are a temporary measure

The power to derogate in human rights treaties is a temporary measure that permits the suspension of certain rights in times of grave emergency. These rights should be suspended only in order to be able to return to a situation of normalcy as soon as possible. Once that objective has been realized, adherence to the human rights treaty should be restored in full.

216 See *ibid.* 1990 Copenhagen Document, para.32(6), *ibid.*, Article 3(2) UN Declaration on Minorities, and Article 3(1) FCNM.

*Certain rights are non-derogable*²¹⁷

Both Article 4 ICCPR and Article 15 ECHR (and their equivalent provisions in other international human rights treaties²¹⁸) acknowledge that certain rights are non-derogable, regardless of the situation. As broad principles, these are the treaty provisions related to:

- the right to life;
- protection from torture, inhuman and degrading treatment or punishment;
- protection from slavery; and
- protection from retrospective criminal penalties and law.

Because the ability to derogate from human rights standards could undermine the entire purpose and value of international human rights protection, those bodies responsible for the implementation and protection of human rights treaties, such as the Human Rights Committee and the European Court of Human Rights, have laid down certain principles that must be satisfied for a derogation to be lawful.²¹⁹ These can be summarized as follows:

- principle of exceptionality;
- principle of publicity;
- principle of proportionality;
- principle of consistency;
- principle of non-discrimination; and
- principle of notification.

These principles place constraints and limits on what a government can do. The fact that states can suspend certain rights is not the same as allowing arbitrary action.

217 The HRC extended the category of non-derogable rights beyond those listed in Article 4(2), see next section for details.

218 E.g. Article 27 of the Inter-American Convention on Human Rights. The African Charter of Human and Peoples Rights contains no derogation provision.

219 “A public emergency may then be seen to have, in particular, the following characteristics: (1) It must be actual or imminent; (2) Its effects must involve the whole nation; (3) the continuance of the organized life of the community must be threatened; (4) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate”, ECtHR, *The Greek case* (Denmark, Norway, Sweden, The Netherlands v. Greece), Applications nos. 3321/67, 3322/67, 3323/67, 3344/67, 18 November 1969, para. 113. See also ECtHR, *Lawless v. Ireland* (No. 3), Application no. 332/57, 1 July 1961, paras. 28 and 90-91.

The following points can be extrapolated from international human rights case law on derogation:²²⁰

- courts will be reluctant to overrule the executive in relation to the existence of an emergency threatening the life of the nation;
- however, the courts will not give government a *carte blanche* and will retain the power to review the need to derogate;
- the derogation needs to be made publicly, and its nature, extent and purpose explained;
- the derogation can be reviewed;
- that review includes scope, duration, and manner of implementation;
- once it has been established that there is a threat to the nation requiring derogation, that response must still be a proportionate and necessary one. If it goes too far, the derogation will be unlawful.

Reviewing the extent of non-derogable rights: HRC General Comment 29²²¹

In July 2001, the Human Rights Committee addressed the issue of derogation. General Comment 29 sets out a number of non-derogable rights, noting that “the fact that some of the provisions of the Covenant have been listed in Article 4 (paragraph 2), as not being subject to derogation does not mean that other Articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists.” It also points out that even during states of emergency, “States parties may in no circumstance invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law.” The rights that, as a matter of international law, cannot be made subject to lawful derogation, beyond those already contained in Article 4, ICCPR are:

- all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person (Article 10 ICCPR);
- prohibitions against taking of hostages, abductions or unacknowledged detention;
- protection of specific minority rights such as prohibition against genocide;

220 In *Brannigan and McBride*, the applicants had been arrested under the Prevention of Terrorism Act 1984 and detained for six days and four days respectively, without being brought before a court. The European Court of Human Rights therefore found that the requirement of promptness had not been respected. However, the UK Government pointed out that the failure to observe these requirements of Article 5 had been met by their derogation under Article 15, ECHR. The Court, therefore, despite finding a breach of Article 5(3), also accepted that the derogation from that provision was within the ambit of Article 15 of the European Convention. The UK had therefore acted lawfully, see ECtHR, *Brannigan and McBride v. UK*, Applications nos. 14553/89 and 14554/89, 25 May 1993, para. 66.

These cases need to be compared with more recent Turkey cases. In *Aksoy*, the Court, while agreeing with Turkey that there was a public emergency which threatened the life of the nation, considered that the measure taken, with regard to unsupervised detention, could not be justified as being strictly required by the exigency of the situation. In *Aksoy*, the applicant was detained for fourteen days without judicial supervision, which the Court considered unnecessary. The Court pointed out that “this period is exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture”, ECtHR, *Aksoy v. Turkey*, Case no. 100/1995/606/694, 26 November 1996, para. 78. Making reference to *Brannigan and McBride* the Court noted that safeguards in Northern Ireland had protected against “arbitrary behaviour and incommunicado detention” (ECtHR, *Brannigan and McBride*, para. 62). In *Aksoy*, the Court acknowledged “that the investigation of terrorist offences undoubtedly presented the authorities with special problems”, but went on to say, “in this case insufficient safeguards were available to the applicant, who was detained over a long period of time. In particular, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him”, ECtHR, *Aksoy*, para. 83.

221 HRC, General Comment No. 29: States of Emergency (article 4), doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 6.

- deportation or forcible transfer of populations that would constitute a crime against humanity; and
- engaging in propaganda for war or advocacy of “national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.”

The Human Rights Committee went further and also pointed out that the requirement of an effective remedy under Article 2(3) constitutes a treaty obligation inherent in the Covenant as a whole. Therefore, while states may take measures strictly required by the exigencies of the situation, they must comply with this “fundamental obligation” by “providing a remedy that is effective.” At the same time, the Committee explained that it is inherent that the rights explicitly recognized as being non-derogable must be secured by procedural guarantees, including judicial guarantees. As such, the provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Therefore, Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. General Comment 29 concludes by pointing out:

- safeguards related to derogation are based on the principles of legality and the rule of law inherent in the Covenant as a whole;
- certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict;
- there is no justification for derogation from these guarantees during other emergency situations;
- principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency;
- only a court of law may try and convict a person for a criminal offence.
- the presumption of innocence must be respected; and
- in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention (i.e., *habeas corpus*), must not be diminished by a state party’s decision to derogate from the Covenant.

The OSCE has emphasized that any derogation from international human rights standards during a state of public emergency has to respect the standards of international human rights law.²²²

Similarly, the UN Working Group on Arbitrary Detention has said,

With regard to derogations that are unlawful and inconsistent with States’ obligations under international law, the Working Group reaffirms that the fight against terrorism may undeniably require specific limits on certain guarantees, including those concerning detention and the right to a fair trial. It nevertheless points out that under any circumstances and whatever the threat, there are rights which cannot be derogated from, that in no event may an arrest based on emergency legislation last indefinitely, and it is particularly important that measures adopted in states of emergency should be strictly commensurate with the extent of the danger invoked. On all these points the Working Group refers to Human Rights Committee general

²²² *Op. cit.*, note 29, 1989 Vienna Document, *Questions Relating to Security in Europe: Principles* para. 21; *op. cit.*, note 6, 1990 Copenhagen Document, paras 16.3 and 24-25.5; *op. cit.*, note 5, 1991 Moscow Document, para. 28.

comment No. 29 on derogations from the provisions of the International Covenant on Civil and Political Rights during a state of emergency.²²³

International criminal law

International criminal law is also relevant to human rights and counter-terrorism.²²⁴ The emergence of international criminal law can be seen as a melding of principles of human rights law and the laws of war, or international humanitarian law, with some specific sources of its own, including from national law.

By applying a serious criminal sanction on the individual, international criminal law targets the civilian or military leaders who ignore their states' international legal obligations, including in relation to both laws of war and norms of international human rights law, such as the prohibitions on torture or genocide. International criminal law may also cover officials who use their power to abuse individuals.

The development of international human rights law has played a key role in the emergence of international criminal law, in that human rights treaties place an obligation on states to suppress violations and provide a remedy to victims. In many cases this will mean an obligation to prosecute those responsible for acts at the national level, for example in relation to torture, hostage-taking and genocide. It also has led to the establishment — by the United Nations Security Council — of *ad hoc* international criminal tribunals to address criminal acts occurring in the territory of the former Yugoslavia and in Rwanda. In many respects, the substantive norms of international criminal law have now been “codified” in the Statute of the International Criminal Court (ICC), which was adopted in 1998.²²⁵ The ICC Statute establishes a permanent international court, which has criminal jurisdiction over four categories of crimes:

- genocide;
- crimes against humanity;
- war crimes; and
- the crime of aggression.²²⁶

223 Report of the UN Working Group on Arbitrary Detention, Chairperson-Rapporteur: Leïla Zerrougui, doc. E/CN.4/2004/3, 15 December 2003, para. 60.

224 The notion of international criminal law, as it is now understood, developed from the war crimes tribunals after the Second World War and particularly the Charter of the International Military Tribunal at Nuremberg. This was adopted as binding international law by resolution of the UN General Assembly in 1946. The Nuremberg Charter established definitively the personal criminal responsibility of both military and political leaders for violations of the laws of war and for gross abuses designated as crimes against humanity. The grave breaches provisions of the 1949 Geneva Conventions further defined those acts which attracted personal criminal liability.

225 The Rome Statute was adopted on July 1998 at the United Nations Diplomatic Conference on the Establishment of an International Criminal Court. It is available at <http://www.un.org/law/icc/index.html>.

226 The definition of the latter has not been agreed and therefore as yet, the crime of aggression under the ICC has not entered into force.

Crimes against humanity involve certain serious crimes knowingly committed against civilian populations as part of a widespread or systematic attack.²²⁷ War crimes include grave breaches of the 1949 Geneva Conventions and other serious violations of the laws of war.

The ICC works under the principle of complementarity. There is an assumption that the state party will prosecute for war crimes or crimes against humanity committed within its jurisdiction, or by its nationals. It is only where that party cannot, or is unwilling to prosecute (or to prosecute effectively) that the jurisdiction of the ICC is engaged.

Terrorism was not included among the crimes under the ICC jurisdiction “on a number of grounds. Chief among them was the alleged lack of an agreed definition of terrorism. (The other grounds were that: (i) the inclusion of the crime would have resulted in the politicisation of the Court, (ii) it was not sufficiently serious an offence to be within the Court’s jurisdiction, and (iii) terrorism would be more effectively prosecuted at the national level, if need be by co-ordinated action of individual States).”²²⁸

Accountability of states for actions of non-state actors

Technically, human rights standards and obligations only attach to states. Human beings are the beneficiaries of human rights and states parties have the corresponding obligation to guarantee the rights contained in human rights treaties. It is incumbent, therefore, upon the state to have in place comprehensive laws, both criminal and civil, to deal with the consequences of terrorism as well as to protect from it. Failure to have in place such provisions would be a violation of human rights obligations imposed upon the state.

As the enforcement mechanisms of international human rights treaties apply only to states parties, there are no procedures in respect of non-state actors. With the exception of international criminal law, there are no means to establish that a non-state actor has violated human rights. Therefore paramilitary organizations or terrorist groups cannot be held to account, internationally, for violation of human rights. However, acts of terrorism are crimes and, as such, the perpetrators can be prosecuted under domestic criminal law and any other appropriate domestic laws.

States may be held responsible for violations arising from a failure to protect adequately against the actions of non-state actors. The circumstances where a state can be held responsible for a human rights violation committed by a non-state actor are as follows:

²²⁷ Rome Statute, Article 7 reads: “For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

²²⁸ *Op. cit.*, note 12, A. Cassese, *International Criminal Law*, pp. 124-125.

- where the state has privatized state activity or the state permits that activity to be carried out in the private sector, the state can be held accountable for violation of human rights by the private actor;²²⁹
- where a violation of human rights occurs between two private individuals, the state cannot escape its liability in connection with those violations, if the laws governing the activity that caused the violation are inadequate;²³⁰
- where activities that violate an individual's rights are carried out by private parties, or non-state actors, the state cannot avoid its responsibilities through an assertion of non-involvement.²³¹

In the context of counter-terrorism, this last point is particularly relevant. A state that allows terrorist organizations to flourish might be held responsible for violating human rights standards. Likewise, a state could in some circumstances be held responsible for the actions of private security companies.

The European Court of Human Rights has also considered the state's positive obligations to protect, through proper regulation, against a violation of the ECHR. Spain was found to have violated the right to private and family life when a local authority failed to regulate the operation of a waste treatment plant,²³² and Italy violated the right to private life where it failed to provide relevant information about pollution from a factory.²³³ In a case that was declared inadmissible on other grounds, the European Court of Human Rights found the law in the UK was inadequate to protect interferences with privacy by one private party over another.²³⁴

Non-state actors in the terrorism context can be divided into four groups.²³⁵ The first of these groups are those who are mandated by government to act, either with the knowledge of government or its acquiescence. These could include paramilitary groups, militias and death squads. Insofar as the government is directly implicated, its legal responsibilities are engaged.

The second category includes private contractors or consultants who carry out functions that the state would otherwise have to carry out. This includes prison management, law en-

229 For example, in a case involving the treatment of a child in an English private school the European Court of Human Rights found that the UK could be held accountable for the actions of a private school, even though no state agency was involved in the possible violation, because the provision of education is an essential state activity; the state cannot opt out of its responsibilities in ensuring compliance with human rights standards, *op. cit.*, note 171, ECtHR, *Costello-Roberts v. UK*.

230 For example, the laws governing rape and sexual assault in Bulgaria were considered insufficient to guarantee a complainant's rights to protection from degrading treatment and protection of physical and emotional integrity. This was because the laws required that evidence of resistance was necessary before a case would be prosecuted, see *op. cit.*, note 173, ECtHR, *M.C. v. Bulgaria*.

231 In a case against Honduras, the Inter-American Court of Human Rights held that Honduras had violated the American Convention of Human Rights in failing to investigate the disappearances that the state argued had been carried out by non-state actors. The Court found a failure on the part of Honduras to fulfil the duties it assumed under the Convention, which obligated it to ensure that the victim had the free and full exercise of his human rights. IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, (Ser. C) No. 4 (1988); see also African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, Communication no. 155/96 (2001), 13-27 October 2001, paras. 58 and 65.

232 ECtHR, *López Ostra v. Spain*, Case no. 41/1993/436/515, 23 November 1994.

233 *Op. cit.*, note 138, ECtHR, *Guerra and Others v. Italy*.

234 ECommHR, *Earl Spencer and Countess Spencer v. UK*, Applications nos. 28851/95 and 28852/95, 16 January 1998.

235 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, doc. E/CN.4/2005/7, 22 December 2004, paras. 65-76. In relation to the term "non-state actors" the Special Rapporteur says "although it has not yet come, there will be a time when the international community decides that this category has outlived its usefulness and that it should instead be looking at different ways of dealing with very different actors."

forcement and some security-company activities. The HRC has made it clear that under the ICCPR the state's obligations require that criminal law should apply to these agencies if they violate certain human rights, notably the prohibition on torture and ill-treatment.

The third category involves those who commit crimes, including murder, that can give rise to state responsibility if the state has failed to take all appropriate measures to deter, prevent and punish the perpetrators, as well as to address any attitudes or conditions in society that encourage or facilitate such crimes. Examples falling into this category include so-called honour killings and killings directed at groups such as homosexuals or members of minority groups. An isolated killing may not give rise to any government responsibility,²³⁶ but once a pattern becomes clear, government inaction can be seen as conferring a degree of impunity upon the killers and failing to satisfy its positive obligations, including its obligation to investigate.

The fourth and final group are those involved in armed opposition against the government. As has already been discussed, as a matter of strict interpretation of human rights law they cannot be classified as human rights violators, regardless of the atrocities that they may carry out. The state must, however, hold these groups criminally accountable for their activities.

²³⁶ *Op. cit.*, note 28, ECtHR, *Osman v. UK*.

PART II

Specific Human Rights in Countering Terrorism

This section focuses on the human rights standards that are directly relevant to the development of counter-terrorism strategies. These are:

- the right to life;
- the absolute prohibition on torture, inhuman or degrading treatment and punishment;
- The right to liberty;
- the right to a fair trial; and
- the right to privacy.

In relation to each of these rights, the general principles of how they work will be explained and their relevance to counter-terrorism strategies will be discussed.

The Right to Life

Article 6(1), ICCPR:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 2, ECHR:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- a) in defence of any person from unlawful violence;
- b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The right to life is fundamental and non-derogable. The right to life is given particular significance in international law because all other rights are rendered meaningless in its absence. This does not mean that the right to life is considered to be the most important right, in relation to which all other rights are subordinate and less protected. The right to life is contained in Article 6 of the ICCPR and Article 2 of the ECHR (see box above). The UN Human Rights Committee has also described the right to life as “the supreme right.”²³⁷ The OSCE has also recognized the importance of the right to life and its highly protected status.²³⁸

International human rights provisions relating to the right to life must be strictly construed. This is particularly the case where excessive use of force is used by law-enforcement agencies.²³⁹

237 HRC, General Comment No. 6 - The right to life (art. 6), 30 April 1982, para. 1. On the same concept, the HRC stated that: “[t]he right enshrined in this article is the supreme right of the human being. It follows that the deprivation of life by the authorities of the State is a matter of the utmost gravity. This follows from the article as a whole and in particular is the reason why paragraph 2 of the article lays down that the death penalty may be imposed only for the most serious crimes. The requirements that the right shall be protected by law and that no one shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State”, HRC, *Baboeram and Others v. Suriname*, Communications nos. 146/1983 and 148-154/1983, doc. CCPR/C/21/D/146/1983, 4 April 1985, para. 14.3.

238 See *op. cit.*, note 29, 1989 Vienna Document, *Questions Relating to Security in Europe: Principles*, para. 24 and *op. cit.*, note 6, 1990 Copenhagen Document, paras. 17.2-17.8.

239 This is evident in the *Guerrero* case, which concerned the excessive use of force by the Colombian police that resulted in the deaths of seven people who were not proven to have been connected with any suspected offence (“In the present case it is evident from the fact that seven persons lost their lives as a result of the deliberate action of the police that the deprivation of life was intentional. Moreover, the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned. Moreover, the victims were no more than suspects of the kidnapping which had occurred some days earlier and their killing by the police deprived them of all the protections of due process of law laid down by the Covenant. In the case of Mrs. Maria Fanny Suarez de Guerrero, the forensic report showed that she had been shot several times after she had already died from a heart attack. There can be no reasonable doubt that her death was caused by the police patrol”) HRC, *Guerrero v. Colombia*, Communication no. 45/1979, doc. CCPR/C/15/D/45/1979, 31 March 1982, para. 14.3.

A common misconception of the right to life is that the positive duty to protect the right to life of the general public justifies the introduction of extreme measures that may violate other rights, including the right to life of those suspected of terrorism. This is not the case. The obligation to guarantee life requires that all measures that are designed to protect it, especially where this involves the use of lethal force, are focused, targeted and exceptional.

Use of lethal force by law enforcement and in armed conflict

The right to life does recognize certain strictly regulated categories of permissible deprivation. These are dealt with below in detail. It is essential that law-enforcement agencies understand the limited circumstances where it could be lawful to use lethal force. These can be summarized as:²⁴⁰

- defence of any person from unlawful violence;
- arrest;
- the prevention of escape; and
- the quashing of an insurrection or riot.

These justifications for the use of lethal force are explicitly recognized in the ECHR and are commonly accepted under national laws. However, these justifications are subject to the test of absolute necessity, which amounts to a very high-threshold proportionality test. Therefore, simply because someone is resisting arrest, even for a serious offence, resorting to the use of lethal force is not permissible without the further justification for its use that the individual concerned is also about to use comparable force against others. This principle would apply equally to those involved in a riot. Permissible deprivations may also be governed by subsidiary rules such as the UN Code of Conduct for Law Enforcement Officials.

The right to life, therefore, clearly imposes a negative obligation on the state to refrain from taking life. Any death caused by an agent of the state using force beyond that which is absolutely necessary or for a reason other than those identified above will amount to a violation of the right to life and will be unlawful. In the context of counter-terrorism, understanding when it is lawful to use lethal force is essential.

The responsibility under the right to life is not limited to this negative obligation. The HRC has also interpreted the right to life as creating positive obligations on the state. It has maintained that, “the inherent right to life cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.”²⁴¹ The HRC suggested that positive measures might include steps to reduce infant mortality and to increase life expectancy, especially through the elimination of malnutrition and epidemics. Those positive obligations do not include the adoption of draconian measures to protect life under all circumstances. The obligation to protect life imposes a duty to adopt reasonable measures to ensure that the right to life can be guaranteed.²⁴²

The right to life should be understood as creating two obligations; a substantive obligation in relation to the guarantee of life itself, and a procedural obligation where there has been a loss of life. The HRC has also addressed the relationship between the right to life and armed con-

240 These were accepted by the HRC in the *Guerrero* case, *ibid.*

241 *Op. cit.*, note 237, HRC, General Comment No. 6, para. 4.

242 *Op. cit.*, note 28, ECtHR, *Osman v. UK*, paras. 115-121.

conflict, and has noted the link between non-compliance with the international law rules prohibiting resort to armed force and the loss of innocent lives.²⁴³ Similarly, the European Court of Human Rights has applied the right to life to situations of armed conflict. These cases are explained below. The former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahangir, also addressed the issue of armed conflict in the counter-terrorism context. Specifically, she expressed concern about indiscriminate killing of civilians by security forces and about military forces being given the authority to shoot looters on sight.

The Special Rapporteur reminded all parties to an armed conflict that they must respect the rights of the civilian population in accordance with international humanitarian and human rights law. She also emphasized that the right to life of civilians and persons *hors de combat* allows for no derogation, even in time of public emergency or in the context of a fight against terrorism.²⁴⁴ The use of the term “shoot to kill” in relation to counter-terrorism policies has also been criticized by the current UN Special Rapporteur, Philip Alston, who said that:

The rhetoric of shoot-to-kill serves only to displace clear legal standards with a vaguely defined licence to kill, risking confusion among law enforcement officers, endangering innocent persons, and rationalizing mistakes, while avoiding the genuinely difficult challenges that are posed by the relevant threat.²⁴⁵

Positive obligations to safeguard life

The Council of Europe Guidelines on Human Rights and the Fight against Terrorism provide that:

States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States’ fight against terrorism in accordance with the present guidelines.²⁴⁶

Appropriate steps should be taken to safeguard the lives of those within the jurisdiction. This may involve the provision of information regarding a possible risk to life caused by actions of the state,²⁴⁷ and this obligation may extend to discouraging individuals from causing serious risks to their own health.²⁴⁸ States’ obligations to protect against the consequences of terrorism include:

243 *Op. cit.*, note 237, HRC, General Comment No. 6, para. 2.

244 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahangir, doc. E/CN.4/2004/7, 22 December 2003, paras. 27-29.

245 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, doc. E/CN.4/2006/53, 8 March 2006, para 45.

246 *Op. cit.*, note 11, CoE, *Guidelines on Human Rights and the Fight against Terrorism*, Guideline I (States’ obligation to protect everyone against terrorism).

247 “The Court considers that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction [...] It has not been suggested that the respondent State intentionally sought to deprive the applicant of her life. The Court’s task is, therefore, to determine whether, given the circumstances of the case, the State did all that could have been required of it to prevent the applicant’s life from being avoidably put at risk”, ECtHR, *L.C.B. v. UK*, Case no. 14/1997/798/1001, 9 June 1998, para. 36.

248 In *Barrett*, the Commission found that the control and supervision of the supply and consumption of alcohol in a naval base and the care and attention the deceased received following his collapse were adequate to protect his right to life, ECommHR, *Barrett v. UK*, Application no. 30402/96, 9 April 1997. See also ECtHR, *Önerildiz v. Turkey*, Application no. 48939/99, 30 November 2004, paras. 89-110.

- an obligation to provide a legal regime that effectively protects life;
- laws that properly prohibit and punish killings; and
- criminal sanctions against unlawful killings, regardless of who carried out the killings.

This is the case even where a state agent is responsible for the taking of a life, if that use of lethal force cannot be justified and was not absolutely necessary. Deaths must be properly investigated, and the law must be effectively implemented.

From a counter-terrorism perspective, the positive obligation to protect life may under certain circumstances require the state to protect individuals from identifiable threats to their lives. This positive obligation means:

- having in place measures to deal with incidents of terrorism to ensure that the consequences have as little impact upon the right to life as possible;
- ensuring, through appropriate planning and guidelines, that counter-terrorism measures themselves have as little impact upon the right to life as possible;
- that those responsible for acts of terrorism resulting in the loss of life are pursued, prosecuted and appropriately sentenced;
- that the state take all appropriate actions to ensure that such acts of terrorism do not occur in the first instance.

Where it is alleged that loss of life was caused by a state agent, the European Court has held that this must be proved beyond reasonable doubt.²⁴⁹ However, where an individual dies in custody and the state fails to provide a satisfactory explanation, the conclusion may be that the death occurred as a result of the acts or omissions of the state authorities. Where there is a death in custody, the burden of proof falls on the state to identify the cause of death. When an individual is detained by the state, there is an obligation to ensure their health and wellbeing. This includes protecting them from committing suicide.²⁵⁰

The extent of the positive obligation to protect life is not limitless. An appropriate balance must be struck. If law-enforcement agencies fail to act, for example, by opting not to arrest someone who then goes on to take a life, this will not necessarily violate the right to life. In *Osman*,²⁵¹ the Court found no violation of the right to life where the police did not arrest an individual who was harassing a family and who then went on to shoot and kill the father of that family. The police, under the circumstances, had no reason to believe such an event might occur. The Court found that the police could not be criticized for having failed to use their powers of arrest when they reasonably believed that they lacked the necessary standard of suspicion to exercise those powers.

The principle that can be adduced from this case, however, is that if it can be shown that the authorities failed to take reasonable steps to avoid a real and immediate risk to life of which

249 ECtHR, *Yaşa v. Turkey*, Case no. 63/1997/847/1054, 2 September 1998, paras. 92-97.

250 "In the context of prisoners, the Court has already emphasised in previous cases that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies [...] There are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing on personal autonomy. Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them will depend on the circumstances of the case", ECtHR, *Keenan v. UK*, Application no. 27229/95, 3 April 2001, paras. 91 and 92.

251 *Op. cit.*, note 28, ECtHR, *Osman v. UK*.

they were aware or ought to have been aware, the right to life may be violated. However, this does not extend to providing protection for an indefinite period nor to prevent every possibility of violence. In the counter-terrorism context, therefore, law-enforcement agencies must make the right risk assessment of the obligation to protect life.

Independent scrutiny of loss of life

The European Court has ruled that the obligation to ensure that law protects everyone's life includes a procedural aspect whereby the circumstance of a deprivation of life receives public and independent scrutiny.²⁵² This includes situations where life has been taken as a result of acts of terrorism and also where the state has used lethal force to protect against such acts.

Intentional killing must be subject to criminal sanctions, as must unintentional killing that results from the use of force in circumstances that cannot be justified. Where death is caused by reckless or negligent acts, whether this must be subject to criminal sanctions partly depends upon the circumstances of the death.

Effective criminal-law provisions must be put in place to deter offences depriving people of their lives. Domestic law should also regulate the permissible use of lethal force by agents of the state. Relevant laws designed to protect life should be practical, effective and be enforced, although there is a degree of discretion on the prosecuting authorities in determining whether to prosecute. However, this degree of discretion should not be abused to nurture a culture of impunity among law-enforcement officers. Therefore:

- a decision on the part of the state not to prosecute or to carry out an inadequate investigation will engage the right to life;²⁵³
- where an acquittal is based on a defence outside the scope of the accepted justifications of the use of lethal force²⁵⁴ this could amount to a violation of the right to life;
- there is a duty on states to punish those agents who kill unlawfully and to compensate the victims of unlawful deprivation of life.²⁵⁵

252 "The Court confines itself to noting [...] that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State", ECtHR, *McCann and Others v. UK*, Case no. 17/1994/464/545, 5 September 1995, para. 161; *op. cit.*, note 249, ECtHR, *Yaşa v. Turkey*, para. 98; ECtHR, *Güleç v. Turkey*, Case no. 54/1997/838/1044, 27 July 1998, paras. 77-78; ECtHR, *Ergi v. Turkey*, Case no. 66/1997/850/1057, 28 July 1998, para. 82; ECtHR, *Kaya v. Turkey*, Case no. 158/1996/777/978, 19 February 1998, para. 86.

253 "To sum up, the judicial system required by Article 2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost as a result of a dangerous activity if and to the extent that this is justified by the findings of the investigation [...] In such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue", *op. cit.*, note 248, ECtHR, *Öneryıldız v. Turkey*, para. 94. Moreover, "there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests", ECtHR, *Hugh Jordan v. UK*, Application no. 24746/94, 4 May 2001, para. 109.

254 As spelt out in Article 2(2) ECHR.

255 *Op. cit.*, note 239, HRC, *Guerrero v. Colombia*, paras. 13-15.

Obligation to investigate deaths

The obligation to investigate deaths arises irrespective of how the authorities found out about the death, whether state agents were involved, or the circumstances surrounding the death. This procedural obligation is not confined solely to circumstances where an individual has lost his or her life as a result of an act of violence. This obligation is not diminished in the counter-terrorism context. For example, in the *McShane* case the right to life was held to be engaged in relation to negligent driving of an armoured vehicle into a rioting crowd in Northern Ireland.²⁵⁶

It is not decisive that a formal complaint has been lodged. The mere knowledge of a killing on the part of the authorities gives rise to an obligation to carry out an effective investigation.²⁵⁷

Failure to investigate properly a death will be at odds with a state's procedural obligations in relation to the right to life, and this will be in addition to any violation found in relation to the killing itself.²⁵⁸ There are therefore two aspects to the right to life. There is a procedural element as well as a substantive one. Merely paying compensation in the absence of an investigation is not sufficient to satisfy either.²⁵⁹

Disappearances

“Enforced disappearances” are the practices of abduction and secret detention. Unacknowledged detention may lead to torture and eventual killing. As such a number of human rights are engaged including:

- the right to life;
- the right to liberty;
- protection from torture;
- due process rights such as *habeas corpus*, and the requirement of legality; and
- the right to an effective remedy.

256 “The Court recalls that Article 2 covers not only intentional killing but also situations where death may result as an unintended outcome of the use of force [...] Nor is the term ‘use of force’ applicable only to the use of weapons or physical violence. It extends, without distortion of the language of the provision, to the use of an army vehicle to break down and dismantle barricades. The facts of this case may be distinguished from a road traffic accident, where, for example, a soldier happens to injure a pedestrian as he is driving home from work, when it may be considered that the involvement of a member of the security forces is incidental. Where however a soldier is given orders to use a heavy armoured vehicle, during a riot, to clear away a barricade in the close vicinity of civilians who are using it either as cover or a shelter, this must be regarded as part of an operation by the security forces for which State responsibility under Article 2 of the Convention may potentially arise”, ECtHR, *McShane v. UK*, Application no. 43290/98, 28 May 2002, para. 101.

257 *Op. cit.*, note 252, ECtHR, *Ergi v. Turkey*, paras. 82-83.

258 “[...] Having regard to the lack of effective procedural safeguards disclosed by the inadequate investigation carried out into the disappearance and the alleged finding of Ahmet Çakıcı’s body [...] the Court finds that the respondent State has failed in its obligation to protect his right to life. Accordingly, there has been a violation of Article 2 of the Convention on this account also”, ECtHR, *Çakıcı v. Turkey*, Application no. 23657/94, 8 July 1999, para. 87.

259 This stems from the joint application of Art. 2 and Art. 13 ECHR: “In cases of the use of lethal force or suspicious deaths, the Court has also stated that, given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure [...] In a number of cases it has found that there has been a violation of Article 13 where no effective criminal investigation had been carried out, noting that the requirements of Article 13 were broader than the obligation to investigate imposed by Article 2 of the Convention”, *op. cit.*, note 253, ECtHR, *Hugh Jordan v. UK*, para. 160. In the same vein, *op. cit.*, note 252, ECtHR, *Ergi v. Turkey*, para. 98 and ECtHR, *Salman v. Turkey*, Application no. 21986/93, 27 June 2000, para. 123).

In 2006, the UN adopted a new treaty that addresses the problems of enforced disappearances and how to deal with them.²⁶⁰ Such disappearances are defined as any form of deprivation of liberty committed by agents of a state or by persons or groups of persons acting with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

The Convention is the first international treaty explicitly to ban practices leading to enforced disappearances. It requires states to incorporate the crime of enforced disappearance into their own legislation and to prosecute and punish perpetrators accordingly. A provision enshrining people's right to know what happened to their relatives will be of crucial importance in preventing enforced disappearances and alleviating the suffering of detainees and their families.

The Convention outlaws secret detention and requires states to hold all detainees in officially recognized places of detention, maintain up-to-date official registers and detailed records of all detainees, authorize detainees to communicate with their families and legal counsel, and give competent authorities access to detainees — obligations that are all critical to preventing enforced disappearances.

Enforced disappearance refers to the whole spectrum of situations in which people may be held in unacknowledged detention, including situations in which killings are rare. Although victims may not be killed, disappearance exposes them to the possibility of being seriously harmed or ultimately killed.²⁶¹ It is for this reason that enforced disappearances are closely related to the right to life.

Even where there is no direct evidence that a person has been abducted and detained by agents of the state, if the state fails to investigate a disappearance properly, this will amount to a failure to guarantee human rights, including protection from torture and the right to life.²⁶²

260 International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly on 20 December 2006, doc. A/61/PV.82. The resolution was adopted by a recorded vote of 85 in favour to none against, with 89 abstentions. The Convention was opened for signature on 6 February 2007. So far, 57 states have signed. It will come into force when ratified by 20 states parties. The treaty is available at <http://www.ohchr.org/english/law/disappearance-convention.htm>.

261 For a detailed analysis see S. Marks, A. Clapham, *International Human Rights Lexicon*, "Disappearances" (Oxford, 2005), p. 121.

262 "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation [...] This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case", *op. cit.*, note 231, IACtHR, *Velásquez Rodríguez v. Honduras*, paras. 174-175.

Even during an emergency that threatens the life of the nation, enforced disappearances can never be justified, because they deny the detainee any form of procedural safeguard and are likely to result in death and/or torture.

For a loss of liberty to fall within the definition of an enforced disappearance, the perpetrator must have been aware that the arrest, detention or abduction would remain unacknowledged, or that information would be refused about the whereabouts or fate of the person concerned. The perpetrator must have intended to remove that person from the protection of the law for a prolonged period of time.

Where an individual has disappeared after being taken into custody and there is no concrete evidence that agents of the state have killed the individual, a violation of the right to life may not have occurred.²⁶³ However, in the event of such a disappearance, the disappeared person's next of kin will have standing under the right to life to require that the disappearance be investigated. Protection from inhuman and degrading treatment will also be relevant. The rights of victims' families are particularly important, including the right to be informed of the whereabouts of the disappeared if it is known to authorities.²⁶⁴

Extra-judicial executions

The targeting and elimination of known or suspected terrorists undermines the right to life. In addition, it may be counter-productive as it places no obligation upon the state to demonstrate that those against whom lethal force was used were, indeed, terrorists or to demonstrate that every other alternative had been exhausted. The practice may, therefore, undermine the credibility of the state's counter-terrorism policy. Furthermore, the acceptance of extra-judicial and arbitrary executions creates the potential for an endless expansion of the relevant categories within it to include any other enemies of the state, social misfits, political opponents, or others.²⁶⁵

The HRC has expressed concern with respect to the alleged use of so-called "targeted killings" of suspected terrorists. The Committee has emphasized that states parties, "should not use 'targeted killings' as a deterrent or punishment. The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities [...] Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted."²⁶⁶

263 ECtHR, *Kurt v. Turkey*, Case no. 15/1997/799/1002, 25 May 1998, paras. 100-109.

264 ECtHR, *Cyprus v Turkey*, Application no. 25781/94, 10 May 2001, para. 157 ("The silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3").

265 "[I]t is increasingly common to read arguments along the lines that 'targeting and eliminating known terrorists is more efficient and costs fewer lives than waging conventional war' [quote]. While there are a great many empirical arguments that might be made in order to show that such strategies will be counterproductive, the point is that such proposals directly undermine the essential foundations of human rights law. Empowering Governments to identify and kill 'known terrorists' places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative had been exhausted [...] And it makes a mockery of whatever accountability mechanisms may have otherwise constrained or exposed such illegal action under either humanitarian or human rights law", Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, doc. E/CN.4/2005/7, 22 December 2004, para. 41.

266 *Op. cit.*, note 131, HRC, Concluding observations: *Israel*, para. 15.

Procedural safeguards required for an effective investigation

The HRC, in its General Comment 6, stated that “states should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.”²⁶⁷ Under the ICCPR, states have positive duties to investigate all state killings, to bring to justice any persons found to be responsible for killings, and to provide redress to victims’ relatives. The right to life, therefore, requires that agents of the state be accountable for their use of lethal force. Their actions should be subjected to some form of independent and public scrutiny capable of determining whether the force used was or was not justified in a particular set of circumstances.²⁶⁸

Effective investigation should comply with the following procedural safeguards:

- it must be carried out by an independent body with a degree of public scrutiny;
- it must be thorough, rigorous and prompt;
- it must be capable of imputing responsibility for the death;
- if agents of the state are responsible, it must be capable of determining whether or not the killing was justified;
- if initiated on the basis of a criminal complaint, the complainant must be able to take part in the proceedings;
- it must be capable of bringing perpetrators to justice; and
- it must enable effective involvement of a next-of-kin.

The European Court has stressed that there must be a sufficient element of public scrutiny of the investigation or its results to ensure accountability in practice as well as in theory. The Court has accepted that the degree of public scrutiny may vary on a case-by-case basis but the next-of-kin of the victim “must in all cases be involved in the procedure to the extent necessary to safeguard their legitimate interests.”²⁶⁹

Any investigation must also be capable of considering any systemic failures that could have caused the death, for example the planning and organization of a rescue operation²⁷⁰ or the planning of anti-terrorist police operations.²⁷¹

The need for independence is particularly important where agents of the state are involved.²⁷² If a different investigatory system is used for cases involving the use of lethal force by state agents than for other cases, this may be treated with suspicion. For example, where decisions to prosecute are not taken by the public prosecutor — as would normally be the case — but by

267 *Op. cit.*, note 237, HRC, General Comment No. 6, para. 4; see also *op. cit.*, note 237, HRC, *Baboeram and Others v. Suriname*, para. 14.3.

268 The procedural safeguards required for an investigation into a loss of life were spelt out in *op. cit.*, note 253, ECtHR, *Hugh Jordan v. UK*, paras. 102-109 (the “Jordan criteria”). That case involved the failure to properly investigate a death arising out of the troubles in Northern Ireland.

269 See ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Applications nos. 57947/00, 57948/00 and 57949/00, 24 February 2005, para. 213; ECtHR, *Isayeva v. Russia*, Application no. 57950/00, 24 February 2005, para. 214. This principle is recalled in many cases dealing with the protection of the right to life, see for instance *ibid.*, ECtHR, *Hugh Jordan v. UK*, para. 109; ECtHR, *Slimani v. France*, Application no. 57671/00, 27 July 2004 para. 32; ECtHR, *McKerr v. UK*, Application no. 28883/95, 4 May 2001, para. 115.

270 ECtHR, *Andronicou and Constantinou v. Cyprus*, Case no. 86/1996/705/897, 9 October 1997, paras. 181-186.

271 *Op. cit.*, note 252, ECtHR, *McCann and Others v. UK*, paras. 192-214.

272 ECtHR, *Kiliç v. Turkey*, Application no. 22492/93, 28 March 2000, paras. 71-77.

specially constituted administrative councils, this could raise questions about independence that might lead, in themselves, to a finding of violation of the right to life.²⁷³

Investigations must be wide ranging and rigorous. For example, violations of the right to life have not been adequately investigated where authorities have failed to:

- ascertain whether there were eye witnesses;
- question suspects at a sufficiently early stage of the inquiry;
- search for corroborating evidence;
- take into account obvious evidence;
- carry out a proper autopsy, including, for example, tests for gunpowder traces.

Absolute necessity and the permitted exceptions to the right to life

The exceptions to the right to life must be construed narrowly.²⁷⁴ They are the internationally recognized circumstances where it may be lawful to use lethal force (defence of persons, arrest, preventing escape or quelling a riot or insurrection). Even then, the amount of force used must be no more than absolutely necessary to achieve the required end. “Absolutely necessary” provides for a stricter test than that applied when determining whether a state interference is “necessary in a democratic society.” The use of force must be a strictly proportionate response.

“In defence of any person from unlawful violence”

Self-defence, or the defence of any person from unlawful violence, can provide a legitimate defence for the taking of life. The state will be required to supply sufficient evidence that agents or other persons came (or would have come) under armed attack at the scene of an incident. Although self defence can be a lawful justification for the use of fatal force, it has to be the option of last resort. Therefore, if earlier opportunities to arrest suspects are not taken and the result is that security forces then have to rely upon the use of lethal force, there may have been a violation of the right to life.²⁷⁵ Self defence should not be invoked to sanction a shoot-to-kill policy.

“In order to effect a lawful arrest or to prevent the escape of a person lawfully detained”

The European Court has emphasized the need for proper warnings to be given before potentially lethal force is used.²⁷⁶ Suspects must be given all opportunities to surrender. The use of force must be the option of last resort. At the same time, there needs to be clear policy

²⁷³ *Op. cit.*, note 252, ECtHR, *Güleç v. Turkey*, paras. 77-82.

²⁷⁴ Article 2(2) ECHR.

²⁷⁵ In *McCann* the UK government’s assertion that they were defending the general public from a terrorist threat was not held to be within the meaning of absolute necessity because the suspected terrorists had been allowed to enter Gibraltar in the first instance, *op. cit.*, note 252, ECtHR, *McCann and Others v. UK*, para. 213.

²⁷⁶ “By definition, warning shots are fired into the air, with the gun almost vertical, so as to ensure that the suspect is not hit [...] That was all the more essential in the instant case as visibility was very poor. It is accordingly difficult to imagine that a genuine warning shot could have struck the victim in the neck. In this context, it should also be noted that according to one of the members of the security forces, the men had taken up position fifty metres apart from each other but were not linked by radio; that must necessarily have made it difficult to transmit orders and to control the operations [...] The Court consequently considers that, even supposing that Musa Oğur was killed by a bullet fired as a warning, the firing of that shot was badly executed, to the point of constituting gross negligence, whether the victim was running away or not”, ECtHR, *Oğur v. Turkey*, Application no. 21594/93, 20 May 1999, para. 83.

concerning when lethal force can be used. Case law has given some guidance as to the use of lethal force:

- the lethal shooting by soldiers of suspected terrorists who drove through a checkpoint without stopping was found absolutely necessary in the circumstances in order to give effect to the lawful arrest;²⁷⁷
- it was not absolutely necessary to use firearms to arrest a non-violent offender who posed no threat to anyone. Under those circumstances, the use of firearms would be unlawful even if it meant the loss of opportunity to arrest;²⁷⁸
- the use of firearms where the applicant was shot several times, although not killed, by police officers after going through a red light was a violation of the right to life due to the lack of legal and administrative safeguards for the use of firearms.²⁷⁹

“In action lawfully taken for the purpose of quelling a riot or insurrection”

There is no established definition in international human rights law of a riot or insurrection. But, where hundreds or thousands of people are throwing projectiles at the security forces this can be a justification for reliance on the use of lethal force. However, for the use of such force to be absolutely necessary those projectiles must be likely to cause death or serious harm to the law-enforcement officers. Throwing stones at fully armed and protected officers is unlikely to justify resort to lethal force. Appropriate riot control procedures and equipment must also be used.²⁸⁰ In relation to prison uprisings, the proportionality of the use of fatal force should be strictly applied. Therefore, when lethal force was used to contain a prison uprising involving serious and violent offenders resulting in extensive loss of life, the manner of the use of lethal force was found to be excessive and disproportionate and consequently a violation of the right to life.²⁸¹

277 “Their conduct must also be assessed against the background of the events in Northern Ireland, which is facing a situation in which terrorist killings have become a feature of life. In this context the Commission recalls the judge’s comments that, although the risk of harm to the occupants of the car was high, the kind of harm to be averted (as the soldiers reasonably thought) by preventing their escape was even greater, namely the freedom of terrorists to resume their dealing in death and destruction”, ECommHR, *Kelly v. UK*, Application no. 17579/90, 13 January 1993.

278 ECtHR, *Nachova and Others v. Bulgaria*, Applications nos. 43577/98 and 43579/98, 6 July 2005, para. 107.

279 “[T]he Court considers that, as far as their positive obligation under the first sentence of Article 2 (1) to put in place an adequate legislative and administrative framework was concerned, the Greek authorities had not, at the relevant time, done all that could be reasonably expected of them to afford to citizens, and in particular to those, such as the applicant, against whom potentially lethal force was used, the level of safeguards required and to avoid real and immediate risk to life which they knew was liable to arise, albeit only exceptionally, in hot-pursuit police operations”, ECtHR, *Makaratzis v. Greece*, Application no. 50385/99, 20 December 2004, para. 71.

280 In finding a violation of Art. 2, the Court stressed that “the use of force may be justified in the present case under paragraph 2 (c) of Article 2, but it goes without saying that a balance must be struck between the aim pursued and the means employed to achieve it. The gendarmes used a very powerful weapon because they apparently did not have truncheons, riot shields, water cannon, rubber bullets or tear gas. The lack of such equipment is all the more incomprehensible and unacceptable because the province of Şırnak, as the Government pointed out, is in a region in which a state of emergency has been declared, where at the material time disorder could have been expected”, *op. cit.*, note 252, ECtHR, *Güleç v. Turkey*, para. 71.

281 “Given the circumstances that surrounded the crushing of the riot at the San Juan Bautista Prison; the fact that eight years after the riot occurred there is still no knowledge of the whereabouts of the three persons to whom this case refers, as was acknowledged by the Minister of Foreign Affairs stating that the victims were not among the survivors and that ‘three of the [non-identified bodies] undoubtedly correspond to those three persons;’ and the disproportionate use of force; it may be reasonably concluded that they were arbitrarily deprived of their lives by the Peruvian forces in violation of Article 4(1) of the Convention”, IACtHR, *Neira Alegria and Others v. Peru*, Series C No. 20, 19 January 1995, para. 76.

Considerations prior to the use of lethal force

The use of force must be a strictly proportionate response. Merely asserting prevention of terrorism will not necessarily be sufficient to justify the use of fatal force. For example, in *McCann*, a case involving the shooting of three members of the IRA in Gibraltar who at the time were unarmed but were genuinely suspected of being about to detonate a bomb, the European Court of Human Rights held that where deliberate lethal force is used the most careful scrutiny must be applied. This is in relation not only to the actions of the agents of the state who actually administer the force, but equally important are the planning and control of the actions under examination. Therefore, in *McCann*, while those who shot the terrorists were not considered to have violated their right to life, those who had planned the operation did violate it. This is because at the point at which lethal force was used the security services were genuinely of the belief that they had no option but to rely upon it. However, the operation was planned in a way that violated the right to life because there had been numerous opportunities to arrest that had not been acted upon.

When planning security operations, which may or do result in the use of lethal force, the following should be taken into account:

- the right to life of the general population and also of the suspects;
- precautions to avoid or minimize incidental loss of civilian life;
- the training given to those involved; and
- the calculations of risk made.

Violations of the right to life have been found when the civilian population has been exposed to cross-fire between the security forces and a paramilitary organization, where insufficient precautions had been taken to protect lives.²⁸² Conversely, the fact that a rescue operation fails, resulting in deaths, will not violate the right to life if it has been planned in a manner that sufficiently sought to minimize any risk to life.²⁸³

The United Nations Committee on the Rights of the Child has reinforced this message in the context of the protection of children caught in cross-fire. The Committee has pointed out that it “is seriously concerned about the impact of terrorism on the rights of children in the State party, as well as the impact of military action on the rights of children.”²⁸⁴

The right to life and armed conflict

Even in situations that could be categorized as an armed conflict, the right to life remains relevant. Therefore, where civilians have been killed by armed forces seeking to suppress an armed insurrection, failure to investigate properly the loss of life may violate the right to life. The simple assertion that the loss of life was a legitimate consequence of fighting is insufficient. The fact that a criminal file has been opened and an investigation is commenced but then closed will not necessarily, in and of itself, satisfy the procedural requirements of the right to life. The following principles can be identified, which are directly relevant to the response to terrorism:

282 *Op. cit.*, note 252, ECtHR, *Ergi v. Turkey*, paras. 80-82.

283 *Op. cit.*, note 270, ECtHR, *Andronicou and Constantinou v. Cyprus*, paras. 181-186.

284 CRC, Concluding observations: *Israel*, doc. CRC/C/15/Add.195, 9 October 2002, para. 58.

- applying the standard of proof of “beyond reasonable doubt”, the failure by a government to disclose in full the criminal investigation file without a satisfactory explanation could give rise to the drawing of inferences against the state. If no justification is given for the use of lethal force, then there is a violation of the right to life, even in the context of an armed conflict;²⁸⁵
- in relation to aerial attacks, the use of indiscriminate or excessive force cannot be considered compatible with the standard of care prerequisite to an operation involving the use of lethal force;²⁸⁶
- even assuming that the military operations pursued a legitimate aim, such as defence from unlawful attack, such operations must be planned and executed with the requisite care for the lives of the civilians;²⁸⁷
- in relation to the procedural obligations regarding the right to life, the failure to conduct an effective investigation violates those rights. Considerable delays and other flaws in the investigation process would contribute to that violation.²⁸⁸

Other issues arising out of the right to life

Amnesty and impunity

Amnesty and impunity have a particular resonance in the context of the right to life. Whether an amnesty is compatible with the right to life will depend upon the relevant factors in each circumstance.²⁸⁹ The victim’s rights and the rights of the next of kin should be taken into consideration. The granting of an amnesty could effect the rights of victims. A general amnesty for officials involved in human rights violations may violate the rights of victims to a fair trial and to an effective remedy.²⁹⁰

As has already been mentioned, the HRC has expressed profound concern in relation to impunity for violations of the right to life, as well as other rights, in the counter-terrorism context. For example, the Committee has held that counter-terrorism operations cannot justify

285 Cf. *op. cit.*, note 269, ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, para. 172; *op. cit.*, note 269, ECtHR, *Isayeva v. Russia*, para. 177; ECtHR, *Hashiyev and Akayeva v. Russia*, Applications nos. 57942/00 and 57945/00, 24 February 2005, para. 134. As regards these cases, it is noteworthy that no state of emergency had been declared in Chechnya at the time, and no derogation had been entered under Article 15 ECHR. Accordingly, the ECHR applied in full, and the military operations had to be judged against a normal legal background.

286 “To sum up, even assuming that that the military were pursuing a legitimate aim in launching 12 S-24 non-guided air-to-ground missiles on 29 October 1999, the Court does not accept that the operation near the village of Shaami-Yurt was planned and executed with the requisite care for the lives of the civilian population”, *ibid.*, ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, para. 199.

287 *Ibid.*

288 *Ibid.*, paras. 214-225. Cf. also *op. cit.*, note 285, ECtHR, *Hashiyev and Akayeva v. Russia*, para.166.

289 In the *Dujardin* case, it was held that an amnesty to persons convicted or suspected of homicide did not violate the right to life because in the circumstances it reflected a proper balance between the interests of the state and the general need to protect life, ECommHR, *Dujardin and Others v. France*, Application no. 16734/90, 2 September 1991.

290 IACtHR, *Chumbipuma Aguirre and Others v. Peru* (Barrios Altos case), Serie C No. 75, 14 March 2001, para. 42. On the issue of incompatibility of amnesty laws with international human rights law in cases engaging serious violations such as torture, summary, extrajudicial or arbitrary executions, enforced disappearances, the Court considered that: “[...] all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law”, *ibid.*, para. 41.

the creation of new laws that exempt law-enforcement and military personnel from liability for harm caused during counter-terrorist operations.²⁹¹

The HRC has also pointed out in the context of substantiated reports of extrajudicial killings, disappearances and torture, including rape, in counter-terrorism operations that while police and military personnel have been prosecuted for crimes committed against civilians, the charges and sentences handed down must correspond with the gravity of the acts as human rights violations.

The Committee has acknowledged that abuse of, and violations against, civilians can also involve non-state actors, but that this does not relieve the state party of its obligations. Of significant concern to the UN is the impunity of mercenaries who commit terrorist acts. The Special Rapporteur on the use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination has pointed out that those who plan terrorist acts do not always rely on fanatical devotees to the cause. The allegation of the involvement of mercenaries in the commission of terrorist acts must always be investigated.²⁹²

Witnesses and collaborators of justice

In the context of countering terrorism, ensuring a successful conviction may depend upon providing effective protection of witnesses and their right to life before, during and after the trial. Intimidation of such witnesses, which can result in their loss of life, should be addressed.²⁹³ This can mean developing special mechanisms for delivering evidence, which in turn may have an impact on an individual's right to a fair trial. This issue is also dealt with in the section on fair trials.

Proportionality between the nature of the protection measures and the seriousness of the intimidation of the witness/collaborator of justice should be ensured.

The death penalty and the right to life

OSCE commitments currently refer specifically to the right to life only in the context of the death penalty. OSCE commitments do not require the abolition of the death penalty. However, OSCE participating States have committed themselves to impose the death penalty only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and in a manner not contrary to their international commitments. OSCE participating States have also committed themselves to making information regarding the use of the death penalty available to the public.²⁹⁴

291 See HRC, Concluding observations: *Russian Federation*, doc. CCPR/CO/79/RUS, 6 November 2003, para. 13. In this regard, the Committee is concerned about the provision in the Federal Law On Combating Terrorism.

292 See Report of the Special Rapporteur on the use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Enrique Bernales Ballesteros, doc. E/CN.4/2004/15, 24 December 2003, paras. 35-36.

293 See CoE, Recommendation of the Committee of Ministers on the protection of witnesses and collaborators of justice, Rec(2005)9, which provides a helpful structure to witness protection, adopted on 20 April 2005, especially paras. 10-28.

294 *Op. cit.*, note 29, 1989 Vienna Document, para. 24 and *op. cit.*, note 6, 1990 Copenhagen Document, paras. 17.2-17.8. See also the ODIHR's yearly background paper, *The Death Penalty in the OSCE Area*, which provides updates on the status and use of the death penalty in OSCE states.

At the same time, most OSCE countries have abolished the death penalty. In 49 OSCE participating States, the death penalty has been abolished for all crimes. In two states — Latvia and Kazakhstan — the death penalty has been abolished for crimes committed in peacetime, but is retained for crimes committed in wartime. In two states — the Russian Federation and Tajikistan — the death penalty is retained for crimes committed in peacetime, but executions are not carried out. Belarus, the United States of America and Uzbekistan are the only OSCE participating States where the death penalty is retained for crimes committed in peacetime, and where legally sanctioned executions are carried out. In the context of counter-terrorism, the following observations have been made in regard to the death penalty:

- In its General Comment No. 29 on states of emergency, the Human Rights Committee reiterated its view that, “as [ICCPR] Article 6 is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant [...]”²⁹⁵;
- In one set of concluding observations, the Committee has expressed disapproval of the mandatory imposition of the death penalty for a number of crimes, including terrorism.²⁹⁶

The key points in relation to the death penalty under international law can be summarized as follows:

- *The death penalty is not outlawed under international law.* Its existence is acknowledged by both Article 2(1) ECHR and Article 6(2) ICCPR.
- *Article 6(2) ICCPR says that the death penalty must be restricted to the most serious crimes.* A crime of “terrorism” *per se* is unlikely to be sufficiently clearly defined to permit the death penalty.
- *If imposed, there must be procedural safeguards.* These would include provision for a sentencing hearing, guided discretion in its imposition, provision for appellate review, and provision for pardon or mercy. The UN Human Rights Committee has held that “the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that the procedural guarantees therein including the right to a fair trial before an independent tribunal, the presumption of innocence, the minimum guarantees for the defence and the right to review by a higher court.”²⁹⁷ If the initial trial was unfair in relation to the highest standards of fairness, it is never appropriate to apply the death penalty.
- *There are restrictions to protect certain citizens from the death penalty.* In accordance with Article 6(5) of the ICCPR, the death penalty must not be imposed on persons below eighteen years of age and shall not be carried out on pregnant women. Further to these two categories of persons, the ECOSOC Safeguards extend this restriction to the elderly, mothers with dependent infants, the insane and the mentally disabled.²⁹⁸
- *Right to seek pardon or commutation* is also envisaged by the ICCPR (Article 6(4), and has been reaffirmed by General Comment No. 6, the ECOSOC Safeguards, and Resolution 2005/59 of the UN Commission on Human Rights.
- *The manner of execution of the death penalty must not involve the infliction of unnecessary suffering over and above that necessary to end life.* On this basis, it was held that death by

²⁹⁵ *Op. cit.*, note 221, HRC, General Comment No. 29, para. 15.

²⁹⁶ HRC, Concluding observations: *Uganda*, doc. CCPR/CO/80/UGA, 4 May 2004, para. 13.

²⁹⁷ HRC, *Carlton Reid v. Jamaica*, Communication no. 250/1987, doc. CCPR/C/39/D/250/1987, 20 July 1990, para. 11.5. See also *op. cit.*, note 237, HRC, General Comment 6, para. 7.

²⁹⁸ ECOSOC, Resolution 1984/50 “Safeguards guaranteeing protection of the rights of those facing the death penalty”, 25 May 1984, para. 3.

asphyxiation was disproportionate and violated the prohibition on cruel and unusual punishment in Article 7 of the ICCPR.²⁹⁹

The position under the ECHR

The right to life guaranteed by Article 2(1) ECHR envisages circumstances whereby the use of the death penalty may be lawful. However, Protocol 6 to the ECHR abolishes the death penalty except in respect of acts committed in time of war. Protocol 13 goes further and abolishes the death penalty under all circumstances. It is now unlawful to deport or extradite somebody from a Council of Europe country to a country where the individual is likely to be executed. Following the Grand Chamber judgment in *Öcalan v. Turkey*, the Court has limited the availability of the death penalty, holding that capital punishment in peacetime has come to be regarded as an unacceptable form of punishment that is no longer permissible under Article 2 of the Convention.³⁰⁰ The Council of Europe Guidelines emphasize that under no circumstances may a person convicted of terrorist activities be sentenced to death; in the event of such a sentence being imposed, it may not be carried out.³⁰¹

Removal, deportation and extradition

The right to life may be engaged where an individual could be deported or extradited to somewhere where, because of the lack of adequate medical care, their death may be particularly cruel and hastened, although this is more likely to engage protection from inhuman and degrading treatment.³⁰² This issue is dealt with in full in the next section.

According to the European Court of Human Rights, states must require firm assurances from retentionist countries that persons to be extradited or expelled will not be sentenced to death.³⁰³ Guideline XIII of the Council of Europe Guidelines on Human Rights and the Fight against Terrorism, on Extradition, states that:

[...] 2. The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:

- i) the person whose extradition has been requested will not be sentenced to death; or
- ii) in the event of such a sentence being imposed, it will not be carried out.

A similar provision has been included in the Amending Protocol to the 1977 European Convention for the Suppression of Terrorism of the Council of Europe.³⁰⁴

299 HRC, *Chitat Ng v. Canada*, Communication no. 469/1991, doc. CCPR/C/49/D/469/1991, 7 January 1994, paras. 16.1-16.5.

300 ECtHR, *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005, para. 163.

301 *Op. cit.*, note 11, CoE, *Guidelines on Human Rights and the Fight against Terrorism*, Guideline X(2).

302 ECtHR, *D. v. UK*, Case no. 146/1996/767/964, 21 April 1997, para. 59.

303 “[O]bjectively it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom eliminates the risk of the death penalty being imposed”, ECtHR, *Soering v. UK*, Application no. 14038/88, 7 July 1989, para. 98.

304 The Treaty (CETS 190) was opened for signatures in Strasbourg on 15 May 2003.

The Absolute Prohibition of Torture, Inhuman and Degrading Treatment or Punishment

Evidence Collection, Interrogation Techniques and Conditions and Circumstances of Detention

There are extensive OSCE commitments outlawing torture and its practice under any circumstances.

For example:

the participating States reaffirm their commitment to prohibit torture and other cruel, inhuman or degrading treatment or punishment and take effective legislative, administrative, judicial and other measures to prevent and punish such practices [...]

stress that no exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture [...]

(1990 Copenhagen Document)

The prohibition of torture is treated as a pre-emptory norm of international law (*ius cogens*) and is a non-derogable right. This means that it is accorded the highest status of law in the international legal order and the prohibition of torture applies universally. The need to protect against torture in international human rights law is not disputed. There are specific treaties in the UN and at the Council of Europe level that protect against it (such as the Convention against Torture). Similarly, torture committed as part of a widespread or systematic attack against civilians is a crime against humanity, as identified by the International Criminal Court.

Protection against torture, inhuman or degrading treatment or punishment is an essential element of human rights standards. As set out in international instruments, it can never be possible to justify subjecting someone to torture or inhuman or degrading treatment or punishment – even in war or national emergency. Counter-terrorism operations cannot, therefore, ever justify the use of treatment and punishment that could be characterized as torture and/or inhuman or degrading treatment.

Since 11 September 2001, the prohibition of torture in combating terrorism has been much discussed. Issues have been raised in a number of countries concerning the extent to which their counter-terrorism strategies comply with the absolute prohibition. This has been particularly relevant in the context of interrogation techniques, evidence collection and circumstances of detention. Fully understanding the absolute prohibition is essential for designing a counter-terrorism strategy that complies with human rights requirements.

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

In acknowledgement of the importance of the protection from torture, the UN has adopted a special treaty, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).³⁰⁵ All OSCE countries have ratified the CAT and are thus bound by its provisions.

The CAT requires states parties:

- to incorporate the crime of torture in their domestic legislation;
- to punish acts of torture by appropriate penalties;
- to undertake a prompt and impartial investigation of any alleged act of torture;
- to ensure that statements made as a result of torture are not invoked as evidence in proceedings (except as evidence against a person accused of torture); and
- to establish an enforceable right to fair and adequate compensation and rehabilitation for victims of torture or their dependants.

³⁰⁵ See note 81.

No exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification for torture. The same applies, in the case of an individual offender, to an order from a superior officer or a public authority.

States parties are prohibited from returning a person to another state where he or she would be at risk of torture (the principle of non-refoulement). They must ensure, on the other hand, that an alleged perpetrator of torture present in any territory under their jurisdiction is prosecuted or extradited to another state for the purpose of prosecution.

The Optional Protocol to the Convention (2002) creates the Subcommittee on Prevention and allows in-country inspections of places of detention to be undertaken in collaboration with national institutions. The Optional Protocol has been signed and ratified by a number of OSCE participating States.³⁰⁶

³⁰⁶ Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution 57/199. It entered into force on 22 June 2006. The treaty and the status of ratifications is available at www.ohchr.org/english/countries/ratification/9_b.htm.

International framework

The OSCE has consistently re-affirmed its commitment to the prohibition of torture.³⁰⁷ These OSCE commitments reflect international human rights law.

The UN CAT and Article 7 ICCPR³⁰⁸ provide the main international human rights law framework to protect against torture or inhuman and degrading treatment and punishment. Specific additional protection is found in other human rights treaties including CEDAW, ICERD and the CRC. Common Article 3 of the Geneva Conventions (law of war) prohibits torture and humiliating and degrading treatment. Torture is also prohibited by Article 3 ECHR.³⁰⁹ The Council of Europe also has its own regional mechanism to combat torture under its own Convention against Torture. That Convention is implemented by its own Committee for the

³⁰⁷ *Op. cit.*, note 29, 1989 Vienna Document; *op. cit.*, note 6, 1990 Copenhagen Document; OSCE Charter of Paris for a New Europe (1990 Paris Charter); *op. cit.*, note 5, 1991 Moscow Document; 1994 Budapest Document: Towards a Genuine Partnership in a New Era (Summit of Heads of State or Government); Document of the OSCE Summit of Heads of State or Government (1999 Istanbul Document).

³⁰⁸ Article 7 ICCPR provides: "No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

³⁰⁹ Article 3 ECHR provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Prevention of Torture (CPT), which has the power to carry out impromptu spot checks on places of detention. The CPT, which has been operating since 1987, has set down a comprehensive set of basic standards that are of potentially universal application.

In addition to the CPT and the UN Subcommittee on Prevention, the International Committee of the Red Cross also has an invaluable role in preventing torture and ameliorating conditions of detention through its programmes of prison visits.

Another important mechanism is the UN Special Rapporteur on Torture, who is able to raise specific allegations with governments and prepare reports on issues relevant to the eradication of torture. Those reports contain essential reading for those seeking to ensure the compliance of counter-terrorism strategies with the absolute prohibition on torture. The Special Rapporteur has pointed out that “the provisions of some new anti-terrorist legislation at the national level may not provide sufficient legal safeguards as recognised by international human rights law in order to prevent human rights violations, in particular those safeguards preventing and prohibiting torture and other forms of ill treatment.”³¹⁰

Soft law framework to combat torture during arrest and in detention

The UN has adopted a number of soft law (i.e., non-binding) guidelines, rules, recommendations and declarations that are relevant to protection from torture. These global values are also reflected in OSCE commitments and they provide a helpful and authoritative guidance to prevent and protect from torture. OSCE participating States are committed to observing the UN Standard Minimum Rules for the Treatment of Prisoners as well as the UN Code of Conduct for Law Enforcement Officials.³¹¹

There are a large number of soft-law standards. Many of their principles have been adopted by the courts, tribunals and committees responsible for implementing international human rights standards. As such, their significance and weight should not be under-estimated. Some of the key documents include:

Standard Minimum Rules for the Treatment of Prisoners (1955)³¹²

The Standard Minimum Rules “set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.”³¹³ They apply to all categories of detainees, including sentenced prisoners, those under administrative detention and persons detained without charge. On the whole, they represent “the minimum conditions which are accepted as suitable by the United Nations.”³¹⁴

The Rules lay down minimum standards for registration; separation and classification of detainees; accommodation; sanitary installations; provision of food, drinking water, articles necessary for personal hygiene, clothing and bedding; religious practice; education; exercise

310 Report by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, doc. A/57/173, 2 July 2002, para. 5.

311 *Op. cit.*, note 29, 1989 Vienna Document, *Questions Relating to Security in Europe: Principles*, para 23.3.

312 The Rules were adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, available at http://www.unhchr.ch/html/menu3/b/h_comp34.htm.

313 *Ibid.*, Preliminary Observations, para. 1.

314 *Ibid.*, Preliminary Observations, para. 2.

and sport; medical services; and treatment of mentally ill prisoners. They regulate disciplinary and complaints systems, the use of instruments of restraint and the transport of detainees. In particular, cruel, inhuman or degrading punishments, including corporal punishment, are prohibited as punishments for disciplinary offences.

*Code of Conduct for Law Enforcement Officials (1979)*³¹⁵

This Code of Conduct is also of direct relevance to the right to life. The term “law enforcement officials” is widely interpreted as including all officers of the law who exercise police powers, especially powers of arrest and detention.

Under the Code, firearms should be used only in the event of armed resistance or jeopardy to the lives of others and only where less extreme measures are not sufficient to apprehend the suspect. Law-enforcement officials should fully protect the health of persons in their custody and take immediate action to secure medical attention when required.

*Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)*³¹⁶

These Principles address the lawful use of force and firearms, the policing of unlawful assemblies and of persons in custody or detention, and reporting and review procedures concerning the use of force and firearms in the line of duty.

Arbitrary or abusive use of force and firearms by law-enforcement officials should be punished as a criminal offence under domestic law. From the operational perspective of counter-terrorism strategies, exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from the principles.

In keeping with the right to life, force and firearms may be used only if other means remain ineffective or without any promise of achieving the intended result. Law-enforcement officials should act in proportion to the seriousness of the offence and the legitimate object to be achieved. Damage and injury should be minimized, medical assistance rendered to injured persons, and relatives or close friends informed at the earliest possible moment.

*Principles of Medical Ethics relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982)*³¹⁷

The preamble of these Principles expresses alarm “that not infrequently members of the medical profession or other health personnel are engaged in activities which are difficult to reconcile with medical ethics”. Health personnel have a duty to protect the physical and mental health of prisoners and detainees and to provide medical treatment of the same quality and standard as is afforded to those who are not detained. Active or passive participation in or

³¹⁵ Adopted by UN General Assembly resolution 34/169 of 17 December 1979.

³¹⁶ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), 27 August-7 September 1990.

³¹⁷ Adopted by UN General Assembly resolution 37/194 of 18 December 1982. These Principles should be read alongside guidance from the World Medical Association, the global representative body for physicians (<http://www.wma.net/e/index.htm>).

support of any form of torture or ill-treatment constitutes a gross contravention of medical ethics.

In recognition of the crucial role played by health-care professionals in the protection from torture, it is also a contravention for health personnel to assist in the interrogation of prisoners or detainees in a manner that:

- may adversely affect their physical or mental health;
- certifies their fitness for any form of treatment or punishment that may adversely affect their physical or mental health (Principle 4); or
- participates in the restraining of a prisoner or detainee unless such a procedure is necessary to protect the health or safety of the person concerned, other detainees or guardians, and presents no hazard to the detainee's physical or mental health.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)³¹⁸

These Principles guarantee rights of persons under arrest and detention to, *inter alia*:

- legal assistance;
- medical care; and
- access to records of their detention, arrest, interrogation and medical treatment.

They also require states to prohibit any act contrary to the Principles, make such acts subject to appropriate sanctions, and conduct impartial investigations of complaints.

Of relevance to counter-terrorism interrogation techniques, the term “cruel, inhuman or degrading treatment or punishment” should be interpreted “so as to extend to the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.”³¹⁹

No detained person may be subjected to violence, threats or methods of interrogation that impair his or her decision-making capacity or judgment. No detainee may be subjected, even with his or her consent, to medical experimentation that may be detrimental to his or her health. Non-compliance with the Principles in obtaining evidence should be taken into account when determining the admissibility of evidence against a detained person.

Detained persons or their legal representatives have the right to lodge a complaint, especially regarding torture or other ill-treatment, with the authorities responsible for the place of the detention and, where necessary, to appropriate authorities vested with reviewing power. Such complaints should be promptly dealt with and replied to without undue delay. No complainant should suffer prejudice for lodging a complaint.³²⁰

318 Adopted by UN General Assembly resolution 43/173 of 9 December 1988.

319 *Ibid.*, Principle 6. See also *op. cit.*, note 5, 1991 Moscow Document, para. 23.1 (ix).

320 *Op. cit.*, note 5, 1991 Moscow Document, para. 23.1 (x).

Promptly after arrest and after each transfer to another place of detention, members of the detainee's family or other persons of his or her choice should be notified of the place where he or she is being held. A proper medical examination should be offered to detained or imprisoned persons as promptly as possible after their admission to the place of detention or imprisonment. Thereafter medical care and treatment should be provided whenever necessary. In all cases, the care and treatment should be provided free of charge.

Places of detention should be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the place of detention. Detainees should have the right "to communicate freely and in full confidentiality" with the persons concerned.

*Basic Principles for the Treatment of Prisoners (1990)*³²¹

Prisoners should be treated with respect for their inherent dignity as human beings. They should not suffer discrimination, and their religious beliefs and cultural precepts should be respected. They should have access to:

- cultural and educational activities aimed at full development of the human personality;
- meaningful remunerated employment that will facilitate their reintegration into society; and
- all health services without discrimination.

Efforts to abolish solitary confinement are encouraged.

*Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (1999)*³²²

The Istanbul Protocol describes in detail the steps to be taken by states, investigators and medical experts to ensure the prompt and impartial investigation and documentation of complaints and reports of torture. In particular:

- the investigation should be carried out by competent and impartial experts, who are independent of the suspected perpetrators and the agency they serve;
- investigators should have access to all necessary information, budgetary resources and technical facilities;
- investigators should have the authority to issue summonses to alleged perpetrators and witnesses, and to demand the production of evidence;
- the findings of the investigation should be made public;
- the alleged victims and their legal representatives should have access to any hearing and to all information relevant to the investigation;
- alleged victims of torture, witnesses, those conducting the investigation and their families should be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation; and

³²¹ Adopted and proclaimed by UN General Assembly Resolution 45/111 of 14 December 1990.

³²² UN Professional Training Series No. 8 /rev.1, at <http://www.ohchr.org/english/about/publications/docs/8rev1.pdf>. The document was submitted to the United Nations High Commissioner for Human Rights on 9 August 1999 by an ad hoc coalition of professional and human rights bodies.

- those potentially implicated in torture should be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.

Protection from torture, inhuman and degrading treatment and punishment: how does it work?

Not all types of harsh treatment will fall within the scope of torture or inhuman or degrading treatment or punishment as protected by Article 3 ECHR or Article 7 ICCPR. To fall within the ambit of these treaties, the conduct must attain a “minimum level of severity”.³²³ Although all of these types of conduct are prohibited, distinctions are often drawn between torture and inhuman or degrading treatment.

Even though it can be argued that punishment *per se* has an inherent element that includes humiliation, this would not in itself amount to degrading treatment. There is a distinction between punishment in general and punishment that is designed to be inhuman and degrading. Corporal punishment, for example, will amount to degrading punishment.³²⁴

Factors that may be relevant to identifying whether treatment violates protection from torture, inhuman or degrading treatment and punishment

Whether the threshold of either torture or inhuman or degrading treatment or punishment has been reached will depend on all the circumstances of the case. To draw a distinction between torture on the one hand, and inhuman or degrading treatment and punishment on the other, is to some extent to make a distinction without a difference, since all are forbidden under international human rights law. Nevertheless, there is a special and particular stigma attached to torture and there are some legal consequences to the distinction. For example, the CAT requires states to prosecute or extradite individuals accused of torture, but does not have the same stipulation for those who inflicted inhuman or degrading treatment. A number of other legal stipulations of the CAT are also limited to torture.

In making the distinction, relevant factors will include duration of the treatment, its severity, the degree of pain inflicted, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.³²⁵ For example, conditions of detention in a police station amounted to inhuman and degrading treatment for one detainee, who was confined to a wheelchair and also suffered from recurrent kidney problems. While there was not evidence of any positive intention to humiliate or debase the detainee, the same conditions for an able-

323 “The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.”, *op. cit.*, note 143, ECtHR, *Ireland v. UK*, para. 162.

324 For this distinction, see the ECtHR judgments in the cases of *Tyrer* and *Costello-Roberts*, in particular: “The circumstances of the applicant’s punishment [Mr. Costello-Roberts] may be distinguished from those of Mr Tyrer’s which was found to be degrading within the meaning of Article 3. Mr Costello-Roberts was a young boy punished in accordance with the disciplinary rules in force within the school in which he was a boarder. This amounted to being slipped three times on his buttocks through his shorts with a rubber-soled gym shoe by the headmaster in private. Mr Tyrer, on the other hand, was a young man sentenced in the local juvenile court to three strokes of the birch on the bare posterior. His punishment was administered some three weeks later in a police station where he was held by two policemen whilst a third administered the punishment, pieces of the birch breaking at the first stroke”, *op. cit.*, note 171, ECtHR, *Costello-Roberts v. UK*, para. 31.

325 *Op. cit.*, note 143, ECtHR, *Ireland v. UK*, para. 162.

bodied person would not have raised the same issues in relation to inhuman and degrading treatment.³²⁶

Definition of torture

Article 1 of the UN Convention against Torture provides a widely-accepted definition of torture:

For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.³²⁷

Because of the stigma attached to torture, international human rights cases have confirmed that the threshold of severity for torture is extremely high. A major case on this issue before the European Court of Human Rights concerned interrogation techniques in counter-terrorism operations in Northern Ireland. The case was brought by Ireland against the United Kingdom. The complaint concerned the so-called five techniques practised by UK security forces in interrogating suspected IRA terrorists. These techniques included:

- wall-standing;
- hooding;
- subjection to noise;
- deprivation of sleep; and
- deprivation of food and drink.³²⁸

The European Court of Human Rights, by a majority, classified the treatment as inhuman treatment rather than torture. Torture, that Court considered, has a particular stigma attached to it. The HRC, however, does not draw such a distinction between treatment amounting to torture and that which can be categorized as inhuman and degrading.

In later cases, the European Court has held that, as the European Convention is a living instrument, treatment that may once have been considered to be inhuman or degrading, may now amount to torture.³²⁹ In one case the applicant, detained for drug trafficking, was found to have been tortured. He was subjected to a large number of intense blows all over his body, he was dragged along by his hair, forced to run along a corridor with police officers tripping him up. He was also urinated over and was threatened with a blow lamp and then a syringe. Key to this finding of torture was the treatment’s duration, severity and intentionality. It thus

³²⁶ ECtHR, *Price v. UK*, Application no. 33394/96, 10 July 2001, paras. 24-30.

³²⁷ However, see the more recent the Rome Statute of the International Criminal Court, *op. cit.*, note 225 Article 2(e): its definition is less circumscribed. Torture is defined as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.

³²⁸ *Op. cit.*, note 143, ECtHR, *Ireland v. UK*, paras. 96-104, 106-107 and 165-168.

³²⁹ The Court took “the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies”, ECtHR, *Selmouni v. France*, Application no. 25803/94, 28 July 1999, para. 101.

fell squarely within the definition of torture within the UN CAT and the ECHR was interpreted accordingly.

Other treatment that the European Court has found to amount to torture includes stripping someone naked and tying their arms behind their back, and then suspending them by their arms;³³⁰ rape of a detainee by an official of the state;³³¹ subjection to electric shocks; hot and cold water treatment; blows to the head; and threats concerning the ill-treatment of the applicant's children.³³²

Similarly, intimidation and threats may fall within the definition of torture.³³³ The UN Special Rapporteur on Torture has pointed out that threats and intimidation are often a crucial element in assessing whether a person is at risk of physical torture and other forms of ill-treatment.

Strip searches may raise issues in relation to degrading treatment and they must be conducted in an appropriate manner.³³⁴ The Special Rapporteur on Torture considers that beating, kicking, punching, stripping and the forced shaving of detainees amounts to torture as it inflicts severe pain or suffering on the victims for the purpose of intimidation and/or punishment.³³⁵

Definition of inhuman

The international conventions do not provide a precise definition of “inhuman” or “degrading”, as they do of torture. The CAT describes “inhuman or degrading” as “acts [...] which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” In short, if treatment or punishment causes physical or mental suffering but is not severe enough to amount to torture, it will be inhuman or degrading treatment. Physical assaults that are not severe enough to constitute torture can amount to inhuman treatment.

330 The so called “Palestinian hanging” was considered to amount to torture in ECtHR, *Aksoy v. Turkey*, *op. cit.*, note 220, para. 64 (“this treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time [...] The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture”).

331 “While being held in detention the applicant was raped by a person whose identity has still to be determined. Rape of a detainee by an official of the state must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim, which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally”, *op. cit.*, note 30, ECtHR, *Aydin v. Turkey*, para. 83 and more generally 80-88.

332 ECtHR, *Akkoç v. Turkey*, Applications nos. 22947/93 and 22948/93, 10 October 2000, paras. 111-119.

333 UN Commission on Human Rights, *Torture and other cruel, inhuman or degrading treatment or punishment*, Resolution 2001/62, 25 April 2001, para. 2.

334 “Obliging the applicant to strip naked in the presence of a woman, and then touching his sexual organs and food with bare hands showed a clear lack of respect for the applicant, and diminished in effect his human dignity. It must have left him with feelings of anguish and inferiority capable of humiliating and debasing him”, ECtHR, *Valašinas v. Lithuania*, Application no. 44558/98, 24 July 2001, para. 117.

335 *Op. cit.*, note 178, *Situation of detainees at Guantánamo Bay*, paras. 54 (shaving may be of particular relevance to prisoners of certain religions).

The UN Human Rights Committee stated that the aim of Article 7, ICCPR is “to protect both the dignity and the physical and mental integrity of the individual [...] the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim”.³³⁶

Deliberately cruel acts may also amount to inhuman treatment, even when a person is not in custody. Therefore, according to the European Court and in the context of counter-terrorism, it was inhuman of the security forces to destroy the applicants’ homes.³³⁷ This constituted an act of violence and deliberate destruction in disregard for the safety and welfare of the applicants, who were left without shelter and in circumstances that caused anguish and suffering.

When an individual is in custody the threshold for inhuman treatment is lowered. For example, the European Court has held that an applicant’s injuries, although relatively slight, nevertheless constituted outward signs of the use of physical force on an individual deprived of his liberty and therefore in a state of inferiority. As such, the treatment had been both inhuman and degrading.³³⁸

Definition of degrading

Although degrading treatment is not specifically defined in the conventions, it includes all ill-treatment that may not reach the level of “inhuman”. For example, it may include various measures designed to break the physical or moral resistance of the victim. Its objective may be to humiliate and debase the person concerned.

Some instances of degrading treatment can be less clear. For example, handcuffing of prisoners with terminal illnesses to a hospital bed may be degrading,³³⁹ while handcuffing in general does not reach the minimum level of severity necessary to amount to degrading treatment.³⁴⁰

Issues arising under protection from torture relevant to counter-terrorism strategies

The CAT Committee on 22 November 2001 issued a general statement referring to the events of 11 September 2001 and their aftermath, which reminded states parties to the Convention

336 HRC, General Comment No. 20 (Replaces General Comment No. 7) concerning prohibition of torture and cruel treatment or punishment (Art. 7), 10 March 1992, paras. 2 and 5.

337 ECtHR, *Selçuk and Asker v. Turkey*, Case no. 12/1997/796/998-999, 24 April 1998, paras. 72-80; ECtHR, *Bilgin v. Turkey*, Application no. 23819/94, 16 November 2000, paras. 97-104; ECtHR, *Dulaş v. Turkey*, Application no. 25801/94, 30 January 2001, paras. 49-56.

338 ECtHR, *Tomasi v. France*, Application no. 12850/87, 27 August 1992, paras. 112-116 (the Court also stated that “the requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals”, para. 115).

339 ECtHR, *Hénaf v. France*, Application no. 65436/01, 27 November 2003, paras 47-60.

340 “[...] Handcuffing does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with lawful arrest or detention and does not entail use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, it is of importance for instance whether there is reason to believe that the person concerned would resist arrest or abscond, cause injury or damage or suppress evidence”, ECtHR, *Raninen v. Finland*, Case no. 152/1996/771/972, 16 December 1997, para. 56 and more generally 52-59.

against Torture “of the non-derogable nature of most of the obligations undertaken by them in ratifying the Convention”. The Committee in particular highlighted:

- Article 2 (whereby no exceptional circumstances whatsoever may be invoked as a justification of torture);
- Article 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer); and
- Article 16 (requiring steps to prevent cruel, inhuman or degrading treatment or punishment).³⁴¹

In its concluding observations in relation to a number states parties’ reports to CAT, the Committee has emphasized the non-derogability of its provisions. The Committee has stressed that while it is “aware of the difficulties that the State party faces in its prolonged fight against terrorism, recalls that no exceptional circumstances whatsoever can be invoked as a justification for torture. It stresses in particular that the reactions of the State party to such threats must be compatible with article 2, paragraph 2, of the Convention [against Torture] and within the limits of Security Council resolution 1373 (2001).”³⁴²

As noted above, it is a guiding OSCE principle that the use of torture and inhuman or degrading treatment can never be justified and that no exceptional circumstances whatsoever may be invoked as a justification of torture. These principles are re-affirmed in the Council of Europe Guidelines on Human Rights and the Fight against Terrorism. Guideline IV confirms the absolute prohibition of torture:

The use of torture or of inhuman or degrading treatment or punishment, is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.

The European Court has recalled the absolute prohibition of torture or inhuman or degrading treatment or punishment on many occasions. For example:

[...] Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 para. 2 even in the event of a public emergency threatening the life of the nation [...] The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim’s conduct [...] The nature of the offence allegedly committed by the applicant was therefore irrelevant for the purposes of Article 3.³⁴³

³⁴¹ Statement of the Committee against Torture, doc. CAT/C/XXVII/Misc.7 (2001), 22 November 2001.

³⁴² CAT, Concluding observations: *Yemen*, doc. CAT/C/CR/31/4, 5 February 2004, para. 5. See also CAT, Concluding observations: *Egypt*, doc. CAT/C/CR/29/4, 23 December 2002, para. 4; *Israel*, doc. CAT/C/XXVII/Concl.5, 23 November 2001, para. 5; *Russian Federation*, doc. CAT/C/CR/28/4, 6 June 2002, para. 4; *Spain*, doc. CAT/C/CR/29/3, 23 December 2002, para. 7. For some details about UN Security Council Resolution 1373 see pp. 35-36 above.

³⁴³ ECtHR, *Labita v. Italy*, Application no. 26772/95, 6 April 2000, para. 119; *op. cit.*, note 143, ECtHR, *Ireland v. UK*, para. 163; *op. cit.*, note 303, ECtHR, *Soering v. UK*, para. 88; *op. cit.*, note 144, ECtHR, *Chahal v. United Kingdom*, para. 79; *op. cit.*, note 220, ECtHR, *Aksoy v. Turkey*, para. 62; *op. cit.*, note 30, ECtHR, *Aydin v. Turkey*, para. 81; ECtHR, *Assenov and Others v. Bulgaria*, Case no. 90/1997/874/1086, 28 October 1998, para. 93; *op. cit.*, note 329, ECtHR, *Selmouni v. France*, para. 95.

The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.³⁴⁴

The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.³⁴⁵

Specific issues relevant to protection from torture and inhuman and degrading treatment or punishment

Conditions of detention

Detention conditions can amount to inhuman and degrading treatment and punishment, and even torture. The UN Special Rapporteur on Torture is concerned that detention conditions generally can amount to torture.³⁴⁶ This may be the case whether detention is in a prison or elsewhere.

Very severe prison conditions can cause pain or suffering that may constitute cruel, inhuman or degrading treatment or even torture. Prison conditions may fall into a “grey area” between torture and other forms of cruel, inhuman and degrading treatment or punishment owing to lack of evidence of the intentional or purposive element required by the term “torture”.³⁴⁷

In assessing the severity of detention conditions the following factors identified by the CPT are relevant:³⁴⁸

- the space at the disposal of detainees;
- the supply of water and other articles needed for personal hygiene;
- the provision of adequate clothing and bedding;
- the quantity and quality of food and drinking water;
- recreational facilities (including outdoor exercise);
- admission of visitors;
- provision of medical assistance;
- sanitation, heating, lighting and ventilation;

344 *Op. cit.*, note 338, ECtHR, *Tomasi v. France*, para. 115; ECtHR, *Ribitsch v. Austria*, Case no. 42/1994/489/571, 21 November 1995, para. 38.

345 “The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion [...] In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration [...]”, *op. cit.*, note 143, ECtHR, *Chahal v. UK*, para. 80; see also ECtHR, *V. v. UK*, Application no. 24888/94, 16 December 1999, para 69.

346 On 16 January 2002, the Special Rapporteur had transmitted an urgent appeal on this issue concerning detention conditions at Guantánamo Bay, to which the United States Government responded by letter dated 3 April 2002 (see Report of the UN Special Rapporteur on Torture, Theo van Boven, doc. E/CN.4/2003/68/Add.1, 27 February 2003, paras. 1907-1909).

347 UN OHCHR, *Combating Torture*, Fact Sheet no. 4 (Rev. 1) (Geneva, 2002), p. 35.

348 The CPT under the European Convention on the Prevention of Torture has identified a number of basic standards derived from that Convention, which in its view must be met in order to protect detained persons from torture and other forms of ill-treatment. See <http://www.cpt.coe.int/en/docsstandards.htm>.

- the disciplinary regime;
- the complaints system; and
- the behaviour of prison personnel.

Solitary confinement

Solitary confinement can cross the threshold of inhuman and degrading treatment and punishment. However, where there is no total sensory deprivation and if the state has a compelling reason to detain somebody under these circumstances, for example they have been convicted of offences of terrorism and they are considered to be dangerously charismatic, the Court has ruled that solitary confinement, for even up to eight years, may not violate the absolute prohibition.³⁴⁹ Nonetheless, indefinite solitary confinement may exceed the standards required for the protection from torture and other ill-treatment. Furthermore, it is essential that the prisoner should be able to have an independent judicial authority review the merits of, and reasons for, a prolonged measure of solitary confinement. According to the Court, rigorous examination is called for to determine whether prolonged detention in solitary confinement is justified, including:

- whether the measures taken were necessary and proportionate compared to the available alternatives;
- what safeguards were afforded the applicant; and
- what measures were taken by the authorities to ensure that the applicant's physical and mental condition was compatible with his continued solitary confinement.

Measures such as solitary confinement should be resorted to only exceptionally and after every precaution has been taken. In order to avoid any risk of arbitrariness, substantive reasons must be given when a protracted period of solitary confinement is extended. Those reasons should establish that the authorities have carried out a reassessment that takes into account any changes in the prisoner's circumstances, situation or behaviour. The reasons will need to be increasingly detailed and compelling the more time goes by.

Secret or incommunicado detention

Incommunicado or secret detention has been found to violate Article 7 ICCPR.³⁵⁰ Torture is most frequently practised when a person is held without access to a lawyer, his or her family and relatives, or groups from civil society (incommunicado detention). There is a direct link between secret or incommunicado detention and enforced disappearances.³⁵¹ In acknowledgement of this, the Commission on Human Rights has stressed that "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form

349 *Op. cit.*, note 134, ECtHR, *Ramirez Sanchez v. France*, Application no. 59450/00, 4 July 2006, paras. 125-150; *op. cit.*, note 300, ECtHR, *Öcalan v. Turkey*, paras. 190-196.

350 *Op. cit.*, note 336, HRC, General Comment No. 20, para. 11. See also HRC, *Campos v. Peru*, Communication no. 577/1994, doc. CCPR/C/61/D/577/1994, 9 January 1998, para. 8.4-8.5; and HRC, *Shaw v. Jamaica*, Communication no. 704/1996, doc. CCPR/C/62/D/704/1996, 4 June 1998, para. 7.1.

351 See pp. 103-105 above.

of cruel, inhuman or degrading treatment.”³⁵² If prolonged incommunicado detention takes place in a secret or unknown place, this may amount to torture.³⁵³

The Committee against Torture commented in one case that it, “continues to be deeply concerned by the fact that incommunicado detention up to a maximum of five days has been maintained for specific categories of particularly serious offences. During this period, the detainee has no access to a lawyer or to a doctor of his or her choice nor is he or she able to notify his or her family. Although the state party explains that incommunicado detention does not involve the complete isolation of the detainee, who has access to an officially appointed lawyer and a forensic physician, the Committee considers that the incommunicado regime, regardless of the legal safeguards for its application, facilitates the commission of acts of torture and ill-treatment.”³⁵⁴

Incommunicado detention also increases the risks of such forms of torture or ill-treatment as sexual abuse and harassment, virginity testing, forced abortion and forced miscarriage.³⁵⁵

Interrogation

Interrogation techniques can also violate the prohibition on torture and inhuman and degrading treatment. Therefore, the legal system needs to provide fundamental safeguards against ill-treatment. Judges and prosecutors play a key role in safeguarding against such ill-treatment. Key safeguards include:³⁵⁶

- the right of detainees to have the fact of their detention notified to a third party of their choice (family, friend or consulate);
- the right of prompt access to a lawyer;
- the right to challenge the legality of the detention (*habeas corpus*); and
- the right to a medical examination by a doctor of the detainee’s choice.

Proper custody records must also be kept. Most of these safeguards – and many others – are included in OSCE commitments.³⁵⁷ The safeguards have also been emphasized by the UN Special Rapporteur on Torture.³⁵⁸

352 Resolution 1999/32, 26 April 1999, para 5, as reiterated in Resolution 2000/43 of 20 April 2000, para. 7. The same concept is stressed in many more UN official documents, cf. e.g. UN General Assembly Resolution 51/86 of 12 December 1996 and 54/156 of 17 December 1999.

353 The CAT has also focused on detention practices, including incommunicado detention, which may increase the risk of torture or ill-treatment: “The Committee expresses its concern that measures adopted or being adopted by the State party against terrorism and illegal armed groups could encourage the practice of torture. In this regard the Committee expresses its concern, in particular, at: [...] (b) Constitutional reform bill No. 223/2003, which, if adopted, would seem to confer judicial powers on the armed forces and enable persons to be detained and questioned for up to 36 hours without being brought before a judge”, CAT, Concluding observations: Colombia, doc. CAT/C/CR/31/1, 4 February 2004, para. 8. See also CAT, Concluding observations: Morocco, doc. CAT/C/CR/31/2, 5 February 2004, para. 5.

354 *Op. cit.*, note 342, CAT, Concluding observations: Spain, para. 10.

355 *Op. cit.*, note 347, UN OHCHR, *Combating Torture*, p. 32, recalling the reports of the UN Special Rapporteur on Torture, Nigel S. Rodley, especially docs. E/CN.4/1995/34, 12 January 1995 and A/55/290, 11 August 2000.

356 See in this regard also CoE, The CPT standards - “Substantive” sections of the CPT’s General Reports, doc. CPT/Inf/E (2002) 1 - Rev. 2006, pp. 6-12, available at <http://cpt.coe.int/en/docsstandards.htm>.

357 See, for example, *op. cit.*, note 5, 1991 Moscow Document, para. 23.1.

358 Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, doc. A/57/173, 2 July 2002, paras. 2-35; see also the following year’s report, doc. A/58/120, 3 July 2003, paras. 11-22.

The UN Special Rapporteur on Torture has also challenged the use of “stress and duress” techniques during interrogation and in particular subjecting detainees to prolonged standing or kneeling, hooding, blindfolding with spray-painted goggles, sleep deprivation and 24-hour lighting, and also the keeping of detainees in painful or awkward positions.³⁵⁹

Even in the context of interrogation and investigations into acts of terrorism, there can be no necessity defence for subjecting a suspect to torture or inhuman or degrading treatment. The HRC has firmly rejected such arguments of the defence of necessity.³⁶⁰

As far as interrogation techniques are concerned, international human rights law has identified the following practices, *inter alia*, to be in violation of the absolute protection from torture, inhuman degrading treatment and punishment:

- suspending someone by their arms;
- rape;
- deprivation of the natural senses, such as sight or hearing, or of awareness of place and the passing of time;
- methods of interrogation that impair decision-making capacity or judgement;
- unduly lengthy interrogations;
- coercion into signing false confessions;
- mock executions and the threat thereof;
- thumb presses;
- immersion in blood, urine, vomit and excrement;
- medical experimentation;
- electric shocks;
- overcrowded and cold conditions;
- threats to family;
- deliberate destruction of homes and communities;
- sleep deprivation;
- hooding;
- blindfolding;
- wall standing;
- use of noise;
- deprivation of food and water;
- humiliation.

Even in the context of counter-terrorism, only normal investigative procedures are authorized.³⁶¹ As a matter of international human rights law, security-service investigators are not

359 Report of the UN Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, doc. E/CN.4/2004/56/Add.1, para. 1813.

360 The Human Right Committee stated that “[...] is concerned that interrogation techniques incompatible with Article 7 of the Covenant are still reported frequently to be resorted to and the ‘necessity defence’ argument, which is not recognised under the Covenant, is often invoked and retained as a justification for [...] actions in the course of investigations. The State party should review its recourse to the ‘necessity defence’ argument”, *op. cit.*, note 131, HRC, Concluding observations: *Israel*, para. 18.

361 “[W]e declare that the GSS does not have the authority to “shake” a man, hold him in the ‘Shabach’ position (which includes the combination of various methods, as mentioned in paragraph 30), force him into a ‘frog crouch’ position and deprive him of sleep in a manner other than that which is inherently required by the interrogation. Likewise, we declare that the ‘necessity’ defence, found in the Penal Law, cannot serve as a basis of authority for the use of these interrogation practices, or for the existence of directives pertaining to GSS investigators, allowing them to employ interrogation practices of this kind”, Supreme Court of Israel, *Public Committee Against Torture v. State of Israel*, HCJ 5100/94, 6 September 1999.

lawfully authorized to use “physical means” or a “moderate degree of physical pressure” during interrogation, particularly where such interrogation could involve serious physical injury and the risk of death.

In relation to interrogation techniques, the UN Special Rapporteur on Torture has concluded that the simultaneous use of exposure to extreme temperatures, sleep deprivation for several days, prolonged isolation and use of dogs (especially if it is clear that a phobia exists) are likely to amount to torture. He has also pointed out that stripping detainees naked, particularly in the presence of women, can, taking into account cultural sensitivities in individual cases, cause extreme psychological pressure and can amount to degrading treatment, or even torture.³⁶² At the same time, he has also pointed out that certain methods of force-feeding “definitely” amount to torture.

The fact of torture cannot be sidestepped through semantics or language changes. Unacceptable and illegal practices remain unacceptable by whatever name. Therefore, simply labelling treatment as “physical means” or “pressure”, rather than “torture” cannot mitigate the violation. The universal prohibition of torture cannot be overcome by trying to reclassify it in a less threatening way. Similarly, attempts to redefine torture to include only the most extreme examples of treatment are also not permissible.³⁶³

OSCE participating States have committed themselves to ensuring “that effective measures will be adopted, if this has not already been done, to provide that law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against any other person.”³⁶⁴

The OSCE/ODIHR publication *Preventing Torture: a Handbook for OSCE Field Staff* contains a checklist of good practice in regard to interrogation. The recommendations include:

- at the outset of each interrogation, the detainee should be informed of the identity (name and/or number) of all persons present;
- the identity of all persons present should be noted in a permanent record that should detail the time at which interrogations start and end and any request made by the detainee during the interrogation;
- the detainee should be informed of the permissible length of an interrogation; the procedure for rest periods between interviews and breaks during an interrogation, places in which interrogations may take place; whether the detainee may be required to stand while being questioned;
- blindfolding or hooding should be forbidden as these practices often make the prosecution of torture virtually impossible, as victims are rendered incapable of identifying their interrogators;
- the detainee should have the right to have a lawyer present during any interrogation;

³⁶² *Op. cit.*, note 178, *Situation of detainees at Guantánamo Bay*, paras. 49-52.

³⁶³ For example a memorandum prepared by the US Justice Department in August 2002 was withdrawn two months later because it defined torture too narrowly. That memorandum, while accepting that torture was prohibited, defined it as follows: “physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function, even death. See US Department of Justice (Office of the Legal Counsel), *Memorandum for Alberto R. Gonzales, Re: Standards of Conduct for Interrogation under 18 U.S.C. ss 2340 – 2340A*, 1 August 2002.

³⁶⁴ *Op. cit.*, note 5, 1991 Moscow Document, para. 23.1(vii).

- all interrogation sessions should be recorded and the detainee or, when provided by law, his or her counsel should have access to these records;
- the authorities should regularly review procedures governing the questioning of persons who are under the influence of drugs, alcohol, medicine or who are in a state of shock; and
- the position of particularly vulnerable persons (for example, the young, those who are mentally disabled or mentally ill) should be the subject of special safeguards.³⁶⁵

Recording of interrogations

One of the best safeguards against abuse during interrogation is to ensure that all interrogations are recorded both in video and audio form on pain of exclusion from evidence. This is the approach favoured by the United Nations. Recording interrogations had a dramatic effect in reducing the number of allegations of abuse emanating from detention centres in Northern Ireland after its introduction there. OSCE experts have also recognized the value of electronic recording of interrogations both to reduce the risk of ill-treatment and to protect authorities against false allegations of mistreatment.³⁶⁶

Consistent with this approach the UN Special Rapporteur on Torture has stated that “[a]ll interrogation sessions should be recorded and preferably video recorded, and the identity of all persons present should be included in the records. Evidence from non-recorded interrogations should be excluded from court proceedings.”³⁶⁷

Reliance on evidence obtained through torture

Evidence obtained through torture, inhuman or degrading treatment will be inadmissible and cannot be adduced at a trial or relied upon in any way to form the case for the prosecution (Article 15 CAT). Evidence obtained through torture or other ill-treatment is notoriously unreliable. The Council of Europe Commissioner for Human Rights succinctly explained the absolute prohibition on the reliance of evidence obtained through torture:

Torture is torture whoever does it, judicial proceedings are judicial proceedings, whatever their purpose – the former can never be admissible in the latter.³⁶⁸

The prohibition on the use of evidence obtained through torture is clear-cut. In *Jalloh*, a case concerning the use of evidence obtained in a manner amounting to inhuman and degrading treatment, the European Court has held that such evidence should not have been admissible, and to do so was a violation of the right to a fair trial. In the same case, the Court made the following general observations in relation to torture, inhuman and degrading treatment and punishment, and the right to a fair trial:³⁶⁹

- incriminating evidence – whether in the form of a confession or other evidence – obtained as a result of acts of violence or brutality or other forms of treatment that can be character-

³⁶⁵ OSCE/ODIHR, *Preventing Torture - A Handbook for OSCE Field Staff* (Warsaw, 1999), pp. 55-56, available at http://www.osce.org/documents/odihr/1999/08/754_en.html.

³⁶⁶ *Ibid.*, p. 56.

³⁶⁷ Report of the UN Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, doc. E/CN.4/2003/68, 17 December 2002, para. 26(g).

³⁶⁸ CoE Commissioner for Human Rights, Alvaro Gil-Robles, Report on the visit to UK of 4-12 November 2004, doc. CommDH(2005)6, Strasbourg, 8 June 2005, para. 27.

³⁶⁹ ECtHR, *Jalloh v. Germany*, Application no. 54810/00, 11 July 2006, paras. 103-123.

ized as torture, should never be relied on as proof of the victim's guilt, irrespective of its probative value;

- although the treatment to which the applicant was subjected did not attract the special stigma reserved for acts of torture, it did meet the minimum level of severity covered by the ambit of the Article 3 prohibition;
- the use of such evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings;
- the general question of whether the use of evidence obtained by an act amounting to inhuman and degrading treatment automatically renders a trial unfair is left open; but, it cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair, irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities that the victim had to challenge its admission and use at his trial.

The judgment is surprising in that it leaves open the possibility that evidence that has been obtained through inhuman or degrading treatment could be admissible without violating the right to a fair trial. However, although the theoretical possibility might exist, the reality is that circumstances where evidence obtained in a way that is inhuman or degrading could be adduced are hardly imaginable.³⁷⁰

This case echoes the *Rochin* case, where the United States Supreme Court held that evidence obtained by police officers who had forcibly opened the suspect's mouth and extracted the contents of his stomach was inadmissible notwithstanding its reliable nature. The Supreme Court ruled that

This is conduct that shocks the conscience [...] They are methods too close to the rack and the screw [...] Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalise the temper of a society.³⁷¹

This principle has been upheld also by the UK's highest court in a case involving the admissibility of evidence of uncertain provenance. That court categorically held that evidence that could have been obtained through torture must be excluded.³⁷²

Methods of restraint

Under international law, the use of methods of restraint is primarily governed by the Standard Minimum Rules for the Treatment of Prisoners. Rule 33 states that instruments of restraint

370 For example in *Göçmen*, the applicant was found guilty of terrorist offences and of being a member of a proscribed organization. It was subsequently established that he had been ill treated and that evidence obtained during this ill-treatment had formed part of the case against him. As such, the European Court held that he did not have a fair trial, ECtHR, *Göçmen and Others v. Turkey*, Application no. 72000/01, 17 October 2006, paras. 67-76.

371 U.S. Supreme Court, *Rochin v. California*, 342 U.S. 165 (1952).

372 House of Lords, *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department*, [2005] UKHL 71, 8 December 2005.

such as handcuffs, chains, irons and straitjackets should never be applied as a punishment and that chains or irons should not be used as restraints.

Instruments of restraint should be used only to prevent escape during a transfer, on medical grounds or as a last resort to prevent prisoners from injuring themselves or others or from damaging property. Rule 34 states that instruments of restraint must not be applied for any longer time than is strictly necessary.

The UN Special Rapporteur on Torture has said that shackling, chaining, hooding and forcing detainees to wear earphones and goggles while being transported will amount to torture.³⁷³

Corporal punishment

Corporal punishment is considered to be unlawful under international law and is not a “lawful sanction” falling outside the definition of torture, cruel, inhuman or degrading punishment. Lawful sanctions refer only to penal practices that are widely accepted as legitimate by the international community and are compatible with basic internationally accepted standards. In Resolution 1998/38, the Commission on Human Rights held that corporal punishment “can amount to cruel, inhuman or degrading punishment or even to torture.”

Access to a doctor

In addition to access to a lawyer, a detainee’s access to a doctor is also a crucial safeguard against abuse. The UN Special Rapporteur on Torture has recommended that “[a]t the time of arrest a person should undergo a medical inspection, and medical inspections should be repeated regularly and should be compulsory upon transfer to another place of detention.”³⁷⁴

Medical examinations must take place in private — in particular in the absence of security personnel — and must be detailed. If they do not afford a detainee a proper opportunity to explain any concerns or complaints he may have, they will be of greatly reduced evidential value and may, on the contrary, facilitate ill-treatment by providing a superficial cover for it. Medical reports should detail fully the date, location and duration of any medical examination, the questions asked and answers provided, and the nature of any physical examination conducted.

The CPT has also stated that the best guarantor of effectiveness in this regard is for detainees to be given the opportunity to undergo a medical examination by a doctor of their choice in addition to any examination by a state-appointed official.

Prosecutors and judges should also be aware of the fact that certain methods of torture may be particularly sophisticated and may not leave visible marks capable of being detected on examination. These may include particular forms of beating, spraying with freezing water, stripping and electric shocks.

³⁷³ *Op. cit.*, note 178, *Situation of detainees at Guantánamo Bay*, para. 54.

³⁷⁴ Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Sir Nigel Rodley, doc. A/56/156, 3 July 2001, para. 39(f).

Denial of medical treatment

The intentional withholding of medical treatment from persons in places of detention or from persons injured by an act attributable to public officials will engage the protection from torture, inhuman and degrading treatment.

The Standard Minimum Rules for the Treatment of Prisoners set out the following principles:

- detainees should have access to at least one qualified medical officer with some knowledge of psychiatry and to a qualified dental officer;
- sick prisoners who require specialist treatment should be transferred to specialized institutions or civil hospitals; and
- medical officers should daily see all sick prisoners, and any prisoner to whom their attention is specially directed, and should report to the director of the institution whenever they consider that a prisoner's physical or mental health has been or will be harmed by continued imprisonment or by any condition of imprisonment.

Appropriately qualified medical officers should regularly inspect and advise the director on the quantity and quality of food, the hygiene and cleanliness of the institution and the prisoners, and observance of the rules concerning physical education.

Protection from torture and inhuman and degrading treatment will also be relevant to enforced treatment in psychiatric hospitals and also experimental treatments. The European Court found in one case that failure to treat adequately a heroin addict for her addiction in prison who subsequently died amounted to a violation of Article 3, ECHR.³⁷⁵ Similarly, failure to treat a prisoner with a history of mental illness who subsequently committed suicide also amounted to a violation of Article 3.³⁷⁶

OSCE participating States have committed themselves to “protect individuals from any psychiatric or other medical practices that violate human rights and fundamental freedoms and take effective measures to prevent and punish such practices.”³⁷⁷

375 “Having regard to the responsibility owed by prison authorities to provide the requisite medical care for detained persons, the Court finds that in the present case there was a failure to meet the standards imposed by Article 3 of the Convention. It notes in this context the failure of the prison authorities to provide accurate means of establishing Judith McGlinchey's weight loss, which was a factor that should have alerted the prison to the seriousness of her condition, but was largely discounted due to the discrepancy of the scales. There was a gap in the monitoring of her condition by a doctor over the weekend when there was a further significant drop in weight and a failure of the prison to take more effective steps to treat Judith McGlinchey's condition, such as her admission to hospital to ensure the intake of medication and fluids intravenously, or to obtain more expert assistance in controlling the vomiting”, ECtHR, *McGlinchey and Others v. UK*, Application no. 50390/99, 29 April 2003, para. 57.

376 “The lack of effective monitoring of Mark Keenan's condition and the lack of informed psychiatric input into his assessment and treatment disclose significant defects in the medical care provided to a mentally ill person known to be a suicide risk. The belated imposition on him in those circumstances of a serious disciplinary punishment - seven days' segregation in the punishment block and an additional twenty-eight days to his sentence imposed two weeks after the event and only nine days before his expected date of release - which may well have threatened his physical and moral resistance, is not compatible with the standard of treatment required in respect of a mentally ill person”, ECtHR, *Keenan v. UK*, Application no. 27229/95, 3 April 2001, para. 116.

377 *Op. cit.*, note 29, 1989 Vienna Document, *Questions Relating to Security in Europe, Principles* para. 23.6.

Hunger strikes and forced feeding

The World Medical Association considers that force-feeding of an individual will amount to inhuman or degrading treatment. In the Association's view doctors should never be used to break hunger strikes through acts such as force-feeding.³⁷⁸ The European Court has also made a similar finding.³⁷⁹

The UN Special Rapporteur on the Right to Health, as part of his report on the situation of detainees in Guantánamo Bay, made the following observation: "From the perspective of the right to health, informed consent to medical treatment is essential, as is its 'logical corollary' the right to refuse treatment. A competent detainee, no less than any other individual, has the right to refuse treatment. In summary, treating a competent detainee without his or her consent — including force-feeding — is a violation of the right to health, as well as international ethics for health professionals."³⁸⁰

Forced medical treatment

The European Court has found that it was a breach of Article 3 to administer an emetic to obtain the regurgitation of a small quantity of swallowed drugs.³⁸¹ Furthermore, the Court found a breach of the right to a fair trial in that the subsequent conviction of the applicant was based on material obtained in breach of the Convention.

The Court reiterated that the Convention did not, in principle, prohibit recourse to a forcible medical intervention that would assist in the investigation of an offence. However, it was stressed that any interference with a person's physical integrity carried out with the aim of obtaining evidence had to be the subject of rigorous scrutiny. In this case, the Court was not satisfied that the forcible administration of emetics had been indispensable to obtain the evidence. The prosecuting authorities could simply have waited for the drugs to pass out of the applicant's system naturally, that being the method used by many other member states of the Council of Europe to investigate drug offences.

The Court found that the authorities had subjected the applicant to a grave interference with his physical and mental integrity against his will. They had forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out had been liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of hu-

378 World Medical Association, Declaration on Hunger Strikers, available at <http://www.wma.net/e/policy/h31.htm>.

379 "A measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Convention organs must nevertheless satisfy themselves that the medical necessity has been convincingly shown to exist [...] Furthermore, the Court must ascertain that the procedural guarantees for the decision to force-feed are complied with. Moreover, the manner in which the applicant is subjected to force-feeding during the hunger strike shall not trespass the threshold of a minimum level of severity envisaged by the Court's case law under Article 3 of the Convention", ECtHR, *Nevmerzhitsky v. Ukraine*, Application no. 54825/00, 5 April 2005, para. 94. See also ECommHR, *X. v. the Federal Republic of Germany*, 1984, 7 EHRR 152 ("under German law this conflict ha[d] been solved in that it [was] possible to force-feed a detained person if this person, due to a hunger strike, would be subject to injuries of a permanent character, and the forced-feeding [was] even obligatory if an obvious danger for the individual's life exist[ed]. The assessment of the above-mentioned conditions [was] left for the doctor in charge but an eventual decision to force-feed [could] only be carried out after judicial permission ha[d] been obtained").

380 *Op. cit.*, note 178, *Situation of detainees at Guantánamo Bay*, para. 82.

381 *Op. cit.*, note 369, ECtHR, *Jalloh v. Germany*.

miliating and debasing him. Furthermore, the procedure had entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand. Although this had not been the intention, the measure was implemented in a way which had caused the applicant both physical pain and mental suffering. He had therefore been subjected to inhuman and degrading treatment contrary to Article 3.

Discrimination

The significance of protecting against discrimination in international human rights law cannot be over-emphasized. This principle would apply in relation to any discrimination in conditions of detention, as it does in all other matters. As has been stressed earlier in this manual, difference of treatment that cannot be justified is likely to amount to unlawful discrimination in such matters as evidence collection, interrogation techniques or conditions of detention. In the counter-terrorism context, priority must be given to principles of non-discrimination. It is also worth noting that severe forms of institutionalized racism can amount to inhuman and degrading treatment.³⁸²

Positive obligations

States are required to put in place mechanisms to prevent torture, inhuman and degrading treatment and punishment. As part of this positive obligation, treatment amounting to torture or inhuman and degrading treatment must be prohibited by criminal law, and criminal laws must be implemented in such a way so as to ensure that the prohibition is effective. For example, there have been a number of cases concerning failure to protect children at risk of abuse.³⁸³ Also, the failure of the law to protect adequately against rape has been found to violate Article 3 ECHR.³⁸⁴

A similar duty can be found to attach to Article 7 ICCPR. The Human Rights Committee's General Comment 20 emphasizes the obligation on states to proscribe Article 7 treatment by

382 *Op. cit.*, note 264, ECtHR, *Cyprus v. Turkey*, paras. 302-311. The Court concluded that Article 3 ECHR had been breached because of the discriminatory living conditions of the Greek Cypriots maintained by Turkey in the North of Cyprus (isolation, restriction on freedom of movement, surveillance and little prospect of renewal or expansion of their community).

383 ECtHR, *Z. and Others v. UK*, Application no. 29392/95, 10 May 2001, para. 74 (“[...] in the present case [...] the neglect and abuse suffered by the four applicant children reached the threshold of inhuman and degrading treatment [...] This treatment was brought to the local authority's attention, at the earliest in October 1987. It was under a statutory duty to protect the children and had a range of powers available to them, including the removal of the children from their home. These were, however, only taken into emergency care, at the insistence of the mother, on 30 April 1992. Over the intervening period of four and a half years, they had been subjected in their home to what the consultant child psychiatrist who examined them referred as horrific experiences [...] The Criminal Injuries Compensation Board had also found that the children had been subject to appalling neglect over an extended period and suffered physical and psychological injury directly attributable to a crime of violence [...] The Court acknowledges the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life. The present case, however, leaves no doubt as to the failure of the system to protect these applicant children from serious, long-term neglect and abuse”).

384 *Op. cit.*, note 173, ECtHR, *M.C. v. Bulgaria*, para. 150 (“Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection”).

private persons.³⁸⁵ Additionally, the Committee has expressed concern about states' failure to proscribe domestic violence.³⁸⁶

In the counter-terrorism context, this issue links directly with impunity and the positive obligation on behalf of the state to ensure that law and procedures exist to guarantee that prosecutions can and do take place for ill-treatment. As part of these positive obligations, all claims of torture, inhuman or degrading treatment must be properly investigated by an independent tribunal.³⁸⁷

Investigation of claims of ill-treatment

The type of investigation required to satisfy the obligations in relation to protection from torture is the same as that required for right to life. As such:

- it must be carried out by an independent body in public;
- it must be thorough, rigorous and prompt;
- it must be capable of imputing responsibility;
- it must enable effective involvement of the victim and their next-of-kin;
- there need to be proper and effective procedural safeguards;
- the investigation should be capable of leading to the identification and punishment of those responsible; and
- it must be capable of bringing perpetrators to justice.

The criteria will not be met where there has been an inadequate forensic medical examination by medical professionals, brief or incomplete medical reports, and failure to take photographs or make analyses of marks on the body.

Failure to investigate allegations of torture or inhuman and degrading treatment suggests of official tolerance and therefore this may show systemic failure in protecting against torture.

The Human Rights Committee has stated "the right to lodge complaints against maltreatment prohibited by Article 7 must be recognized in domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective."³⁸⁸ The Istanbul Protocol also spells out the principles for the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment.³⁸⁹

385 *Op. cit.*, note 336, HRC, General Comment No. 20, para. 13.

386 See HRC, Concluding Observations: *Yemen*, doc. CCPR/CO/84/YEM, 9 August 2005, para. 12 and HRC, Concluding Observations: *Yemen*, doc. CCPR/CO/75/YEM, 26 July 2002, para. 6.

387 "[...] Where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible [...] If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance [...] would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity", *op. cit.*, note 343, ECtHR, *Assenov and Others v. Bulgaria*, para. 102.

388 *Op. cit.*, note 336, HRC, General Comment No. 20, para. 14. See also HRC, *Herrera Rubio v. Colombia*, Communication No. 161/1983, doc. CCPR/C/31/D/161/1983, 2 November 1987, paras. 10.2-10.5.

389 UN, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (New York and Geneva 2004), para. 73-117.

In a number of cases, the European Court has held that there has been a failure at prosecutorial and judicial level to investigate adequately allegations of torture and ill-treatment when they were first made. Such failures detract from the procedural protections that should be in place for all victims of torture. Failure to comply with the procedural requirements to protect against torture may, in itself, amount to a violation of the prohibition on torture, inhuman and degrading treatment as protected by Article 3 ECHR.³⁹⁰

The UN Guidelines on the Role of Prosecutors state:

When prosecutors come into possession of evidence obtained against suspects they know or believe on reasonable grounds was obtained through recourse to unlawful methods constituting a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.³⁹¹

Retaliation against victims, witnesses and any other person acting on behalf of torture victims

Article 13 of the CAT states: "Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."

These protections should extend also to those who act on behalf of torture victims. As such, the Special Rapporteur on Torture may intervene when measures of retaliation are taken or threatened against victims of torture, their relatives, members of civil society, lawyers working on torture complaints, and medical or other experts acting on behalf of torture victims.

Reparation to torture victims

A key aspect of the absolute prohibition on torture and the positive obligation to protect against it is the requirement to provide effective and prompt reparation to torture victims, including facilities for their rehabilitation.

Expulsion, deportation, rendering and extradition³⁹²

Extradition and deportation play an important role in combating terrorism and other serious crime, and they directly relate to a state's positive obligations. Particularly in the context of

390 See, most recently, ECtHR, *Mammadov (Jalaloglu) v. Azerbaijan*, Application no. 34445/04, 11 January 2007, paras. 71-79 ("The minimum standards as to effectiveness defined by the Court's case-law also include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness"), but also in the same vein ECtHR, *Menesheva v. Russia*, Case no. 59261/00, 9 March 2006, para. 67 and *op. cit.*, note 269, ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, paras. 208-213.

391 *UN Guidelines on the Role of Prosecutors*, adopted by the Eighth Crime Congress, Havana, 27 August-7 September 1990, in para. "Role in criminal proceedings".

392 Cf. OSCE/ODIHR, "Background paper on extradition and human rights in the context of counter-terrorism", March 2007 (updated version), available at <http://www.osce.org/odihr/publications.html>.

prohibiting torture, the extradition of alleged torturers to face prosecution for their alleged offences is a crucial element of the regime envisaged by the CAT. Co-operation between states, including the establishment of extradition and deportation guarantees, is therefore vital to containing international crime, including terrorism.

The principle of non-refoulement

The absolute nature of protection from torture or inhuman or degrading treatment means that it would violate the right to protection from torture, inhuman or degrading treatment to deport (*refouler*), render or extradite an individual in the knowledge that they will be tortured or subject to inhuman or degrading treatment.

The principle of *non-refoulement* prohibits the expulsion of persons to states where there are substantial grounds for believing they would be at risk of torture or other serious human rights violations.³⁹³ The absolute character of the principal of *non-refoulement* in international human rights law³⁹⁴ has been emphasized at the UN level in a joint statement that stressed that “no one shall be deported to a State where he or she would be in danger of being subjected to torture.”³⁹⁵ This reflects a growing body of case law relating to the absolute prohibition on *refoulement* where there is a danger of torture, inhuman or degrading treatment or punishment.

Also directly connected to this principle is the prohibition of the collective expulsion of aliens. Article 4 of Protocol 4, ECHR states categorically and in absolute terms, the “[c]ollective expulsion of aliens is prohibited.”

Standard of proof required

In order for the principle of *non-refoulement* to be engaged, the risk of such treatment has to be “personal and present”. A mere suspicion of possible torture is insufficient to engage this protection, but the test need not meet the standard of being highly probable.³⁹⁶

To rely upon the protection from torture provisions, applicants must show that their expulsion would have the foreseeable consequence of exposing them to a “real and personal” risk of being tortured. As protection from torture is absolute, considerations of a procedural nature or the nature of the activities in which the person engaged are not relevant. The protection exists “irrespective of whether the individual concerned has committed crimes and the seriousness of those crimes.”³⁹⁷

393 This principle is also contained in Article 33 of the Convention relating to the status of Refugees of 1951 and in common Article 3 of the Geneva Conventions and the additional protocols thereto.

394 As opposed to in International Refugee Law (Article 33(2) of Geneva 1951 Convention) which permits limitations in case of “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

395 Joint statement of the UN Committee against Torture, the Special Rapporteur of the Commission on Human Rights on the Question of Torture, the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture and the United Nations Deputy High Commissioner for Human Rights and Officer in charge of the Office of the High Commissioner for Human Rights in the occasion of the United Nations International Day in Support of Victims of Torture, 26 June 2003.

396 CAT, General Comment No. 01 (Implementation of article 3 of the Convention in the context of article 22), doc. A/53/44, annex IX, 21 November 1997, para. 7.

397 *Op. cit.*, note 347, UN OHCHR, *Combating Torture*, p. 35.

In weighing up evidential merits, the authorities and a court have to be satisfied that the applicant has produced a sufficient body of evidence to substantiate his or her claim that, if expelled, he or she will be exposed to a real risk of torture, inhuman or degrading treatment or punishment. As such it is incumbent on persons who allege that their expulsion would amount to a breach of the protection against torture to demonstrate, to the greatest extent practically possible, material and information allowing the authorities and a court to assess the risk that a removal may entail. Such information can include country reports and publications compiled primarily by governments and international NGOs, as well as supplementary (and complementary) witness statements.³⁹⁸

Failure on the part of the authorities to investigate adequately allegations and to scrutinize the merits of a claim may in and of itself amount to a violation of the obligation to protect against torture.

Interim measures

Reflecting the importance given to the protection against torture, inhuman and degrading treatment under international human rights law and the irreversible nature of the potential damage done, where a state permits the right of individual petition under relevant UN human rights treaties, such as the ICCPR or CAT, an individual or a group of individuals at risk of “imminent” deportation to a country where there are reasonable grounds to believe that an identifiable risk of torture or other ill-treatment exists can petition either the HRC or the Committee against Torture invoking a risk of deportation in breach of the absolute prohibition on torture and other ill-treatment. Either committee may then request the state party concerned to take interim measures, i.e., not to expel the author of the communication while the matter is under consideration. In *Brada*, the Committee against Torture found that:

The State party’s action in expelling the complainant in the face of the Committee’s request for interim measures nullified the effective exercise of the right to complaint conferred by article 22, and has rendered the Committee’s final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations under article 22 of the Convention.³⁹⁹

In cases where the “deporting” country is a state party to the ECHR, applicants can seek interim measures such as a stay of deportation through application to the European Court of Human Rights. The jurisprudence on this point has been substantially strengthened by the re-

398 ECtHR, *Said v. The Netherlands*, Application no. 2345/02, 5 July 2005, paras. 27-35 and 51.

399 CAT, *Brada v. France*, doc. CAT/C/34/D/195/2002, 24 May 2005, para. 13.4. The case concerned the deportation of an Algerian citizen from France. On the importance of procedural guarantees against expulsions, see also HRC, *Mansour Ahani v. Canada*, doc. CCPR/C/80/D/1051/2002, 29 March 2004, para 10.8 (“The Committee observes further that article 13 is in principle applicable to the Minister’s decision on risk of harm, being a decision leading to expulsion. Given that the domestic procedure allowed the author to provide -limited- reasons against his expulsion and to receive a degree of review of his case, it would be inappropriate for the Committee to accept that, in the proceedings before it, ‘compelling reasons of national security’ existed to exempt the State party from its obligation under that article to provide the procedural protections in question. In the Committee’s view, the failure of the State party to provide him with the procedural protections afforded to the plaintiff in *Suresh* on the basis that he had not made out a risk of harm did not satisfy the obligation in article 13 to allow the author to submit reasons against his removal in the light of the administrative authorities’ case against him and to have such complete submissions reviewed by a competent authority, entailing a possibility to comment on the material presented to that authority. The Committee thus finds a violation of article 13 of the Covenant, in conjunction with article 7”).

cent judgment in *Mamatkulov*,⁴⁰⁰ in which the Grand Chamber decided that interim measures of protection requested by the Court are binding on states parties to the ECHR.

Both the Human Rights Committee and the Committee against Torture have made it clear that states have an obligation to respect the principle of *non-refoulement*. The Human Rights Committee has, on a number of occasions expressed concern over the possible negative effects of asylum legislation and practices that fail to ensure that those returned are not exposed to torture. The Committee has expressed concern that, “the absence of monitoring mechanisms with regard to the expulsion of those suspected of terrorism to their countries of origin which, despite assurances that their human rights would be respected, could pose risks to the personal safety and lives of the persons expelled.”⁴⁰¹

The Committee is therefore clear. To deport someone, or render them for whatever reason, to their country of origin, or to a third country that will then return them to their country of origin, which will put that person at risk of being tortured, is unlawful. Interim measures are a preventive mechanism.

Diplomatic assurances

Diplomatic assurances concerning some human rights can be effective under certain circumstances. For example, it is possible for receiving states to give an assurance that an individual will not face the death penalty if returned, even though that penalty is still recognized as lawful under circumscribed circumstances in international law. Therefore, it is a matter of international relations and negotiation that a particular punishment that the deporting state finds particularly repugnant will not be sought or applied.⁴⁰² Unlike assurances against torture, which may be hard to verify, it would be easy to ascertain that a returnee had not been executed. Likewise, a state requesting extradition of a person may provide diplomatic assurances that that person will not be re-extradited to a third country where they might be at risk of human rights violations and/or that they would be returned to the requested country on completion of the prosecution or of the sentence as the respect of such diplomatic assurances can easily be verified.

The issue of the validity of diplomatic assurances in the context of torture and *refoulement* is, however, controversial. It is currently the subject of extensive debate. The UN High Commissioner for Human Rights has expressed her grave doubts that diplomatic assurances in the context of torture could ever be effective and morally acceptable.⁴⁰³ She has indicated that these assurances have proven unreliable and ineffective in many cases. Those subject to their “guarantees” have been tortured and ill-treated.⁴⁰⁴ She added:

In the end we are back to the same fundamental question: why are these people sent to countries where they face the risk of torture? They may be sent to face trial, or simply to be held in

400 ECtHR, *Mamatkulov and Askarov v. Turkey*, Applications nos. 46827/99 and 46951/99, 4 February 2005, para. 128.

401 HRC, Concluding observations: *New Zealand*, doc. CCPR/CO/75/NZL, 26 July 2002, para. 11.

402 Some countries, however, have difficulties in relation to diplomatic assurances in this context as they are of the view that the question of punishment is one for an independent judge, not for the executive who provides the diplomatic assurance.

403 L. Arbour, UN High Commissioner for Human Rights, In Our Name, 15 February 2006, at <http://www.chatham-house.org.uk/pdf/research/il/ILParbour.pdf>.

404 Report of the UN High Commissioner for Human Rights, *Protection of human rights and fundamental freedoms while countering terrorism*, doc. E/CN.4/2006/94, 16 February 2006, para. 9.

custody, possibly indefinitely, or to be interrogated with the hope that that the interrogation abroad will yield more information than the methods that could be used at home. The last two scenarios involve, at best, legal avoidance: suspects will be transferred because what will be done to them abroad could not legally be done at home. I fail to see any justification for any state to be a party to such practice. If they are transferred to face trial, prudence would dictate that their transfer should not be tainted with illegality since in many countries this could lead to the courts declining to exercise jurisdiction. If they are transferred to countries where very few due process requirements are likely to stand in the way of prolonged detention, illegal interrogations or unfair trials, then we should be clear about our endorsement of such double standards: we are not willing, or not able, to dilute our domestic legal protections in the name of counter-terrorism, but we will happily have resort to the methods used by others that we otherwise overtly denounce and deplore.⁴⁰⁵

These views have been echoed throughout international human rights organizations such as the Council of Europe and elsewhere at the UN.

The Special Rapporteur on Torture has expressed his concern that the practice of seeking diplomatic assurances for the purpose of expelling or returning persons, in spite of a risk of torture and cruel, inhuman or degrading treatment or punishment, reflects a tendency in Europe to circumvent the internationally recognized principle of *non-refoulement*. He has warned that diplomatic assurances are not an appropriate tool to eradicate the risk of torture and other ill-treatment by the receiving country.⁴⁰⁶ The issues raised by the use of “diplomatic assurances” were also considered by the Council of Europe. Its Steering Committee for Human Rights recommended that the Council should not embark in the drafting of a legal instrument on minimum conditions/standards required when using such practices, so as not to support the principle of diplomatic assurances themselves in this sensitive context.⁴⁰⁷

On numerous occasions, the Human Rights Committee has emphasized its position in relation to *refoulement*. For example, the Committee has stressed that it was, “concerned about the formulation of the draft law on the legal status of foreigners, which [...] may allow for the removal of foreigners who are regarded as a threat to State security, despite the fact that they may be exposed to a violation of their rights under [ICCPR] Article 7 in the country of return.”⁴⁰⁸

The Committee has also emphasized that Security Council Resolution 1373 does not give permission to violate human rights. It has pointed out that, “the State Party is requested to ensure that counter-terrorism measures, whether taken in connection with Security Council resolution 1373 (2001) or otherwise, are in full conformity with the Covenant. In particular, it should ensure absolute protection for all individuals, without exception, against *refoulement* to countries where they risk violation of their rights under article 7.”⁴⁰⁹

405 *Op. cit.*, note 403, L. Arbour, *In Our Name*, pp. 19-20.

406 See for instance Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, doc. A/60/316, 30 August 2005, paras. 45-46.

407 Meeting Report CDDH(2006)007. At the 963rd meeting of Ministers’ Deputies on 3 May 2006, the Committee of Ministers took note of the report of the Steering Committee.

408 HRC, Concluding Observations: *Lithuania*, doc. CCPR/CO/80/LTU, 4 May 2004, para. 7.

409 *Ibid.* See also *op. cit.*, note 386, HRC, Concluding observations: *Yemen* (2002), para. 18; *op. cit.*, note 342, CAT, Concluding observations: *Yemen*, para. 5. For a recent opinion of the HRC on violations of Art. 13 ICCPR in connection with terrorism and expulsion proceedings, see HRC, *Ahani v. Canada*, Communication No. 1051/2002, doc. CCPR/C/80/D/1051/2002, 15 June 2004.

Significantly, The HRC has criticized states parties for not ensuring that those who are returned are protected from torture, inhuman and degrading treatment. For example, the Committee has noted that, “[...] nationals suspected or convicted of terrorism abroad and [returned] have not benefited in detention from the safeguards required to ensure that they are not ill-treated, having notably been held incommunicado for periods of over one month (Articles 7 and 9 of the Covenant).”⁴¹⁰

Like the HRC, the Special Rapporteur on Torture has stressed the binding nature of the obligation to protect against torture in the context of deportation. Governments therefore have been urged to refrain from deporting persons to a country where they would be at risk of torture (or to a transit country where they would be at serious risk of further deportation to such a country) unless:

- they obtain unequivocal guarantees that the persons concerned will not be subjected to ill-treatment; and
- there is a system to monitor their treatment after their return.

Importantly, the deporting state may incur responsibility where the authorities of the receiving country are “unable or unwilling” to provide effective protection from ill-treatment by non-state agents. The ECtHR judgment in *Chahal*⁴¹¹ is worth emphasizing in this regard. There the Court found that Article 3 ECHR did not only protect against state ordered torture, it protected where the state had limited control over the day-to-day practices of its security forces. The principle in *Chahal* has been extended to cover situations where the person to be removed fears ill-treatment at the hands of non-state actors. Although the ECtHR will not easily assume that a state is not capable of protecting persons within its jurisdiction against private violence, the Court has not ruled out that circumstances might be so serious that an individual might warrant protection against return.

As noted, there have also been a number of cases under the right of individual petition before both the HRC and the CAT. These cases have affirmed the absolute prohibition on returning individuals to face the risk of torture.⁴¹² In one case the Committee against Torture ruled that the state party had violated its *non-refoulement* obligation and that the assurances it had received were insufficient to protect against torture and other ill-treatment. In that case, despite assurances being given and some efforts at post-return monitoring by the sending state, the complainant was ill-treated during the return and alleged that he was tortured on return.⁴¹³ In another case, the European Court of Human Rights found that, while accepting the good faith of the requesting government in providing diplomatic assurances as to the protection of the returnee, in fact, the government did not have sufficient control over the security services in a particular area of the country to provide an effective guarantee of protection.⁴¹⁴

410 HRC, Concluding observations: Egypt, doc. CCPR/CO/76/EGY, 28 November 2002, para. 16(c).

411 *Op. cit.*, note 144, ECtHR, *Chahal v. UK*, paras. 83-107.

412 CAT, *Agiza v. Sweden*, Communication no. 233/2003, doc. CAT/C/34/D/233/2003, 24 May 2005, para 13.8. This jurisprudence may be considered consolidated; see for instance, CAT, *Tapia Paez v. Sweden*, Communication no. 39/1996, doc. CAT/C/18/D/39/1996, 28 April 1997, para. 14.1-15; HRC, *Byahuranga v. Denmark*, Communication no. 1222/2003, CCPR/C/82/D/1222/2003, 9 December 2004, para. 11.2.

413 *Ibid.*, CAT, *Agiza v. Sweden*, paras. 13.1-13.9.

414 *Op. cit.*, note 144, ECtHR, *Chahal v. UK*, paras. 102-105.

Since diplomatic assurances are controversial and may not in themselves provide protection from torture and other ill-treatment, the following considerations should be taken into account. Diplomatic assurances are unacceptable in circumstances:

- where there is substantial and credible evidence that torture and prohibited ill-treatment in the country of return are systematic, widespread, endemic, or a recalcitrant or persistent problem;
- where government authorities do not have effective control over the forces in their country that perpetrate acts of torture and ill-treatment; or
- where the government consistently targets members of a particular racial, ethnic, political or other identifiable group for torture or ill-treatment and the person subject to return is associated with that group.

Due-process safeguards must also be in place to ensure that any person subject to return can challenge their return before an independent and impartial tribunal.

Rendition

The UN High Commissioner for Human Rights and the Council of Europe have also expressed significant concerns about the use of unlawful rendition or the transfer across borders of suspected terrorists who are considered to pose a security risk. The High Commissioner for Human Rights has pointed out that cases have come to light that demonstrate that some of these transfers are taking place outside the law, in the absence of procedural safeguards such as due-process protection and judicial oversight. Persons subject to such transfers often have no ability to challenge the legality of their transfer or the reliability of the assurances given by the receiving state that they will be protected from torture and other ill-treatment.⁴¹⁵ Renditions under unlawful circumstances will violate due process guarantees and thus be at odds with international human rights law; they may also violate the absolute prohibition on torture, inhuman and degrading treatment, the right to an effective remedy and the right to liberty. As such, it is incumbent upon states to have in place procedures to address the phenomenon of unlawful rendition whether by the activities of its own agents, the presence of foreign agents or the use of its airspace.

The Secretary General of the Council of Europe has made the following recommendations on how best to contain the practice of rendition.⁴¹⁶ These are:

- all forms of deprivation of liberty outside the regular legal framework need to be defined as criminal offences in all states and be effectively enforced. Offences should include aiding and assisting in such illegal acts, as well as acts of omission (being aware but not reporting), and strong criminal sanctions should be provided for intelligence staff or other public officials involved in such cases;
- the rules governing activities of secret services appear inadequate in many states and better controls are necessary, in particular over the activities of foreign secret services on their territory;

⁴¹⁵ *Op. cit.*, note 404, Report of the UN High Commissioner for Human Rights, paras. 18-33.

⁴¹⁶ Secretary General's report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies, doc. SG/Inf (2006)5, 28 February 2006. See also, Secretary General's supplementary report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies, SG/Inf (2006)13, 14 June 2006.

- the current international regulations for air traffic do not give adequate safeguards against abuse. There is a need for states to be given the possibility to check whether transiting aircraft are being used for illegal purposes. Within the current legal framework, states should equip themselves with stronger control tools;
- international rules on state immunity often prevent states from effectively prosecuting foreign officials who commit crimes on their territory. Immunity must not lead to impunity where serious human rights violations are at stake. Work should start at European and international levels to establish clear human rights exceptions to traditional rules on immunity;
- mere assurances by foreign states that their agents abroad comply with international and national law are not enough. Formal guarantees and enforcement mechanisms need to be set out in agreements and national law in order to protect ECHR rights.

The European Court of Human Rights has, for decades, incorporated many of these principles into its case law. The non-expulsion to countries where the individual would be subjected to torture, inhuman and degrading treatment and punishment was first established in *Soering*.⁴¹⁷ In that case, the Court held that to extradite the applicant to the US to face a charge of murder would amount to inhuman and degrading treatment because the applicant would be exposed to the death row phenomenon. Post-*Soering*, it is therefore necessary to receive an assurance that the death penalty will not be applied. The *Soering* judgment also extended the principle of *non-refoulement* to cover cases where the return would result in a flagrant denial of justice although this was not applicable in the *Soering* case.

As already mentioned, in *Chahal*⁴¹⁸ the Court held that Article 3, ECHR would be violated if the applicant, a Sikh terrorist, was deported to India in the knowledge that on his arrival he would be likely to be tortured. This ruling was made despite assurances from India that he would not be subjected to torture, inhuman or degrading treatment, as the Court found that the Indian Government was not in a position to ensure such guarantees. The fact that his presence in the UK was not in the public interest was not sufficient to justify exposing him to torture. This landmark decision established that national security and counter-terrorism strategies cannot take precedence over the absolute obligation to protect people from torture.

The blanket nature of this protection is emphasised in *D*. In that case the applicant was a convicted drug-trafficker who had been diagnosed with AIDS while in prison in the UK. He could not be deported to his country of origin, St. Kitts, because he had no family there, no

417 *Op. cit.*, note 303, ECtHR, *Soering v. UK*.

418 *Op. cit.*, note 144, ECtHR, *Chahal v. UK*.

home and there was no treatment whatsoever for HIV/AIDS. The Court ruled that to deport someone under such circumstances would amount to inhuman and degrading treatment.⁴¹⁹ The case law of the Court is reflected in the Council of Europe Guidelines on Human Rights and the Fight against Terrorism. In the context of *refoulement* and deportation, where relevant, Guideline XII states that:

2. It is the duty of a State that has received a request for asylum to ensure that the possible return (“refoulement”) of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion. [...]
4. In all cases, the enforcement of the expulsion or return (“refoulement”) order must be carried out with respect for the physical integrity and for the dignity of the person concerned, avoiding any inhuman or degrading treatment.

Guideline XIII, concerning extradition, points out that:

2. The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:
 - (i) the person whose extradition has been requested will not be sentenced to death; or
 - (ii) in the event of such a sentence being imposed, it will not be carried out.
3. Extradition may not be granted when there is serious reason to believe that:
 - (i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment;
 - (ii) the extradition request has been made for the purpose of prosecuting or punishing a person on account of his/her race, religion, nationality or political opinions, or that that person’s position risks being prejudiced for any of these reasons.
4. When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition.

⁴¹⁹ “It is true that this principle has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of non-State bodies in that country when the authorities there are unable to afford him appropriate protection [...] Aside from these situations and given the fundamental importance of Article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant’s claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant’s personal situation in the expelling State”, ECtHR, *D. v. UK*, Case no. 146/1996/767/964, 21 April 1997, para. 49.

Detention Conditions, the Right to Liberty and Access to a Lawyer of Those Suspected of Terrorism

Article 9, ICCPR:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 5 ECHR:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty, save in the following circumstances and in accordance with the procedure prescribed by law:

- a. the lawful detention of a person after conviction by a competent court;
- b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e. the lawful detention of persons for the prevention of the spreading of infectious diseases, or persons of unsound mind, alcoholics or drug addicts or vagrants;

f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power, and shall be entitled to a trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

International human rights law recognizes that all persons should be protected from interference with the right to liberty except under defined and limited circumstances. At the same time, international human rights law also recognizes that those in detention require special protection due to their vulnerable position (vulnerable because they are entirely in the power of the state and, due to their imprisonment, are at higher risk of abuse). The right to liberty is therefore a test of the legality of detention and a procedural guarantee. The key protections in this context are three-fold:

- the prohibition on arbitrary detention. Detention can only be justified on specified grounds;
- the right of all persons deprived of their liberty to challenge the lawfulness of their detention before a court (through the legal procedure known as *habeas corpus*) and to have the detention reviewed on a regular basis. Of particular concern here is incommunicado detention;⁴²⁰ and
- the rights of persons while in detention, including the physical conditions, disciplinary systems, use of solitary confinement and the conditions under which contacts are ensured with the outside world (including family, lawyers, social and medical services and non-governmental organizations).

From a counter-terrorism perspective, understanding the right to liberty is particularly important. In combating terrorism, an instinctive way of responding to the problem of potential terrorist acts is to detain those that may be thought to be involved. In countering terrorism, the ability of law-enforcement agencies to detain suspects quickly and effectively is a high priority. Consequently, the detention of those considered to be likely to engage in acts of terrorism will inevitably form a key element of any counter-terrorism strategy. It is important to ensure that that aspect of the strategy is lawful.

Where there is an emergency that threatens the life of a nation, as has been explained above, it may be possible to temporarily suspend the guarantee of the right to liberty and some of the procedural safeguards that come with it.⁴²¹ In the absence of such a declared emergency, however, the right to liberty and all of its safeguards have to be complied with.

In the counter-terrorism context, particular issues from a human rights perspective in relation to the right to liberty are:

- access to a lawyer;
- access to court to review and/or challenge the detention;
- detailed reasons for arrest;
- information concerning charges.

International human rights law has laid down detailed criteria about when it is lawful to detain people and how such people should be treated in detention. In international human rights law, the liberty and security of the person is protected by Article 9 of the ICCPR and Article 5 of the ECHR (see box above). Article 5 of the ECHR is more precisely worded than Article 9. Additionally, the case law under Article 5 of the ECHR is more comprehensive and extensive. In explaining how the right to liberty works in international human rights law, this

⁴²⁰ See pp. 126 and 158-159.

⁴²¹ See the section on derogation at pp. 87-91 above.

section will therefore focus primarily on Article 5 of the ECHR, although it will also review UN standards and OSCE commitments.⁴²²

UN standards

The UN system has evolved a number of standards in relation to the right to liberty. Article 10, ICCPR, builds upon Article 9 by dealing with the treatment of prisoners in detention. It:

- stipulates that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person (Article 10(1));
- provides for the segregation, save in exceptional circumstances, of accused persons from convicted ones and that juvenile persons shall be separated from adults (Article 10(2)); and
- states that the “essential aim” of imprisonment should be “the reform and social re-adaptation of prisoners” (Article 10(3)).

Article 10 has a clear relationship with the protection from torture, inhuman and degrading treatment and punishment. The Human Rights Committee’s General Comment on Article 10 of the ICCPR provides useful guidance in this area. It clarifies that Article 10 imposes on states parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty:

[N]ot only may persons deprived of their liberty not be subjected to [torture or other cruel, inhuman or degrading treatment or punishment], including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the [ICCPR], subject to the restrictions that are unavoidable in a closed environment.⁴²³

Significantly, the Human Rights Committee has also stressed that the obligation to treat persons deprived of their liberty with dignity and humanity is a fundamental and universally applicable rule, not dependent on the material resources available to the state party.⁴²⁴

In the context of the detainees at Guantánamo Bay who have not been convicted of any criminal offence, a joint report of several UN special rapporteurs stated that limited periods of solitary confinement may comply with Article 10, but periods of solitary confinement that run back to back for up to 18 months and that are aimed at causing stress are unlikely to, and might also amount to inhuman treatment in violation of Article 7 of the ICCPR.⁴²⁵

The HRC has found a breach of Article 10 in relation to the treatment of detainees in a number of cases. In these cases, however, the conditions have tended to be quite serious:

422 Due to the increasing cross-pollination between international human rights jurisdictions, the detailed standards that have been developed under Article 5 ECHR are likely to be read into Article 9 ICCPR.

423 HRC, General Comment No. 21 (Replaces General Comment 9) concerning humane treatment of persons deprived of liberty (Art. 10), 10 April 1992, para.3.

424 *Ibid.*, para. 4.

425 *Op. cit.*, note 178, *Situation of detainees at Guantánamo Bay*, para. 53.

- The Committee found a violation of Article 10(1) where a detainee had only a piece of sponge and newspapers to sleep on, food described by the person as “not fit for human consumption”, and was treated with unspecified brutality by warders when he made complaints.⁴²⁶
- The Committee found a violation of Article 10(1) where the detainee had spent a week in a “filthy” police cell with seven other prisoners, was being held on remand for nearly two years with convicted prisoners in a cell without basic sanitary facilities and in a death row cell that was “dirty, smelly and infected with insects”, and kept all day except for five minutes to slop out [i.e., empty his toilet bowl] or attend visits.⁴²⁷

The Standard Minimum Rules for Treatment of Prisoners (SMR, 1957)⁴²⁸ and the UN Body of Principles (BP, 1988) have already been examined in the context of protection against torture, inhuman degrading treatment and punishment. They are also directly relevant to deprivation of liberty. They build on the ICCPR provisions by setting out in much greater detail the content of the protections that should be afforded to detainees. In summary, the SMR and BP cover such areas as:

- the maintenance of a register of prisoners;⁴²⁹
- separation of categories of prisoner;⁴³⁰
- the right of access to legal advice⁴³¹ and medical services;⁴³²
- visits by family members and an adequate opportunity to communicate with outside world;⁴³³ and
- provision of a complaint mechanism for detainees and/or detainee’s family or legal representative in relation the detainee’s treatment.⁴³⁴

There are also the Basic Principles for the Treatment of Prisoners, based on a General Assembly Resolution of 1990.⁴³⁵

Protections under customary international law

Many of the above provisions have attained the status of customary international law. These include, in particular:

- the right in criminal cases of detained persons to be brought promptly before a judge; and
- the right of anyone deprived of liberty to challenge lawfulness of detention and to be released if detention is found to be unlawful.⁴³⁶

426 HRC, *Harold Elahie v. Trinidad and Tobago*, Communication no. 533/1993, doc. CCPR/C/60/D/533/1993, 19 August 1997, para. 8.3.

427 HRC, *Lewis v. Jamaica*, Communication no. 708/1996, CCPR/C/60/D/708/1996, 15 August 1997, para. 8.5.

428 The bulk of these Standard Minimum Rules are now somewhat outdated. The relevant ones are quoted here.

429 SMR, para. 7.

430 SMR, para. 8.

431 BP, paras. 17-18.

432 SMR, paras. 22-25.

433 SMR, paras. 37-39; BP, para. 19.

434 SMR, paras. 35-36; BP, paras. 33-34.

435 *Op. cit.*, note 321, UN General Assembly Resolution 45/111. At the Council of Europe level, the UN standards are reflected, and somewhat updated, in the more comprehensive Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, 11 January 2006.

436 See N. Rodley, *The treatment of prisoners under international law* (2nd edition), Oxford, 1999.

OSCE commitments in relation to the right to liberty

OSCE participating States have made extensive commitments in relation to freedom from arbitrary arrest or detention. In particular in Moscow (1991), the circumstances and conditions for arrest and loss of liberty were spelt out:⁴³⁷

- (23.1) The participating States will ensure that
- (i) no one will be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law;
 - (ii) anyone who is arrested will be informed promptly in a language which he understands of the reason for his arrest, and will be informed of any charges against him;
 - (iii) any person who has been deprived of his liberty will be promptly informed about his rights according to domestic law;
 - (iv) any person arrested or detained will have the right to be brought promptly before a judge or other officer authorised by law to determine the lawfulness of his arrest or detention, and will be released without delay if it is unlawful; [...]
 - (vi) Any person arrested or detained will have the right, without undue delay, to notify or to require the competent authority to notify appropriate persons of his choice of his arrest, detention, imprisonment and whereabouts; any restriction in the exercise of this right will be prescribed by law and in accordance with international standards;
 - (vii) Effective measures will be adopted, if this has not already been done, to provide that law enforcement bodies do not take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against any other person;
 - (viii) The duration of any interrogation and the intervals between them will be recorded and certified, consistent with domestic law;
 - (ix) A detained person or his counsel will have the right to make a request or complaint regarding his treatment, in particular when torture or other cruel, inhuman or degrading treatment has been applied, to the authorities responsible for the administration of the place of detention and to higher authorities, and when necessary, to appropriate authorities vested with reviewing or remedial power;
 - (x) Such request or complaint will be promptly dealt with and replied to without undue delay; if the request or complaint is rejected or in case of inordinate delay, the complainant will be entitled to bring it before a judicial or other authority; neither the detained or imprisoned person nor any complainant will suffer prejudice for making a request or complaint;
 - (xi) Anyone who has been the victim of an unlawful arrest or detention will have a legally enforceable right to seek compensation.

Understanding the right to liberty

Both the ICCPR and the ECHR set out the right to liberty and security of person. Both also state that no one shall be deprived of liberty except in accordance with procedure prescribed by law. Understanding liberty, therefore, raises two questions, which the following sections will seek to answer:

⁴³⁷ *Op. cit.*, note 5, 1991 Moscow Document, (23.1).

- What is meant by the right to liberty and security?
- What is a procedure prescribed by law?

Liberty and security

Firstly, the right to security does not mean protection from attack by others. The right to liberty is only concerned with physical liberty.

The right is engaged when there is any loss of liberty. This will occur even when a law enforcement officer obliges a person to stay somewhere or to go elsewhere. Compulsion is required even if surrender is voluntary. Mere restrictions on liberty will not engage the right. What is required is that there is a loss of liberty.

Two issues arise in relation to loss of liberty:

- The nature of the confinement. For example, the European Court found that an individual who was detained in a mental hospital was detained even though he could freely walk around the building.⁴³⁸ Similarly, the Court found that a preventive measure requiring an individual to live on part of a particular island amounted to a loss of liberty.⁴³⁹
- The status of the person affected may also be relevant. For example, members of the armed forces can be treated differently from civilians.⁴⁴⁰

438 ECtHR, *Ashingdane v. UK*, Application no. 8225/78, 28 May 1985, paras. 35-50.

439 "Deprivation of liberty may [...] take numerous [...] forms. Their variety is being increased by developments in legal standards and in attitudes; and the Convention is to be interpreted in the light of the notions currently prevailing in democratic States [...] Whilst the area around which the applicant could move far exceeded the dimensions of a cell and was not bounded by any physical barrier, it covered no more than a tiny fraction of an island to which access was difficult and about nine-tenths of which was occupied by a prison. Mr. Guzzardi was housed in part of the hamlet of Cala Reale which consisted mainly of the buildings of a former medical establishment which were in a state of disrepair or even dilapidation, a carabinieri station, a school and a chapel. He lived there principally in the company of other persons subjected to the same measure and of policemen. The permanent population of Asinara resided almost entirely at Cala d'Oliva, which Mr. Guzzardi could not visit, and would appear to have made hardly any use of its right to go to Cala Reale. Consequently, there were few opportunities for social contacts available to the applicant other than with his near family, his fellow 'residents' and the supervisory staff. Supervision was carried out strictly and on an almost constant basis. Thus, Mr. Guzzardi was not able to leave his dwelling between 10 p.m. and 7 a.m. without giving prior notification to the authorities in due time. He had to report to the authorities twice a day and inform them of the name and number of his correspondent whenever he wished to use the telephone. He needed the consent of the authorities for each of his trips to Sardinia or the mainland, trips which were rare and, understandably, made under the strict supervision of the carabinieri. He was liable to punishment by 'arrest' if he failed to comply with any of his obligations. Finally, more than sixteen months elapsed between his arrival at Cala Reale and his departure for Force [...] It is admittedly not possible to speak of 'deprivation of liberty' on the strength of any one of these factors taken individually, but cumulatively and in combination they certainly raise an issue of categorisation from the viewpoint of Article 5", ECtHR, *Guzzardi v. Italy*, Application no. 7367/76, 6 November 1980, para. 95.

440 "Military discipline [...] does not fall outside the scope of Article 5 para. 1 [...] A disciplinary penalty or measure may in consequence constitute a breach of Article 5 para. 1 [...] Each State is competent to organise its own system of military discipline and enjoys in the matter a certain margin of appreciation. The bounds that Article 5 requires the State not to exceed are not identical for servicemen and civilians. A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman. Nevertheless, such penalty or measure does not escape the terms of Article 5 when it takes the form of restrictions that clearly deviate from the normal conditions of life within the armed forces of the Contracting States", *op. cit.*, note 168, ECtHR, *Engel and Others v. The Netherlands*, para. 57 and 59.

Prescribed by law

Any deprivation of liberty must be prescribed by law. This requires compliance with both national law and international human rights law. National law must be accessible and foreseeable. There must also be a continued legal basis for the detention. For example, where national law only permits detention under a particular circumstance for 12 hours and an individual is detained for 12 hours and 40 minutes, the detention for 40 minutes will be unlawful.⁴⁴¹ There must also be legal certainty of the reasons for detention. Procedures that have evolved over time may not be sufficient to guarantee legal certainty.⁴⁴²

An arrest warrant will indicate that the arrest is lawful, although warrants may not always be required for lawful detention. For the purposes of Article 5, detention begins following the apprehension of the individual.

When detention is lawful

To be lawful under international human rights law, detention must be justifiable for one of six reasons. These are explicitly identified in Articles 5(1)(a)(f), ECHR and can be summarized as:

- detention following conviction;
- detention to enforce court orders or to fulfil an obligation prescribed by law;
- detention following arrest to bring the individual before the competent legal authorities;
- detention of children for educational supervision or to bring them before the competent legal authorities;
- detention of alcoholics, drug addicts, vagrants and persons of unsound mind;
- detention pending deportation or extradition.

As with Article 5 ECHR, the Human Rights Committee's General Comment on Article 9⁴⁴³ makes it clear that Article 9(1) is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction or immigration control.

Detention for counter-terrorism purposes and the right to liberty

Detention for counter-terrorism purposes is likely to engage the right to liberty in three situations:

- detention post-conviction by a competent court;⁴⁴⁴
- detention on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent a person from committing an offence;⁴⁴⁵ and

441 "The maximum period of twelve hours' detention for the purposes of checking identity was laid down by law and was absolute. Since the maximum period of detention was known in advance, the authorities responsible for the detention were under a duty to take all necessary precautions to ensure that the permitted duration was not exceeded.", ECtHR, *K.-F. v. Germany*, Case no. 144/1996/765/962, 27 November 1997, para. 72.

442 ECtHR, *Jėčius v. Lithuania*, Application no. 34578/97, 31 July 2000, paras. 53-64. See also ECtHR, *Baranowski v. Poland*, Case no. 28358/95, 28 March 2000, paras. 50-52.

443 See HRC, General Comment No. 8 - Right to liberty and security of persons (Art. 9), 30 June 1982, para. 1.

444 Article 5(1)(a) ECHR.

445 Article 5(1)(c) ECHR.

- detention for the purposes of preventing unauthorized entry into a country or deportation and extradition.⁴⁴⁶

Additionally, the legality from the perspective of human rights standards of preventive detention and/or administrative detention⁴⁴⁷ will need to be examined.

Access to a lawyer

Nowhere in the right to liberty is there an express mention of the need to have access to a lawyer on being detained. However, without immediate access to a lawyer, the right can be rendered meaningless. Therefore under the doctrine that human rights must be “practical and effective”, this right of access to a lawyer as soon as is practicable has been read into the right to liberty as well as the right to a fair trial.⁴⁴⁸ Failure to grant access to a lawyer can also raise issues of the absolute prohibition on torture and other ill-treatment. It should be recalled that OSCE commitments provide for the right of individuals to seek and receive adequate legal assistance where violations of human rights or fundamental freedoms are alleged to have occurred.⁴⁴⁹

The centrality of the legal profession to the rule of law and the protection of human rights is precisely why access to a lawyer represents such a crucial safeguard for detainees. As to what this means, the HRC and the European Court have repeatedly made it clear that this access must be immediate and must be effective. The European Court has specified that access to a lawyer is a “basic safeguard against abuse”,⁴⁵⁰ and in a case concerned with the hanging of a detainee, which occurred during lengthy incommunicado detention, the Court observed that the absence of such access to a lawyer left a detainee “completely at the mercy of those detaining him.”⁴⁵¹

Detention post-conviction by a competent court

This is the most straightforward form of detention and regulates and authorizes the detention of convicted offenders. The court of conviction must satisfy the requirements of independence and impartiality and have jurisdiction to try the case.

The fact that a conviction is subsequently overturned on appeal does not necessarily affect the lawfulness of detention pending appeal. What is required is lawful detention, not neces-

446 Article 5(1)(f) ECHR.

447 See Council of Europe, Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts, 15 December 2004. See also ECtHR, *McKay v. UK*, Application no. 543/03, 3 October 2006, paras. 30-51.

448 “The Court observes that it has not been disputed by the Government that Article 6 applies even at the stage of the preliminary investigation into an offence by the police. In this respect it recalls [that] the manner in which Article 6-3-c is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing”, ECtHR, *John Murray v. UK*, Case no. 41/1994/488/570, 25 January 1996, paras. 62-63 and more generally paras. 59-70.

449 *Op. cit.*, note 6, 1990 Copenhagen Document, para. 11.

450 *Op. cit.*, note 220, ECtHR, *Brannigan and McBride v. UK*, paras. 61-66.

451 *Op. cit.*, note 220, ECtHR, *Aksoy v. Turkey*, para. 83.

sarily a just conviction.⁴⁵² There will be a breach where the conviction had no basis in domestic law.⁴⁵³ The conviction itself must be the cause of the detention.⁴⁵⁴

Detention on reasonable suspicion of having committed an offence

This governs the circumstances where it is permissible to detain someone who is suspected of having committed an offence or where someone is considered likely to commit an offence. For the detention to be lawful under this heading the following three-stage test must be met:

- the offence must exist in national law. In *Lukanov* the detention of the former prime minister violated the right to liberty because the activity that he was accused of carrying out was not unlawful;⁴⁵⁵
- the objective must be to bring the individual before the competent legal authority and there is an obligation to act diligently in this respect; and
- there must be reasonable suspicion to arrest someone. The fact that an individual has past convictions is not enough. Reasonable suspicion requires objective justification, but can be based on anonymous informants.⁴⁵⁶ In a case involving counter-terrorism, it was not necessary for there to be sufficient evidence to charge someone in order to be able to establish reasonable suspicion, if detention was justified subject to further investigations.⁴⁵⁷ Honesty and good faith is required on the part of the law-enforcement officers.

Blanket arrests are unlikely to be proportionate. Detention on reasonable suspicion of having committed an offence cannot be used to authorize a general policy of preventive detention on the basis of a propensity to commit offences. For this ground to be relied upon, the offence in issue needs to be a specific one. Detention under reasonable suspicion also guarantees further protection under the right to liberty, in particular judicial supervision and other procedural safeguards.

452 “A period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For this reason, the Convention organs have consistently refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of fact or law”, ECtHR, *Douiye v. The Netherlands*, Application no. 31464/96, 4 August 1999, para. 45.

453 ECtHR, *Tsirlis and Kouloumpas v. Greece*, Cases nos. 54/1996/673/859-860, 25 April 1997, paras. 52-63.

454 “The formal legal connection between Mr. Weeks’ conviction in 1966 and his recall to prison some ten years later is not on its own sufficient to justify the contested detention under Article 5(1)(a). The causal link required [...] might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the sentencing court. ‘In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with Article 5’ [quoting the *Van Droogenbroeck* case], ECtHR, *Weeks v. UK*, Application no. 9787/82, 2 March 1987, para. 49.

455 ECtHR, *Lukanov v. Bulgaria*, Case no. 25/1996/644/829, 20 March 1997, para. 43.

456 ECtHR, *Doorson v. the Netherlands*, Case no. 54/1994/501/583, 20 February 1996, paras. 68-69.

457 “Such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others. There is no reason to believe that the police investigation in this case was not in good faith or that the detention of the applicants was not intended to further that investigation by way of confirming or dispelling the concrete suspicions which, as the Court has found, grounded their arrest [...] Had it been possible, the police would, it can be assumed, have laid charges and the applicants would have been brought before the competent legal authority”, ECtHR, *Brogan and Others v. UK*, Applications nos. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, para. 53.

Detention for the purposes of deportation and extradition

The right to liberty permits the detention of individuals pending extradition or deportation. Attempts to deport or extradite must be genuine and be in process. However, importantly and of direct relevance to counter-terrorism measures, if deportation or extradition is impossible, the right to liberty cannot justify detention. The ECtHR has held that “the fact that an individual is detained [...] for an undetermined and unforeseeable period, without such detention being based on a specific legal provision or a valid judicial decision, runs counter to the principle of legal security, which is implicit in the Convention and one of the fundamental elements of the rule of law.”⁴⁵⁸

Grounds for detention for counter-terrorism purposes that are unlikely to be justified

Detention can also be justified to enforce a court order or to fulfil an obligation prescribed by law.⁴⁵⁹ This is unlikely to be of general assistance in counter-terrorism strategies, although it may be relevant in particular circumstances. In relation to detention following the lawful order of a court, that detention is only permitted for as long as is necessary to carry out the court’s order. For example, the court may order the detention of an individual for the purpose of taking a blood test. Once that blood has been taken, the individual must be released.

Detention to secure the fulfilment of any obligation prescribed by law also requires specificity, such as a failure to turn up for national service. In *Ciulla* the Italian authorities could not rely on this ground for detention to justify the imprisonment of a suspected *Mafioso* who had failed to change his behaviour.⁴⁶⁰ This failure was not considered to be a specific and concrete obligation. This ground cannot be used to justify preventive detention. As such, when considering when it is lawful to detain, this provision must be interpreted narrowly and it cannot be used to justify detention that would otherwise not comply with the justifications for detention under the right to liberty. There must be specific and concrete reasons for the detention.

For the purposes of detaining children for educational supervision or to bring them before the competent legal authorities,⁴⁶¹ a minor is someone who is under the age of 18. This is relevant to counter-terrorism if the suspect is a minor.

Detention of alcoholics, drug addicts, vagrants and persons of unsound mind⁴⁶² is also unlikely to be of particular assistance to counter-terrorism strategies. In *Guzzardi*, the Italian Government sought to rely on it to detain suspected *Mafiosi*; however, the European Court of Human Rights rejected Italy’s suggestion that the Mafia fell within the definition of “va-

458 ECtHR, *Shamsa v Poland*, Applications no. 45355/99 and 45357/9927, November 2003, para. 58 (in French only, our translation). In this case, the Polish authorities issued a deportation order against the applicants (Libyan citizens) and detained them with a view to executing the order. After several unsuccessful deportation attempts, they remained in the custody of the border police at Warsaw airport, long after the 80-days period provided by Polish law.

459 Article 5(1)(b) ECHR.

460 “[...] the Court does not underestimate the importance of Italy’s struggle against organised crime, but it observes that the exhaustive list of permissible exceptions in paragraph 1 of Article 5 of the Convention must be interpreted strictly”, ECtHR, *Ciulla v. Italy*, Application no. 11152/84, 22 February 1989, para. 41.

461 Article 5(1)(d) ECHR.

462 Article 5(1)(e) ECHR.

grant.”⁴⁶³ In *De Wilde*,⁴⁶⁴ the Court accepted the Belgian penal code definition of a vagrant as someone of no fixed abode, with no trade or profession and no means of subsistence.

Preventive and/or administrative detention

As has been made clear, the right to liberty guarantees a number of minimum safeguards to those facing a criminal prosecution. States may not avoid these safeguards by reclassifying detention as “administrative” rather than “criminal.” The definition of proceedings as “criminal” is an autonomous concept⁴⁶⁵ it is therefore open to courts to go behind the definition given by the state authorities to establish whether or not proceedings are in fact criminal.

If the circumstances of preventive or administrative detention cannot be justified by reference to one of the six lawful purposes of detention listed above, then it will be unlawful. If the state party wishes to proceed with detentions not in line with the six purposes, it will then have to consider whether it can justify derogating from its obligations under human rights law. Even if the detention is lawfully permitted under derogation, it should still remain subject to scrutiny by an independent and impartial tribunal.

Counter-terrorism strategies may rely on preventive and/or administrative detention primarily in the context of migration. Where such detention occurs the following rights will be engaged:

- right to liberty;
- the right to a fair trial;
- protection from torture and inhuman and degrading treatment;
- the right to private and family life; and
- non-discrimination.

The Special Rapporteur on the Human Rights of Migrants has addressed the relationship between counter-terrorism measures and migration, pointing out: “[T]he strengthening of security policies and the tendency to consider migration as a matter falling under State security plans pose a threat to the human rights of migrants.”⁴⁶⁶ Drawing particular attention to the issue of administrative detention of migrants, she has stated:

There is in fact a tendency to criminalise infringements of immigration regulations and to punish them severely, while a great number of countries resort to administrative detention of irregular migrants pending deportation. The Special Rapporteur regrets that deprivation of liberty is resorted to without due regard for the individual history of the persons in question [...] This situation is often encouraged by the absence of automatic mechanisms for judicial or administrative review [...] [The Special Rapporteur] recommends that procedural safeguards and guarantees established by international human rights law and national law in criminal proceedings be applied to any form of detention.⁴⁶⁷

⁴⁶³ *Op. cit.*, note 439, ECtHR, *Guzzardi v. Italy*.

⁴⁶⁴ ECtHR, *De Wilde, Ooms and Versyp (“vagrancy”) v. Belgium*, Applications nos. 2832/66; 2835/66; 2899/66, 18 June 1971, para. 68.

⁴⁶⁵ See above at p. 73.

⁴⁶⁶ Report of the UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, doc. A/58/275, 12 August 2003, at Summary, para. 5.

⁴⁶⁷ *Ibid.*, paras. 34-37.

The Working Group on arbitrary detention has come to a similar conclusion, expressing:

[...] its concern about the frequent use of various forms of administrative detention, entailing restrictions on fundamental rights. It notes a further expansion of States' recourse to emergency legislation diluting the right of *habeas corpus* or *amparo* and limiting the fundamental rights of persons detained in the context of the fight against terrorism. In this respect, several States enacted new anti-terror or internal security legislation, or toughened existing ones, allowing persons to be detained for an unlimited time or for very long periods, without charges being raised, without the detainees being brought before a judge, and without a remedy to challenge the legality of the detention.⁴⁶⁸

Procedural safeguards — reasons for detention⁴⁶⁹

Reasons for detention must be given promptly. This safeguard applies to all people detained for whatever reason.

Art. 5(2) contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with art. 5(4) [...] Whilst this information must be conveyed “promptly” (in French: “dans le plus court délai”), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.⁴⁷⁰

What qualifies as promptness depends upon the circumstances of the case. Prompt does not necessarily mean immediate; a few hours might suffice in terrorist cases. In one case, the European Court of Human Rights did not object to a delay of 12 hours where national security was concerned.⁴⁷¹ Without a reason for detention, it is very difficult to challenge the legality of detention. A delay of 19 hours should therefore be considered the exception and not the rule.⁴⁷² A ten day delay⁴⁷³ in a mental health case was held to violate this obligation.

Reasons need not be in writing, although it is insufficient simply to refer to a formal statutory provision. By the same token, it is not sufficient to inform someone that they have been detained under emergency legislation without providing a more specific reason. To comply with this obligation, reasons must also be given in a language that the detainee understands.

468 Report of the UN Working Group on arbitrary detention, doc. E/CN.4/2005/6, 1 December 2004, para. 61.

469 Cf. Article 5(2) ECHR and Article 9(2) ICCPR.

470 ECtHR, *Fox, Campbell and Hartley v. UK*, Applications nos. 12244/86; 12245/86; 12383/86, 30 August 1990, para. 40.

471 The applicant was arrested at 7 a.m. and beaten till 2 a.m.. “At about 7 p.m., a member of the secret service had threatened him, saying: ‘You belong to *Devrimci Sol* [a proscribed entity], and if you don't give us the information we need, you'll be leaving here feet first!’ In the Court's opinion, that statement gave a fairly precise indication of the suspicions concerning the first applicant. Accordingly, and having regard to the illegal nature of the organisation in question and to the reasons he may have had for concealing his identity and fearing the police (his sister had been killed in a clash with the police), the Court considers that Mr Dikme should or could already have realised at that stage that he was suspected of being involved in prohibited activities such as those of *Dev-Sol*”, ECtHR, *Dikme v. Turkey*, Application no. 20869/92, 11 July 2000, para. 55-56.

472 ECtHR, *Murray v. UK*, Application no. 14310/88, 28 October 1994, para. 72 onwards.

473 ECtHR, *van der Leer v. the Netherlands*, Case no. 12/1988/156/210, 22 January 1990, paras. 25-31.

The age and mental state of the detained person are also relevant. It may be that a responsible third person must be informed promptly of the reasons for the detention.

Procedural safeguards — judicial supervision⁴⁷⁴

Justifications for delay in bringing suspects detained on suspicion of having committed an offence before a court have been very heavily scrutinized by the European Court of Human Rights. The presumption is that detainees should be brought before a court promptly. That court must have the power to order release. A power to recommend release is insufficient.⁴⁷⁵ In *Brogan*, it was held that to detain somebody for four days and six hours before bringing them before the competent legal authority was too long,⁴⁷⁶ even where national security and suspected terrorist activity were involved. Delays of 14 days were unlawful even in an accepted emergency that threatened the life of the nation.⁴⁷⁷

Continuing detention must be authorized by a court or “an officer authorised by law”. To satisfy this test, the officer must be independent of the Executive and be impartial. That person must also be able to authorize release. In *Brincat*,⁴⁷⁸ detention was confirmed by a public prosecutor who subsequently concluded that he did not have territorial jurisdiction over the case. The case was then handed over to another prosecutor in the appropriate district. In finding the detention unlawful, the Court held that doubts as to the impartiality of the officer were raised immediately after the detention was confirmed. It was immaterial that he later lacked jurisdiction.⁴⁷⁹

Article 9(3), ICCPR is similarly worded to Article 5(3) and even though it only applies to a “criminal charge”, the Human Rights Committee has interpreted this to mean that formal charges do not have to have been made in order for the Article to apply. Instead, the focus has been placed on the act of arrest.⁴⁸⁰ Where complainants were held for investigation under “prompt security measures” but were not charged until approximately 6 months later (when they were charged with involvement in “subversive activities”), the Committee found a violation of article 9(3) because, among other things, the complainants were not brought promptly before a judicial officer upon their arrest.⁴⁸¹ Thus, in circumstances where people are lawfully detained during the course of a counter-terrorism investigation prior to being charged with an offence, that detention must be regulated and controlled by an independent and impartial tribunal that is authorized to order release.

As to the meaning of “promptly” in Article 9, ICCPR (in relation to the need for a person arrested or detained to be brought “promptly” before a judge or other judicial authority), the

474 Article 5(3) ECHR and Article 9(3) ICCPR.

475 *Op. cit.*, note 143, ECtHR, *Ireland v. UK*, para. 199.

476 *Op. cit.*, note 457, ECtHR, *Brogan v. UK*, para. 62.

477 “Although the Court is of the view [...] that the investigation of terrorist offences undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention. This period is exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture [...] Moreover, the Government have not adduced any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable”, *Op. cit.*, note 220, ECtHR, *Aksoy v. Turkey*, para. 78.

478 ECtHR, *Brincat v. Italy*, Application no. 13867/88, 26 November 1992, para. 21.

479 In relation to the requirement for there to be access to judicial review of administrative acts, see *op. cit.*, note 447, CoE Recommendation Rec(2004)20.

480 Report of the HRC, General Assembly Official Records, 35th session, Supplement No. 40 (1980), Annex VI.

481 HRC, *Netto, Weismann and Lanza v. Uruguay*, Communication no. 8/1977, doc. CCPR/C/9/D/8/1977, 3 April 1980, para. 16.

Committee has tended to follow its interpretation of not more than a “few days” as set down in General Comment 8. The Committee has held that keeping a victim incommunicado for five days without being brought before a judge and without having access to counsel entails a violation of article 9, paragraph (3).⁴⁸²

A trial within a reasonable time and the right to bail⁴⁸³

Any period of pre-trial detention, no matter how short, will always have to be justified. All pre-trial detention must be subject to judicial supervision. The suspect is not under any obligation to assist the authorities in their prosecution. However, failure to do so may affect the slowness of the process. What is meant by ECHR, Article 5(3)'s entitlement to “a trial within a reasonable time” depends on the circumstances of a case. For example, a complex fraud trial that took four years to come to trial, and which involved many witnesses and much documentation, was not held to violate Article 5(3).⁴⁸⁴ Yet, in a less complex case, delays of over three years did violate Article 5(3).⁴⁸⁵

There is a presumption in favour of bail.⁴⁸⁶ Prior to conviction the presumption of innocence applies. As such the court must consider bail at the earliest opportunity.⁴⁸⁷ Grounds for refusing bail can include:

- fear of absconding;
- interference with the course of justice;
- prevention of further offences;
- preservation of public order;
- protection of the defendant.

Bail is permitted and is preferable to pre-trial detention, but the bail hearing must be in accordance with fair trial principles. Any objections to bail must be relevant and sufficient and reasons should be given. In relation to bail conditions, the right to liberty requires only what is necessary to ensure presence. Conditions might include reporting to a local police station and/or the surrender of a passport. The right to liberty was violated when bail was calculated

482 HRC, *Teran Jijon v. Ecuador*, Communication no. 277/1988, doc. CCPR/C/44/D/277/1988, 8 April 1992, para. 5.3.

483 Cf. Article 5(3) ECHR and Article 9(3) ICCPR.

484 ECtHR, *W. v. Switzerland*, Application no. 14379/88, 26 January 1993, para. 42.

485 ECtHR, *Clooth v. Belgium*, Case no. 49/1990/240/311, 27 November 1991, paras. 35-49; see also ECtHR, *Muller v. France*, Case no. 13/1996/632/816, 18 February 1997, paras. 46-48, where the Court took into account the non-expeditious conduct of the proceedings in finding a violation of Art. 5(3).

486 *Op. cit.*, note 447, ECtHR, *McKay v. UK*, para. 41; see also *op. cit.*, note 338, ECtHR, *Tomasi v. France*, para. 84. The term ‘bail’ refers to provisional liberty generally and does not necessarily require a financial guarantee.

487 In *ibid.*, ECtHR, *McKay v. UK*, paras. 30-51, the applicant complained that the court to which he was brought could not grant him bail. This was because the offence he was alleged to have committed (burglary) was scheduled as being included as a terrorist offence. On the facts of the case, it was not in dispute that the applicant had not been involved in terrorist activity. Only a higher court was empowered to grant bail. In this case this meant that the applicant was dealt with some 24 hours later by the High Court, which ordered his release. The European Court found no element of possible abuse or arbitrariness arose from the fact that his release was ordered by another tribunal or judge or from the fact that the examination was dependent on his application to the High Court. The applicant’s lawyer had lodged such an application without any hindrance or difficulty.

on the basis of the loss imputed to the alleged victim.⁴⁸⁸ Any financial conditions attached to bail should be proportionate and take into account the personal situation of the defendant to ensure the effective enjoyment of the right to liberty without discrimination.

Procedural safeguards: the right to challenge the legality of detention — *habeas corpus*

The right to challenge the legality of detention, or *habeas corpus*, is set out in Article 9(4) ICCPR and Article 5(4) ECHR. It provides essential protection for detainees and is now considered to be an absolute and non-derogable right.⁴⁸⁹ The following apply:

- fixed-term sentences incorporate *habeas corpus* protection;
- indeterminate sentences require *habeas corpus* proceedings to determine release;
- the degree of scrutiny required varies with the context but a judicial authority must be able to review the lawfulness of the detention;
- a judicial authority must be independent and impartial and able to take binding decisions, but not necessarily in public;
- principles of equality of arms apply, which implies adversarial proceedings;
- the detaining authority must prove the legality of detention; and
- it may be necessary to provide legal assistance/legal aid.

In relation to ongoing detention, it should be possible to challenge the detention at reasonable intervals.

488 The Court clearly pointed out that “[t]he guarantee provided for by [Article 5(3)] is designed to ensure not the reparation of loss but rather the presence of the accused at the hearing. Its amount must therefore be assessed principally by reference to him, his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond”, ECtHR, *Neumeister v. Austria*, Application no. 1936/63, 27 June 1968, para. 14.

489 *Op. cit.*, note 221, HRC, General Comment No. 29, para 15 and 16 reads: “It is inherent in the protection of rights explicitly recognized as non-derogable in article 4(2), that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights [...] Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant.” Cf. also HRC, Concluding observations: *Israel*, doc. CCPR/C/79/Add.93, 18 August 1998, para. 21; see also the recommendation by the Committee to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities concerning a draft third optional protocol to the Covenant, UN General Assembly (49th session), General Assembly Official Records, Supplement no. 40, doc. A/49/40, vol. I, annex XI, para. 2: “[...] the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole.” These concerns have been expressed at the regional level by IACtHR, *Habeas Corpus in Emergency Situations* (Arts. 27(2) and 7(6) of the American Convention on Human Rights), *Advisory Opinion OC-8/87*, 30 January 1987, doc. Ser. A No. 8 (1987), where (paras. 42-43) is stated that “[...] writs of *habeas corpus* and of *amparo* are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited [...] and that serve, moreover, to preserve legality in a democratic society [...] The Constitutions and legal systems of the States Parties that authorize, expressly or by implication, the suspension of the legal remedies of *habeas corpus* or of *amparo* in emergency situations cannot be deemed to be compatible with the international obligations imposed on these States by the Convention.”

The right to challenge the legality of detention can be summarized as follows:

- the right to challenge detention applies to all persons deprived of their liberty and not just those suspected of committing a criminal offence;
- the authority before which the challenge is to be made must be a formally constituted court or tribunal with the power to order the release of the detainee. The HRC has held that review of a petitioner's claim before a superior military officer lacked the "judicial character" of a court hearing;⁴⁹⁰
- the authority ruling on the application must be both subjectively and structurally impartial and independent from the body making the decision to detain;
- the authority must make its decision without delay. The longer detention lasts the greater burden the state bears in justifying it;
- the right to *habeas corpus* has a vital role in ensuring that a person's life and physical integrity are respected, in preventing disappearances or the keeping of a detainee's whereabouts secret and in protecting that person against torture or other cruel, inhumane or degrading punishment or treatment.⁴⁹¹

Compensation for unlawful detention

Article 5(5) ECHR guarantees that everyone who has been the victim of unlawful arrest or detention has an enforceable right to compensation. This does not require that the detainee establishes bad faith on the part of the authorities.

Safeguards for special categories of detainees

All detained people have the right to equal treatment but particular allowances should be made for special categories including women, juveniles, the elderly, foreigners, ethnic minorities, those with different sexual orientation, those who are ill and those with mental health disabilities. Some groups may need particular protection from abuse from other detainees, as well as from those detaining them.

Women in detention

Detention of women in detention centres run exclusively by male officers can give rise to particular problems and, in some cases, very serious abuse. The UN Standard Minimum Rules

490 "Whenever a decision depriving a person of his liberty is taken by an administrative body or authority, there is no doubt that article 9, paragraph 4, obliges the State party concerned to make available to the person detained the right of recourse to a court of law. In this particular case it matters not whether the court would be civilian or military. The Committee does not accept the contention of the State party that the request for review before a superior military officer according to the Law on Military Disciplinary Procedure, currently in effect in Finland is comparable to judicial scrutiny of an appeal and that the officials ordering detention act in a judicial or quasi-judicial manner. The procedure followed in the case of Mr. Vuolanne did not have a judicial character, the supervisory military officer who upheld the decision of 17 July 1987 against Mr. Vuolanne cannot be deemed to be a 'court' within the meaning of article 9, paragraph 4 therefore, the obligations laid down therein have not been complied with by the authorities of the State party", HRC, *Vuolanne v. Finland*, Communication no. 265/1987, doc. CCPR/C/35/D/265/1987, 2 May 1989, para. 9.16.

491 "In order for *habeas corpus* to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here *habeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.", *op. cit.*, note 489, IACtHR, *Habeas Corpus*, para. 35.

for the Treatment of Prisoners also set out basic ground rules for the detention of women. These are:

- women in custody should be supervised by female members of staff;
- they should so far as possible also be held in separate institutions or segregated within an institution under the authority of female staff;
- no male staff should enter the part of the institution set apart for women unaccompanied by a female member of staff;
- in institutions where women are held in custody, facilities for pre-natal and post-natal care and treatment must be provided; and
- wherever possible, arrangements should be made for children to be born in a hospital outside the institution.

Proper safeguards, including the ability to have immediate access to counsel and effective judicial scrutiny, can prevent mistreatment.⁴⁹² In a case involving allegations of threats of rape,⁴⁹³ the European Court was particularly concerned to ensure proper hygiene facilities and privacy for female detainees arrested and held at the same location as male detainees.

Juvenile detention

Some specific obligations also apply in relation to children. These are found, principally, in the Convention on the Rights of the Child. The Convention applies to children up to the age of 18, who would normally be regarded as juveniles within most criminal justice systems.

Article 37 of the Convention emphasizes that detention of children should be a measure of last resort and used for the shortest possible period of time. It requires due account to be taken of their needs and states that they should be kept separate from adults unless it is considered in their best interests to be kept together, for example in the case of detention of their guardian or parents.

The CPT has also laid down some specific safeguards for protecting children against ill-treatment. It has endorsed the approach taken in certain jurisdictions that recognize that the inherent vulnerability of juveniles requires that additional precautions be taken. These include placing police or other detaining officers under a formal obligation themselves to ensure that an appropriate person is notified of the detention and a prohibition on interviewing a juvenile unless an appropriate person or lawyer is present.

People with mental health problems

The UN Standard Minimum Rules also provide guidance for detention of people with mental health problems. The rules state that people with mental health problems shall not be detained in prisons and shall be observed and treated in specialized institutions under medical management.

Similarly, the CPT has set out a number of principles:

⁴⁹² *Op. cit.*, note 30, ECtHR, *Aydin v. Turkey*, paras. 80-86.

⁴⁹³ ECtHR, *Elci and Others v. Turkey*, Applications nos. 23145/93 and 25091/94, 13 November 2003, para 21 and 641-642.

- a mentally ill prisoner should be kept and cared for in a hospital facility that is adequately equipped and possesses appropriately trained staff;
- this facility should be a civil mental hospital or specially equipped psychiatric facility within the prison system; and
- a mentally disturbed violent prisoner should be treated under close supervision and nursing support. While sedatives may be used, if considered appropriate, instruments of physical restraint should only be used rarely and must either expressly be authorized by a medical doctor or be immediately brought to the attention of a doctor. These should be removed at the earliest opportunity and should never be used as a means of punishment.

The right to liberty and counter-terrorism

Since the adoption of Security Council Resolution 1373, the HRC has made a number of observations about the powers of detention that states parties have assumed in contravention of Article 9 ICCPR. They include:⁴⁹⁴

HRC Concluding observations: Israel

[T]he Committee is concerned about the frequent use of various forms of administrative detention [...] entailing restrictions on access to counsel and failure to disclose of full reasons of the detention. These features limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment prohibited under Article 7 [ICCPR] and derogating from Article 9 more extensively than what in the Committee's view is permissible pursuant to [ICCPR] Article 4 [...] The Committee is concerned that the use of prolonged detention without any access to a lawyer or other persons of the outside world violates articles of the Covenant (arts. 7, 9, 10 and 14, para. 3 (b)). The State party should ensure that no one is held for more than 48 hours without access to a lawyer;⁴⁹⁵

HRC Concluding observations: Colombia

The Committee notes with concern that the so-called "anti-terrorist statute" [...] makes provision for granting to the armed forces the powers of judicial police, and also authorises searches, administrative detention and other measures without a prior judicial order. It also places restrictions on the right to privacy and the right to apply for remedies. Those provisions do not seem to be compatible with the guarantees set forth in the Covenant (Arts. 9 and 14);⁴⁹⁶

HRC Concluding observations: Sri Lanka

The Committee is concerned that the Prevention of Terrorism Act (PTA) remains in force and that several of its provisions are incompatible with the Covenant (Arts. 4, 9 and 14) [...] The Committee is also concerned that the continued existence of the PTA allows arrest without a warrant and permits detention for an initial period of 72 hours without the person being produced before the court (sect. 7), and thereafter for up to 18 months on the basis of an administrative order issued by the Minister of Defence (sect. 9). There is no legal obligation on the State to inform the detainee of the reasons for the arrest; moreover, the lawfulness of a detention order issued by the Minister of Defense cannot be challenged in court [...] The

494 These examples are drawn from *op. cit.*, note 30, E. J. Flynn, "Counter terrorism and human rights: the view from the United Nations", in *European Human Rights Law Review*, vol. 1, 2005, p. 40.

495 *Op. cit.*, note 131, HRC, Concluding observations: *Israel*, paras. 12-13.

496 HRC, Concluding observations: *Colombia*, doc. CCPR/CO/80/COL, 26 May 2004, para. 9.

Committee is concerned that such provisions, incompatible with the Covenant, still remain legally enforceable [...];⁴⁹⁷

HRC Concluding observations: Yemen

While it understands the security requirements connected with the events of 11 September 2001, the Committee expresses its concern about the effects of this campaign on the human rights situation [...] in relation to both nationals and foreigners. It is concerned, in this regard, at the attitude of the security forces, including Political Security, proceeding to arrest and detain anyone suspected of links with terrorism, in violation of the guarantees set out in the Covenant (art. 9);⁴⁹⁸

HRC Concluding observations: UK (and Overseas Territories)

The Committee notes with concern that, under the general Terrorism Act 2000, suspects may be detained for 48 hours without access to a lawyer if the police suspect that such access would lead, for example, to interference with evidence or alerting another suspect. Particularly in circumstances where these powers have not been used [...] for several years, where their compatibility with articles 9 and 14 inter alia is suspect, and where other less intrusive means for achieving the same ends exist, the Committee considers that the State party has failed to justify these powers;⁴⁹⁹

The Working Group on Arbitrary Detention has also expressed concern about detention in the context of counter-terrorism. For example they have pointed out that:

In a growing number of cases in the fight against terrorism, legal safeguards concerning detainees are now observed only insofar as they are consistent with the objectives of military security. No justification can be used in any circumstances – whether conflict, war, or state of exception – to abrogate the right to challenge unlawful detention [...]⁵⁰⁰

The Council of Europe Guidelines on Human Rights and the Fight against Terrorism reaffirm the importance of guaranteeing substantive and procedural safeguards in relation to the right to liberty. In Guideline VII, concerning arrest and police custody, in accordance with Article 5 ECHR it is stated that:

1. A person suspected of terrorist activities may only be arrested if there are reasonable suspicions. He/she must be informed of the reasons for the arrest.
2. A person arrested or detained for terrorist activities shall be brought promptly before a judge. Police custody shall be of a reasonable period of time, the length of which must be provided for by law.
3. A person arrested or detained for terrorist activities must be able to challenge the lawfulness of his/her arrest and of his/her police custody before a court.

497 HRC, Concluding observations: *Sri Lanka*, doc. CCPR/CO/79/LKA, 1 December 2003, para. 13. See also HRC, *Nal-laratnam Singarasa v. Sri Lanka*, Communication No. 1033/2001, doc. CCPR/C/81/D/1033/2001, 23 August 2004, para. 7.3 (see also note xx, including more references to the HRC's jurisprudence on the matter).

498 *Op. cit.*, note 386, HRC, Concluding Observations: *Yemen*, para. 18.

499 HRC, Concluding observations: *UK (and Overseas Territories)*, doc. CCPR/CO/73/UK; CCPR/CO/73/UKOT, 6 December 2001, para. 19.

500 Report of the UN Working Group on Arbitrary Detention (Chairperson-Rapporteur: Leïla Zerrougui), doc. E/CN.4/2004/3, 15 December 2003, para. 63.

The Right to a Fair Trial

Article 14, ICCPR:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 6, ECHR:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

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

a. to be informed promptly in a language which he understands and in detail of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The right to a fair trial is protected by Article 14 ICCPR and Article 6 ECHR (see box above), which set out specific guarantees in relation to both criminal and civil proceedings.

The importance of the right to a fair trial

The closely related principles of “due process” and “the rule of law” are fundamental to the protection of human rights. Such rights can only be protected and enforced if an individual has recourse to courts and tribunals, independent of the executive, which can resolve disputes in accordance with fair procedures. The protection of procedural due process is not, in itself, sufficient to protect against human rights abuses but it is the foundation stone for “substantive protection” against state power. The protection of human rights therefore begins but does not end with fair-trial rights.

The Chairperson of the UN Working Group on Arbitrary Detention and the Special Rapporteur on the Independence of Judges and Lawyers have emphasized these values in the context of terrorism. He has pointed out that, “the essence of a democratic society includes the right to challenge the lawfulness of detention before a court (ICCPR, Art 9(4)) and the right to a fair trial by a competent, independent and impartial court of law (ICCPR, Art 14); they protect every person from arbitrary detention and unjust punishment and safeguard the presumption of innocence.”⁵⁰¹

Fair-trial rights are not only a fundamental safeguard to ensure that individuals are not unjustly punished under criminal law, but they are also indispensable for the protection of other human rights, including the right to freedom from torture and the right to life, as well as the right to freedom of expression and freedom of association.

The implementation of the right to a fair trial therefore plays a crucial role in the maintenance of order, the rule of law, and confidence in state authorities. If there is a system of fair trial in place, before independent and impartial judges, there is an assurance, in principle:

- that convictions are well-founded;
- that the executive arm of government can, if necessary, be held to account; and
- that there is an effective dispute resolution system between private parties.

Fair-trial rights are also relevant to administrative and civil proceedings. While nations have developed different systems of administrative, civil and criminal procedures, international human rights law has been able to establish a number of fair-trial principles that straddle and apply broadly to all legal systems.

The international community has recognized the pivotal position that the right to a fair trial plays in guaranteeing human rights. In addition to the recognition in international human rights law of the right to a fair trial (ICCPR and ECHR), there have been extensive developments expanding upon what a fair trial requires. There is, for example, at the UN a sessional working group on the administration of justice at the UN Sub-Commission on the Promotion and Protection of Human Rights, which has prepared many studies and resolutions for adoption by the Commission on Human Rights.⁵⁰² The Commission on Human rights has a

⁵⁰¹ *Op. cit.*, note 178, *Situation of detainees at Guantánamo Bay*, para. 17.

⁵⁰² At its 2006 session, for example, the Sub-Commission adopted seven resolutions or decisions on the administration of justice and recommended two decisions for adoption by the Human Rights Council.

Special Rapporteur on the Independence of Judges and Lawyers. The Special Rapporteur has expressed concern that “the number of complaints of failure by governments to respect internationally accepted judicial guarantees in the case of terrorism-related crimes is constantly on the increase.”⁵⁰³

The UN Human Rights Committee’s General Comment 13 also explains in detail the requirements of Article 14 of the ICCPR. The General Comment points out, for example, that the specific rights set out in Article 14(3) are minimum guarantees, which may not be sufficient to ensure a fair trial overall.

OSCE commitments also stress the importance of fair-trial rights. These are wide ranging and form an important element of the OSCE human dimension commitments.⁵⁰⁴

It is under Article 6, ECHR that the most detailed and intricate explanation of the workings of a fair trial can be found. The case law under Article 6 is comprehensive and extensive. This section on how the right to a fair trial works will focus to a large extent, therefore, on Article 6, ECHR. The case law and guidance of the UN bodies, as well as OSCE commitments, will also be relied upon.

The right to a fair trial and the right to an effective remedy

A key feature of the right to a fair trial is that, ultimately, it is through the medium of a fair trial that the right to an effective remedy is guaranteed. This is a further reason why the right to a fair trial is so vital to the whole scheme of human rights. The relationship between the right to a fair trial and the right to an effective remedy is a symbiotic one. Whether rights are being enforced through the normal trial processes, or by way of judicial review of administrative acts, the requirement for fairness remains the same.⁵⁰⁵

The OSCE participating States will:

(13.9) ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; they will, inter alia, effectively apply the following remedies:

- the right of the individual to appeal to executive, legislative, judicial or administrative organs;
- the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one’s choice;
- the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies.

(1989 Vienna Document)

The right to a fair trial and how it works

As a general principle, whether dealing with criminal or civil law, the right to a fair trial is considered to be fundamental. It needs, therefore, to be given a wide and broad interpreta-

503 Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, doc. E/CN.4/2004/60, 31 December 2003, para. 58.

504 See, for example, *op. cit.*, note 29, 1989 Vienna Document, *Questions Relating to Security in Europe: Principles*, para. 13.9 and *op. cit.*, note 6, 1990 Copenhagen Document para. 5.

505 *Op. cit.*, note 447, CoE Recommendation Rec(2004)20, para. 1(a).

tion. To give it a restrictive interpretation would not correspond to the aim and purpose of the right to a fair trial.⁵⁰⁶ The crucial aspect of the right to a fair trial is that governments must put in place a legal and institutional framework to protect it. As such, the right to a fair trial requires the state to provide, among other things:

- availability of legal assistance, including legal aid;
- a prosecution service;
- a trained and independent judiciary;
- right of access; and
- right to a remedy.

Is the right to a fair trial absolute?

The right to a fair hearing lies at the heart of the concept of a fair trial and encompasses all the procedural and other guarantees laid down in international standards. These include the right to cross examine witnesses and the right to be defended by a lawyer of choice, as well as the right to be presumed innocent and the right to be tried without undue delay. Observing each of these individual guarantees does not in itself ensure that a hearing has been fair. The right to a fair trial is broader than the sum of the individual guarantees, and depends on the entire conduct of the trial.⁵⁰⁷

The right to a fair trial, as a procedural right, is somewhat different from other guarantees of human rights protection and is subject to its own rules of interpretation. Although it may be possible in time of emergency to derogate from aspects of the right to a fair trial, the derogation cannot undermine the whole notion of due process and the rule of law. The separate ingredients of the right to a fair trial can be limited in certain circumstances, as long as the right to a fair trial as a whole is not compromised.

When is it permissible to limit fair-trial guarantees?

Constituent fair-trial guarantees (but not a fair trial as a whole) are sometimes subject to interpretation in the public interest. This does not mean that they are qualified rights. It is essential that any attempt to limit the constituent elements of the right to a fair trial is differentiated from the approach taken to qualify rights such as freedom of expression and privacy. Those rights are intended to be balanced between the right, on the one hand, and the community's interest, on the other, or in relation to competing rights.

Where there may be a need to limit certain elements of the right to a fair trial, the motivation and process for doing so are different. The aim is to ensure the fairness of the trial, while at the same time acknowledging that to ensure fairness to all involved, including the public interest, it may be necessary to adopt different procedures. The most straightforward example may be cases where a witness had been directly threatened by the defendant. It may

⁵⁰⁶ ECTHR, *Delcourt v. Belgium*, Application no. 2689/65, 17 January 1970, para. 25.

⁵⁰⁷ HRC, General Comment No. 13 - Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), 13 April 1984, para. 1. "Although article 14 does not explain what is meant by a 'fair hearing' in a suit at law (unlike paragraph 3 of the same article dealing with the determination of criminal charges), the concept of a fair hearing in the context of article 14 (1) of the Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of ex officio *reformatio in pejus*, and expeditious procedure", HRC, *Moraël v. France*, Communication no. 207/1986, doc. CCPR/C/36/D/207/1986, 28 July 1989, para. 9.3.

also be necessary to ensure that alleged victims are not required to be directly confronted by the defendant. Therefore, the methods and content of cross-examination can be limited to guarantee victims' rights. If this happens, it must be balanced to ensure that the defence is still provided a fair trial. For example, the tribunal that decides the guilt or innocence of the defendant must take this into account and attach appropriate weight to the evidence.

It is less clear whether it is appropriate to limit fair-trial rights in cases involving national security and counter-terrorism in particular. A state, for example, may have good reasons for not wishing to disclose all its evidence to the defence; however, to fail to do so may significantly prejudice the defendant, who would therefore not be in a position to rebut those allegations and thus potentially prove his or her innocence.

It is in this type of situation that the right to a fair-trial is put under the most pressure. It then becomes incumbent upon the state to propose mechanisms that guarantee the fairness of a trial, while also preserving the state interest in protecting national security. It is up to the court to decide whether such proposed procedures are fair, and to either accept, reject or modify them. For example, the European Court appears to have approved of a system in national security cases where a special counsel is appointed to act in the interests of a fair trial. This counsel sees all the evidence, but the defence does not. That special counsel can therefore, without disclosing that evidence, take instructions from the defence and make representations to the court.⁵⁰⁸

The Council of Europe's Consultative Council of European Judges (CCJE), has recommended that judges, in discharging their functions as interpreters of the law and guarantors of individual rights, ensure that the offence of "terrorism" (including incitement, preparations to commit such acts and the financing of such acts) reaches the goal set by legislators. At the same time, judges must ensure that prosecutions for terrorism do not abuse the scope of the term, and to see that the protection of the public interest is reconciled with respect for human rights and fundamental freedoms. The CCJE has also called for judges constantly to ensure that a balance is struck between the need to protect witnesses and the victims of acts of terrorism, and the rights of the persons allegedly responsible for these acts.⁵⁰⁹

Derogating from the right to a fair trial

It can be lawful under limited circumstances to derogate from elements of the right to a fair trial if there is a national emergency.⁵¹⁰ However, any such derogation cannot undermine the principles of independence and impartiality of a court or tribunal.

The HRC has stressed that certain elements of the right to a fair trial must be respected, even under states of emergency.⁵¹¹ The HRC has written, for example, that, "[it] notes with alarm that military courts and State security courts have jurisdiction to try civilians accused of ter-

508 *Op. cit.*, note 144, ECtHR, *Chahal v. UK*, paras. 144 and 154.

509 CCJE, *The role of judges in the protection of the rule of law and human rights in the context of terrorism*, Opinion no. 8 prov. (2006), Strasbourg, 8-10 November 2006.

510 See above at pp. 87-91, where the issue of derogation is explained in full.

511 *Op. cit.*, note 221, HRC, General Comment No. 29, para 11-16.

rorism although there are no guarantees of those courts' independence and their decisions are not subject to appeal before a higher court (Article 14 of the Covenant)."⁵¹²

The right to a fair trial in criminal proceedings

Acts of terrorism are criminal offences. The established rigours of criminal law should therefore apply to them. The right to a fair trial in criminal proceedings requires the right to equal treatment by the courts.⁵¹³ This means that the defence and the prosecution are to be treated in a manner that ensures that both parties have an equal opportunity to present their cases during the course of the proceedings. It also means that every accused person is entitled to be treated equally with other similarly placed accused people, without discrimination. Therefore, a person charged with a criminal offence such as destruction of property should be afforded the same guarantees whether the offence occurred in a "terrorist" or "ordinary criminal" context.

Where the determination of a criminal charge is involved, the right to a fair trial requires access to a lawyer and the presumption of innocence. There must also be further procedural protections in criminal cases, which will be elaborated in the following sections.

Access to a lawyer

Access to a lawyer is as important under the right to fair trial as it is to the right to liberty. Prompt access to lawyers is central to the administration of justice and the effective prosecution of offenders. As such, it is an essential element of fair-trial guarantees. The European Court has held that even a 24-hour delay in access to a lawyer would involve a violation of the right to a fair trial.⁵¹⁴

In the absence of access to a lawyer, the right to fair trial may be meaningless. As will be explained below, there is a guarantee of a lawyer in criminal trials; however, this principle can also apply to the need for a lawyer and legal advice in civil and administrative law matters. A consequence of this may be the obligation on the state to pay for the provision of legal aid.⁵¹⁵

OSCE participating States have recognized that "any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he

512 HRC, Concluding observations: *Egypt*, Doc. CCPR/CO/76/EGY, 28 November 2002, para. 16(b). See also *op. cit.*, note 342, CAT, Concluding observations: *Yemen*, para. 6 and *op. cit.*, note 342, CAT, Concluding observations: *Egypt*, para. 5. See also *op. cit.*, note 497, HRC, *Nallaratnam Singarasa v. Sri Lanka*, para. 7.3.

513 Article 14(1) ICCPR.

514 "The Court recalls that in its John Murray judgment it noted that the scheme contained in the 1988 Order was such that it was of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation. It observed that, under the Order, an accused is confronted at the beginning of police interrogation with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. Under such conditions the concept of fairness enshrined in Article 6 requires that the accused have the benefit of the assistance of a lawyer already at the initial stages of police interrogation", ECtHR, *Averill v. UK*, Application no. 36408/97, 6 June 2000, paras. 55-62.

515 For the application of this principle in a separation case, see *op. cit.*, note 140, ECtHR, *Airey v. Ireland*, paras. 20-28; see also ECtHR, *Steel and Morris v. UK*, Application no. 68416/01, 15 February 2005, paras. 59-72.

does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”⁵¹⁶

Effective access to a lawyer means access must be confidential. Failure to guarantee confidentiality may mean a detainee may feel intimidated out of disclosing ill-treatment. This requirement for confidential access has long been emphasized by the HRC and it is reflected in the rules and procedures of the International Criminal Court. The European Court has emphasized

[...] that an accused’s right to communicate with his legal representative out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3 (c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.⁵¹⁷

Respect for the functions of a lawyer

OSCE participating States have declared that one of the elements of justice essential to the full expression of human rights is the recognition and protection of the independence of legal practitioners, in particular as regards conditions for recruitment and practice.⁵¹⁸

The European Court has made clear that freedom of action on the part of lawyers is critical to the maintenance of the rule of law. In one case involving the detention of 16 lawyers, the Court made a very strong statement as to the importance of not associating lawyers with the alleged causes or actions of their clients. The following was highlighted:

The Court would emphasise the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention, in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system. For this reason, allegations of such persecution in whatever form, but particularly large scale arrests and detention of lawyers and searching of lawyers’ offices, will be subject to especially strict scrutiny by the Court.⁵¹⁹

What is a criminal charge?

Fair-trial rights apply not only to court proceedings but also to the stages that precede and follow them. A state cannot escape its obligations under the right to a fair trial and the application of criminal procedural safeguards by seeking to classify criminal matters as non-criminal while retaining criminal sanctions. A criminal charge is an autonomous concept defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence” irrelevant of national definitions of

516 *Op. cit.*, note 6, 1990 Copenhagen Document, para 5.17.

517 *Op. cit.*, note 300, ECtHR, *Öcalan v Turkey*, para. 133.

518 *Op. cit.*, note 6, 1990 Copenhagen Document, para 5.13.

519 *Op. cit.*, note 493, ECtHR, *Elci and Others v. Turkey*, para. 669.

“criminal charge.”⁵²⁰ Whether something amounts to a criminal charge will depend on a number of factors, including its classification under domestic law, the nature of the offence and the severity of the penalty. Classification as non-criminal in domestic law is relevant but not definitive.

Fair-trial rights can also be engaged when someone is significantly disadvantaged by an investigation, i.e., before they are charged with a criminal offence.⁵²¹

What is an independent and impartial tribunal?

A fundamental principle and prerequisite of a fair trial is that the tribunal charged with the responsibility of making decisions in a case must be established by law, and must be competent, independent and impartial and free from any interference by the state, the parties and external influences.⁵²²

Like the right to *habeas corpus*, the right to an independent and impartial tribunal is now considered to be an absolute and non-derogable right in international human rights law. The right to trial by an independent and impartial tribunal is so central to the due process of law that the HRC has stated that it “is an absolute right that may suffer no exception.”⁵²³

International standards relating to the selection of judges and their conditions of employment have been established to safeguard the independence and competence of the judiciary.⁵²⁴

An independent and impartial tribunal requires independence from the executive. OSCE participating States are committed to ensuring the independence of judges and the impartial operation of the public judicial service.⁵²⁵ Relevant issues in determining whether the requirement of independence has been met include the manner of appointment of a tribunal’s members, their term of office, the existence of guarantees against outside pressures, and the

520 ECtHR, *Deweert v. Belgium*, Application no. 6903/75, 27 February 1980, para. 46.

521 ECtHR, *Funke v. France*, Application no. 10828/84, 25 February 1993, para. 44.

522 “[...] In order to establish whether a tribunal can be considered as ‘independent’, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence [...] As to the question of ‘impartiality’, there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect”, ECtHR, *Findlay v. UK*, Case no. 110/1995/616/706, 21 January 1997, para. 73. “In order to comply with the requirements of Article 6 regarding independence, the court concerned must be seen to be independent of the executive and the legislature at each of the three stages of the proceedings, namely the investigation, the trial and the verdict [...] More specifically, where a military judge has participated in an interlocutory decision that forms an integral part of proceedings against a civilian the whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court”, *op. cit.*, note 300, ECtHR, *Öcalan v. Turkey*, paras. 114-115; ECtHR, *McGonnell v. UK*, Application no. 28488/95, 8 February 2000, paras. 48-58.

523 HRC, *González del Río v. Peru*, Communication no. 263/1987, doc. CCPR/C/46/D/263/1987, 28 October 1992, para. 5.2.

524 *UN Basic Principles on the Independence of the Judiciary*, as adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paras. 1-7. See also CCJE, *Opinion no 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges*, doc. CCJE (2001) OP N0. 1, 23 November 2001 and CoE, Recommendation R(94)12 of the Committee of Ministers on the independence, efficiency and role of judges, 13 October 1994.

525 *Op. cit.*, note 6, 1990 Copenhagen Document, para 5.13.

question of whether the body presents an appearance of independence.⁵²⁶ Independence does not have to be guarded by statute but should be assessed on the basis of all the facts that are publicly known. Appointment by the executive or legislature is permissible, provided that the appointees are free from influence or pressure when carrying out their adjudicatory role.

In order to establish a lack of independence in the manner of appointment, it is necessary to show that the practice of appointment as a whole was unsatisfactory, or alternatively that the establishment of the particular court, or the appointment of the particular adjudicator, gave rise to a risk of undue influence over the outcome of a case.⁵²⁷

A relatively short term of office has been viewed as acceptable for unpaid appointees to administrative or disciplinary tribunals.⁵²⁸ A renewable four-year appointment for a judge who is a member of a national security court was considered “questionable”.⁵²⁹ Members of a tribunal must at a very minimum be protected against removal during their term of office.⁵³⁰ How and when judges can be removed forms a key element in securing their independence.

Independence also requires that each judge and tribunal member be free from outside instructions or pressure, whether from the executive, legislature, parties to the case or other members of the court or tribunal. A court cannot be said to be independent if the executive provides a binding interpretation of the law.⁵³¹ Also, where a tribunal’s members “include a person who is in a subordinate position in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person’s independence.”⁵³²

If the identities of judges are concealed, this also undermines their independence.⁵³³

526 See for example ECtHR, *Campbell and Fell v. UK*, Applications nos. 7819/77 and 7878/77, 28 June 1984, para. 78; *op. cit.*, note 522, ECtHR, *Findlay v. UK*, para. 73; ECtHR, *Incal v. Turkey*, Case no. 41/1997/825/1031, 9 June 1998, para. 65; ECtHR, *Le Compte, van Leuven and de Meyere v. Belgium*, Applications nos. 6878/75 and 7238/75, 23 June 1981, paras. 41-61. “[...] As to the question of impartiality, a distinction must be drawn between a subjective test, whereby it sought to establish the personal conviction of a given judge in a given case, and an objective test, aimed at ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect”, ECtHR, *Langborger v. Sweden*, Application no. 11179/84, 22 June 1989, para. 32.

527 ECommHR, *Zand v. Austria*, Application no. 7360/76, 12 October 1978, para. 69 (it is the “object and purpose of the clause in Article 6(1) requiring that the court shall be ‘established by law’ that the judicial organization in a democratic society must not depend on the discretion of the Executive, but that it should be regulated by law emanating from Parliament”).

528 *Op. cit.*, note 526, ECtHR, *Campbell and Fell v. UK*, para. 80.

529 *Op. cit.*, note 526, ECtHR, *Incal v. Turkey* para. 68.

530 “It is true that the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6(1). However, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present”, *op. cit.*, note 526, ECtHR, *Campbell and Fell v. UK*, para. 80. It is accepted that judges can be removed promptly for having committed criminal offences or for sexual harassment.

531 “[...] The minister’s involvement, which was decisive for the outcome of the legal proceedings, was not open to challenge by the applicants, who had moreover not been afforded any possibility of giving their opinion on the use of the referral procedure and the wording of the question. Only an institution that has full jurisdiction and satisfies a number of requirements, such as independence of the executive and also of the parties, merits the designation ‘tribunal’ within the meaning of Article 6(1)”, ECtHR, *Beaumartin v. France*, Application no. 15287/89, 24 November 1994, para. 38.

532 ECtHR, *Sramek v. Austria*, Application no. 8790/79, 22 October 1984, para. 42.

533 “What is more, because judges who preside over the treason trials are ‘faceless’, defendants have no way of knowing the identity of their judge and, therefore, of assessing their competence. Compounding the problem is the fact that the law does not allow these judges to recuse themselves”, IACtHR, *Castillo Petruzzi and Others v. Peru*, 30 May 1999, para. 133.

The requirement for an impartial tribunal embodies the protection against actual and presumed bias. The European Court has adopted a dual test for impartiality. The Court examines any evidence of actual bias and then makes an objective assessment of the circumstances alleged to give rise to a risk of bias.⁵³⁴

The onus of establishing actual bias is a heavy one. The test adopted for bias is that members of a tribunal must be “subjectively free of personal prejudice or bias”.⁵³⁵ There is a presumption that the court has acted impartially, which must be displaced by evidence to the contrary.⁵³⁶ The European Court will inquire whether the tribunal offered guarantees sufficient to exclude such a doubt,⁵³⁷ or whether there are ascertainable facts that may raise doubts as to a tribunal’s impartiality.⁵³⁸

In making an assessment of a tribunal’s impartiality, “even appearances may be important”.⁵³⁹ Where there is a legitimate doubt as to a judge’s impartiality, she or he must withdraw from the case.⁵⁴⁰ Any allegations of partiality must be properly investigated by the tribunal itself, unless they are manifestly devoid of merit.⁵⁴¹

The principal of impartiality demands that both judges and juries be unbiased, that proceedings be conducted fairly, and that decisions be made solely on the evidence.⁵⁴² The fact that a judge has dealt with the accused on a previous occasion will not necessarily cause the proceedings to be unfair. The key issue will be the nature and character of the previous decision.⁵⁴³

The requirement that a court or tribunal be established by law is important because the judicial organization in a democratic society must not depend upon the discretion of the execu-

534 ECtHR, *Piersack v. Belgium*, Application no. 8692/79, 1 October 1982, para. 30.

535 *Op. cit.*, note 522, ECtHR, *Findlay v. UK*, para. 73.

536 ECtHR, *Hauschildt v. Denmark*, Application no. 10486/83, 24 May 1989, para. 47.

537 *Op. cit.*, note 534, ECtHR, *Piersack v. Belgium*, para. 30 and 31; *op. cit.*, note 526, ECtHR, *Incal v. Turkey*, para. 30.

538 *Op. cit.*, note 536, ECtHR, *Hauschildt v. Denmark*, para. 48.

539 “[...] It is not possible to confine oneself to a purely subjective test. In this area, even appearances may be of a certain importance”, *op. cit.*, note 534, ECtHR, *Piersack v. Belgium*, para. 30.

540 “What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw”, *Op. cit.*, note 536, ECtHR, *Hauschildt v. Denmark*, para. 48.

541 ECtHR, *Remli v. France*, Case no. 4/1995/510/593, 30 March 1996, para. 48.

542 “The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14(1) [ICCPR]. ‘Impartiality’ of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14”, HRC, *Karttunen v. Finland*, Communication No. 387/1989, doc. CCPR/C/46/D/387/1989, 5 November 1992, para. 7.2. “In a trial by jury, the necessity to evaluate facts and evidence independently and impartially also applies to the jury; it is important that all the jurors be placed in a position in which they may assess the facts and the evidence in an objective manner, so as to be able to return a just verdict. On the other hand, the Committee observes that where alleged improprieties in the behaviour of jurors or attempts at jury tampering come to the knowledge of either of the parties, these alleged improprieties should have been challenged before the court”, HRC, *Collins v. Jamaica*, doc. CCPR/C/43/D/240/1987, 14 November 1991, para. 8.4. See also ECtHR, *Fey v. Austria*, Application no. 14396/88, 24 February 1993, paras. 25-36.

543 *Op. cit.*, note 536, ECtHR, *Hauschildt v. Denmark*, para. 50-51.

tive. It should be regulated by law emanating from the legislature that establishes at least the framework for the judicial organization.⁵⁴⁴

The tribunal for the purposes of the right to a fair trial must also be able to give a binding decision.⁵⁴⁵

Courts martial, military tribunals and military judges

The presence of serving military (or police) on a tribunal will compromise the independence of that tribunal if those service personnel are appointed by and belong to the military and are subject to military discipline. There are legitimate doubts as to independence because the military is subject to the orders of the executive and therefore reappointment of the judge is also in the hands of the executive.

These concerns cannot be cured by an assurance that no instructions will be given and that the members of the tribunal are instructed to act independently from the executive.⁵⁴⁶ In the *Öcalan* case, the Court ruled that the last-minute replacement of a military judge was insufficient to remedy the lack of independence.⁵⁴⁷

The key to the compatibility of courts martial with fair trial rights is the appointment process. Crucial to this is the involvement of civilians who are unrelated to the military hierarchy.⁵⁴⁸

544 “[...] the Commission observes that the term ‘a tribunal established by law’ in Article 6 (1) envisages the whole organizational set-up of the courts, including not only the matters coming within the jurisdiction of a certain category of courts, but also the establishment of the individual courts and the determination of their local jurisdiction [...] It is the object and purpose of the clause of Article 6 (1) requiring that the courts shall be ‘established by law’ that the judicial organization in a democratic society must not depend on the discretion of the Executive, but that it should be regulated by law emanating from Parliament. However, this does not mean that delegated legislation is as such unacceptable in matters concerning the judicial organisation. Article 6 (1) does not require the legislature to regulate each and every detail in this field by formal Act of Parliament, if the legislature establishes at least the organizational framework for the judicial organization”, ECommHR, *Zand v. Austria*, Application no. 7360/76, 16 May 1977, paras. 68-69, in Decision and Reports (D.R.) 15, p. 80.

545 “In addition, the Court finds it significant that the convening officer also acted as ‘confirming officer.’ Thus, the decision of the court martial was not effective until ratified by him, and he had the power to vary the sentence imposed as he saw fit [...] This is contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of ‘tribunal’ and can also be seen as a component of the ‘independence’ required by Article 6(1)”, *op. cit.*, note 522, ECtHR, *Findlay v. UK*, para. 77.

546 “[...] The Court attaches great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces [...] It follows that the applicant could legitimately fear that because one of the judges of the İzmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case”, *op. cit.*, note 526, ECtHR, *Incal v. Turkey*, para. 72.

547 *Op. cit.*, note 300, ECtHR, *Öcalan v. Turkey*, paras. 112-118.

548 “[...] The Court finds that the presence in a court-martial of a civilian with such qualifications and with such a pivotal role in the proceedings constitutes not only an important safeguard but one of the most significant guarantees of the independence of the court-martial proceedings.”, ECtHR, *Cooper v. UK*, Application no. 48843/99, 16 December 2003, para. 117. “[...] The lack of a civilian in the pivotal role of Judge Advocate deprives a naval court-martial of one of the most significant guarantees of independence enjoyed by other services’ courts-martial (army and air-force court-martial systems being the same for all relevant purposes - *Cooper, cit.*, para. 107), for the absence of which the Government have offered no convincing explanation”, ECtHR, *Grievies v. UK*, Application no. 57067/00, 16 December 2003, para. 89.

The HRC has held that the basic fair-trial requirements of Article 14 ICCPR apply equally to military tribunals as to ordinary tribunals.⁵⁴⁹ Of particular importance, these tribunals must satisfy the obligations of independence and impartiality. The HRC, in noting the existence in certain countries of military tribunals that try civilians, has pointed out that “the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14”.

The approach of the European Court is to ask whether the manner in which such tribunals function infringes the applicant’s right to a fair trial. The European Court places much emphasis on the confidence that the courts in a democratic society must inspire in the public, as well as in the accused. In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his or her doubts can be held to be objectively justified. Therefore, even in the context of counter-terrorism, the presence of a military judge in a case involving civilians might mean that the judge could be unduly influenced by considerations that have nothing to do with the nature of the case.”⁵⁵⁰

Military tribunals responsible for determining the legality of conduct in the context of armed conflict are governed by principles of humanitarian law, or the laws of war, most notably the Geneva Conventions and their Protocols, as well as customary international law.⁵⁵¹ Among other things, these provide for battlefield hearings to resolve doubts about the legal status of detainees captured by the military in combat.

Under these circumstances, the laws governing wars will be the primary basis upon which to proceed. However, that does not mean that human rights law plays no role or is silent during the process. Military tribunals, even within the midst of an armed conflict, must still guarantee certain minimum safeguards in relation to a fair trial. These include ensuring:

- the impartiality of the tribunal;
- the detainee has an opportunity to contest the factual basis for his/her detention;
- the detainee is given the reasons for his/her detention;
- the detainee has an opportunity to be heard within a reasonable time; and
- the detainee has the right of access to a lawyer.

What is a trial within a reasonable time?⁵⁵²

For the purposes of determining a “reasonable time” for a fair trial, time is usually seen as beginning to run when an individual is charged, although this may stretch back to arrest

549 “The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14 [...]”, *op. cit.*, note 507, HRC, General Comment No. 13, para. 4.

550 *Op. cit.*, note 526, ECtHR, *Incal v. Turkey*, para. 72.

551 For example, see Article 5 of the Convention (III) relative to the Treatment of Prisoners of War.

552 See also Chapter 11 above on the right to liberty, especially pp. 159-160.

rather than formal charge.⁵⁵³ Time ends for the purposes of a fair trial when the proceedings are over, including any appeal. The requirement to try people without undue delay can have a direct bearing on counter-terrorism strategies.⁵⁵⁴

When assessing whether a length of time can be considered reasonable, the Court takes into account the following factors:

- the complexity of the case (complexity issues may concern questions of fact as well as law);
- the conduct of the applicant;
- the conduct of the judicial and administrative authorities of the state; and
- what is at stake for the applicant (i.e., whether they are being detained).

Other relevant issues may be the nature of the facts to be established, the number of accused persons and witnesses, international elements, and the joinder or relevance of the case to other cases. For example, six years and three months was not considered unreasonable in a case concerning a difficult murder inquiry and the parallel progression of two cases.⁵⁵⁵ Sixteen years, however, was an unreasonable delay, even though the case involved a complex murder and sensitive problems of dealing with juveniles.⁵⁵⁶

The applicant is not required to co-operate actively in expediting the proceedings that might lead to his or her own conviction. Delays brought about by a defendant bringing legitimate points cannot be held against an applicant in an overall delay case. Periods spent at large are discounted.

The authorities cannot seek to justify delays because of the workload of the court or shortages of resources. In a straightforward case, a period of inactivity of one year is unduly long.⁵⁵⁷

The Human Rights Committee has found that a delay of three years between arrest for fire-bombing a car and final appeal breached Article 14.⁵⁵⁸ By contrast, a delay of four and a half years between arrest and delivery of judgement in a fraud case did not breach Article 14, as

553 "In criminal matters, the 'reasonable time' referred to in Article 6(1) begins to run as soon as a person is 'charged'; this may occur on a date prior to the case coming before the trial court [...] such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened [...] 'Charge', for the purposes of Article 6(1) may be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether 'the situation of the [suspect] has been substantially affected' [...]", ECtHR, *Eckle v. Germany*, Application no. 8130/78, 15 July 1982, para. 73.

554 The UN Special Rapporteur on the independence of judges and lawyers has pointed out that because the vast majority of the detainees at Guantánamo Bay have not been charged with an offence, despite several years of detention, as they continue to be detained the detainees' right to be tried without undue delay is being violated, *op. cit.*, note 178, *Situation of Detainees at Guantánamo Bay*, para. 38.

555 "Article 6 commands that judicial proceedings be expeditious, but it also lays down the more general principle of the proper administration of justice. In the circumstances of the case, the conduct of the authorities was consistent with the fair balance which has to be struck between the various aspects of this fundamental requirement", ECtHR, *Boddaert v. Belgium*, Case no. 65/1991/317/389, 22 September 1992, para. 39.

556 ECtHR, *Ferrantelli and Santangelo v. Italy*, Case no. 48/1995/554/640, 26 June 1996, para. 42.

557 ECtHR, *Ledonne (No. 2) v. Italy*, Application no. 38414/97, 12 May 1999, paras. 17-24.

558 "Having examined all the information available to it, the Committee fails to see in which respect this case could be regarded as complex. The sole witness was the eyewitness who gave evidence at the hearing in July 1985, and there is no indication that any further investigation was required after that hearing was completed", HRC, *Hill and Hill v. Spain*, Communication no. 526/1993, doc. CCPR/C/59/D/526/1993, 23 June 1997, para. 12.4.

“investigations into allegations of fraud may be complex and the author had not shown that the facts did not necessitate prolonged proceedings.”⁵⁵⁹

When is there a right to appeal?

Article 6, ECHR does not guarantee a right to appeal or an obligation to set up an appeal procedure.⁵⁶⁰ However, if an appeal exists, that appeal process must also be compliant with fair-trial rights.⁵⁶¹

Article 14 of the ICCPR provides that everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law. The Human Rights Committee has held that this requires full review of the conviction and sentence.⁵⁶² However, there is no right to a hearing *de novo*.

What is a fair hearing?

Access to court

The right to access to court has been read into the right to a fair hearing.⁵⁶³ The right of access to court is not absolute; by its very nature it calls for regulation. The right may be regulated in relation to ancillary aspects of the criminal justice system, such as prison disciplinary proceedings and civil actions against the police. It may also be regulated in relation to time limits on bringing a prosecution.

Equality of arms

The right to equality of arms is fundamental to the notion of a fair trial. In essence, equality of arms guarantees that everyone who is party to the proceedings must have a reasonable opportunity of presenting their case to the court under conditions that do not place them at a

559 HRC, *Wolf v. Panama*, Communication no. 289/1988, doc. CCPR/C/44/D/289/1988, 8 April 1992, para. 6.4.

560 A right to appeal in criminal matters is guaranteed under the Convention in Article 2 of the 7th Protocol.

561 “Article 6(1) of the Convention does not, it is true, compel the Contracting States to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6 [...] There would be a danger that serious consequences might ensue if the opposite view were adopted; the Principal Delegate of the Commission rightly pointed to those consequences and the Court cannot overlook them. In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision [...]”, *op. cit.*, note 506, ECtHR, *Delcourt v. Belgium*, para. 25.

562 *Op. cit.*, note 297, HRC, *Carlton Reid v. Jamaica*, para. 6.4; HRC, *Gómez Vázquez v. Spain*, Communication no. 701/1996, doc. CCPR/C/69/D/701/1996, 11 August 2000, para. 11.1.

563 “[...] Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the ‘right to a court’, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6(1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing [...]”, ECtHR, *Golder v. UK*, Application no. 4451/70, 21 February 1975, para. 36.

substantial disadvantage vis-à-vis their opponent.⁵⁶⁴ This right, which has been read into fair-trial rights, also relates to the guarantee of adequate time and facilities to prepare a defence and the right to examine witnesses.

This guiding principle of the guarantee of a fair trial is likely to raise serious challenges in the context of counter-terrorism prosecutions in terms of what must — or need not — be disclosed to the defence. The principle imposes on prosecuting and investigating authorities an obligation to disclose any material in their possession, or to which they could gain access, that may assist the accused in exonerating him or herself or in obtaining a reduction in sentence, including material that might undermine the credibility of a prosecution witness.⁵⁶⁵ This principle has been held to include access to all the materials that the judge sees, including the court's amicus brief.⁵⁶⁶

The right to be present

Where important evidence is adduced in the absence of the defendant, this will usually render the trial unfair.⁵⁶⁷ In criminal trials, it may be allowed in certain exceptional circumstances to proceed with the trial of the accused in their absence. This will only be permitted if the authorities have acted diligently but have not been able to notify the relevant person of the hearing.⁵⁶⁸ However, as a general rule the defendant has the right to be present at the trial.

A defendant does not permanently waive his rights to a fair trial by absconding. Rather, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. Minimum safeguards must therefore be guaranteed.

⁵⁶⁴ In *Rowe and Davis* the applicants were convicted of murder. The prosecution had decided, without notifying the judge, to withhold certain evidence on the grounds of public interest. On appeal, the Court of Appeal reviewed the undisclosed evidence in ex-parte hearings with submissions from the prosecution, but in the absence of the defence, and decided not to disclose the evidence. The European Court found a violation of Article 6(1) and pointed out that although disclosure of relevant evidence is not an absolute right, non-disclosure can only be permissible where it is strictly necessary. The procedures before the Court of Appeal could not remedy the initial flaw in the trial because they relied upon accounts of the issues given to them by the prosecution alone, ECtHR, *Rowe and Davis v. UK*, Application no. 28901/95, 16 February 2000, paras. 59-67. But in *Jasper and Fitt*, where the evidence had been submitted to the judge at an ex parte hearing, the Strasbourg Court held that there was no violation, see ECtHR, *Jasper v. UK*, Application no. 27052/95, 16 February 2000, paras. 50-58; and ECtHR, *Fitt v. UK*, Application no. 29777/96, 16 February 2000, paras. 43-50.

⁵⁶⁵ "As regards the interpretation of the term 'facilities', the Commission notes firstly that in any criminal proceedings brought by a state authority, the prosecution has at its disposal, to back the accusation, facilities deriving from its powers of investigation supported by judicial and police machinery with considerable technical resources and means of coercion. It is in order to establish equality, as far as possible, between the prosecution and the defence that national legislation in most countries entrusts the preliminary investigation to a member of the judiciary or, if it entrusts the investigation to the Public Prosecutor's Department, instructs the latter to gather evidence in favour of the accused as well as evidence against him. It is also, and above all, to establish the same equality that the 'rights of the defence', of which Article 6, paragraph 3 of the Convention gives a non-exhaustive list, have been instituted [...] the Commission takes in view that the 'facilities' which everyone charged with a criminal offense should enjoy include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings. Furthermore, the Commission has already recognised that although a right of access to the prosecution file is not expressly guaranteed by the Convention, such a right can be inferred from Article 6, paragraph 3 (b). It matters little, moreover, by whom and when the investigations are ordered or under whose authority they are carried out. In the view of the diversity of legal systems existing in the states parties to the Convention the Commission cannot restrict the scope of the term 'facilities' to acts carried out during certain specified phases of the proceedings, e.g. the preliminary investigation [...]", ECommHR, *Jespers v. Belgium*, Application no. 8403/78, 14 December 1981, paras. 55-56, in Decisions and Reports (D.R.) 27, p. 87.

⁵⁶⁶ ECtHR, *Göç v. Turkey*, Application no. 36590/97, 11 July 2002, paras. 53-58.

⁵⁶⁷ ECtHR, *Barberà, Messegué and Jabardo v. Spain*, Application no. 10590/83, 6 December 1988, paras. 81-89.

⁵⁶⁸ ECtHR, *Goddi v. Italy*, Application no. 8966/80, 9 April 1984, paras. 26-32.

In the absence of the possibility of a retrial in the presence of the accused, the primary concern for the authorities must be whether the proceedings held in the accused's absence were compatible with human rights standards and the right to a fair trial in particular. This includes whether they guaranteed a fair determination of the merits of the charge, in respect of both law and fact.⁵⁶⁹

Defendants can be excluded from their trials where they cause disruption to the proceedings, refuse to come to court or make themselves too ill to attend, provided that their interests are protected by the presence of their lawyers.⁵⁷⁰

The right to a fair trial may not be violated under certain circumstances where a defendant has waived his or her right to be present either expressly or impliedly by failing to attend the hearing after having been given effective notice of it. That waiver must be clear and unequivocal.⁵⁷¹

The Human Rights Committee has held that criminal trials *in absentia* will only be tolerated when the defendant has been given ample notice, and adequate opportunity, to attend the proceedings.⁵⁷²

An adversarial hearing

The notion of an adversarial hearing requires that all evidence and submissions be made in the presence of the defendant and in circumstances in which she or he has the opportunity to comment upon them.⁵⁷³ This applies even where submissions are made by an independent party such as an amicus lawyer and where those submissions are wholly objective.

Effective participation in the hearing

The right to participate in the hearing requires that the defendant is able to hear and follow the proceedings. In *T. & V.*, a case involving two 11-year-old boys on trial for the murder of a

569 ECtHR, *Poitrinol v. France*, Application no. 14032/88, 23 November 1993, para. 31.

570 “[...] The rights secured by Article 6(3) are those of the accused and the defence in general [...] In order to determine whether these rights were respected, it is not sufficient to consider the situation in which the accused himself is placed: consideration must also be given to the situation in which the defence as a whole is placed [...]”, ECommHR, *Ensslin, Baader and Raspe v. the Federal Republic of Germany*, Applications nos. 7572/76, 7586/76 and 7587/76, 8 July 1978, para. 21 (in this case the applicants were unable to attend trial because of ill health induced by hunger strike).

571 “Everyone charged with a criminal offence has the right to be defended by counsel. For this right to be practical and effective, and not merely theoretical, its exercise should not be made dependent on the fulfilment of unduly formalistic conditions: it is for the courts to ensure that a trial is fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence, is given the opportunity to do so”, ECtHR, *Lala v. the Netherlands*, Case no. 25/1993/420/499, 23 August 1994, para. 34.

572 HRC, *Maleki v. Italy*, Communication no. 699/1996, doc. CCPR/C/66/D/699/1996, 27 July 1999, para. 9.4.

573 ECtHR, *Ruiz-Mateos v. Spain*, Application no.12952/87, 26 June 1993, para. 63.

toddler, it was held that they did not have a fair trial because, due to their age, they were unable to properly participate in and understand the proceedings.⁵⁷⁴

Public hearing

The public nature of hearings is an important safeguard for the individual and the interests of society at large. Apart from exceptional circumstances, a hearing must be generally open to the public including the press. Moreover, even in cases where the public is excluded, the judgement, with certain strictly defined exceptions, must be made public. The right to a public hearing generally includes the right to an oral hearing.⁵⁷⁵

There is a presumption that ordinary criminal proceedings should be public, even when they involve dangerous individuals. Although aspects of that hearing may be held in private, where this does occur the rights of the defence must be safeguarded.

It has been accepted that it would impose a disproportionate burden on the authorities to require prison disciplinary hearings to be held in public.⁵⁷⁶ However, where those disciplinary proceedings amount to the determination of a criminal charge, convicted prisoners have a right to be legally represented.⁵⁷⁷

Reasons for decisions

Article 6(1) obliges courts to give reasons for their judgements. This obligation does not extend to providing a detailed answer to every argument. The courts must indicate with sufficient clarity the grounds on which they base their decisions, because it is these reasons that will be taken into account in making it possible for the accused to appeal.⁵⁷⁸

574 "The Court does not consider that it was sufficient for the purposes of Article 6(1) that the applicant was represented by skilled and experienced lawyers. This case is different from that of *Stanford* [...] where the Court found no violation arising from the fact that the accused could not hear some of the evidence given at trial, in view of the fact that his counsel, who could hear all that was said and was able to take his client's instructions at all times, chose for tactical reasons not to request that the accused be seated closer to the witnesses. Here, although the applicant's legal representatives were seated, as the Government put it, 'within whispering distance', it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence", ECtHR, *T. v. UK*, Application no. 24724/94, 16 December 1999, para. 88.

575 "[...] In order to guarantee the rights of the defence enshrined in article 14(3), of the Covenant, in particular those contained in subparagraphs (d) and (e), all criminal proceedings must provide the person charged with the criminal offence the right to an oral hearing, at which he or she may appear in person or be represented by counsel and may bring evidence and examine the witnesses", HRC, *Rodríguez Orejuela v. Colombia*, Communication no. 848/1999, doc. CCPR/C/75/D/848/1999, 20 September 2002, para. 7.3.

576 *Op. cit.*, note 526, ECtHR, *Campbell and Fell v. UK*, paras. 86-88.

577 ECtHR, *Ezeh and Connors v. UK*, Applications nos. 39665/98 and 40086/98, 9 October 2003, spec. paras. 120-138.

578 "The Contracting States enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6 (art. 6). The national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him [...]", ECtHR, *Hadjianastassiou v. Greece*, Application no. 12945/87, 16 December 1992, para. 33.

Specific guarantees in relation to criminal trials

The presumption of innocence

A fundamental principle of the right to fair trial is the right of every person charged with a criminal offence to be presumed innocent unless and until proven guilty in accordance with the law after a fair trial.⁵⁷⁹

This right applies from when criminal charges are first laid, right through until a conviction is confirmed following a final appeal. It applies to all public officials, including prosecutors and police.⁵⁸⁰ The presumption of innocence can be infringed by, for example, unqualified public statements by the police or prosecution which refer to an individual as the perpetrator of an offence.⁵⁸¹ Public officials in their statements must therefore take care with their choice of words before a person has been tried and found guilty of an offence.⁵⁸² Whether a statement of a public official is in breach of the presumption of innocence must be determined in the context of the particular circumstances in which the statement is made.⁵⁸³

The presumption of innocence imposes the burden of proof on the prosecution: if there is reasonable doubt, the accused must not be found guilty.⁵⁸⁴ Any doubt should benefit the accused. The presumption of innocence requires that members of the court should not start with the pre-conceived idea that the accused has committed the offence charged. Moreover, procedures during the trial must not impinge on the presumption of innocence. For example, holding the accused in a cell within the courtroom or requiring the accused to wear handcuffs, shackles or prison uniform, could impact on the presumption of innocence. Once a person is finally acquitted, that judgment is binding on all state authorities, and therefore police and prosecutors should refrain from questioning a person's innocence following acquittal.

Acquittal of a criminal offence does not prohibit courts from establishing civil liability based on the same set of facts and using a lower standard of proof. Acquittal, however, may also

579 Cf. Article 11 UDHR, Article 14(2) ICCPR, Article 6(2) ECHR.

580 *Op. cit.*, note 507, HRC, General Comment No. 13, para. 7. The presumption of innocence is *not*, however, considered to be violated if the authorities inform the public about criminal investigations and in doing so name a suspect, or state that a suspect has been arrested or has confessed, provided there is no declaration that the person is guilty. "Article 6(2) of the Convention, laying down the principle of presumption of innocence, is certainly first of all a procedural guarantee applying in any kind of criminal procedure [...] However, the Commission is of the opinion that its application is wider than this. It is a fundamental principle embodied in this Article which protects everybody against being treated by public officials as being guilty of an offence before this is established according to law by a competent court. Article 6 (2), therefore, may be violated by public officials if they declare that somebody is responsible for criminal acts without a court having found so. This does not mean, of course, that the authorities may not inform the public about criminal investigations. They do not violate Article 6(2) if they state that a suspicion exists, that people have been arrested, that they have confessed etc. What is excluded, however, is a formal declaration that somebody is guilty", ECommHR, *Krause v. Switzerland*, Application no. 7986/77, 3 October 1978, pp. 75-76; and ECtHR, *Worm v. Austria*, Case no. 83/1996/702/894, 29 August 1997, paras. 47-59).

581 ECtHR, *Alenet de Ribemont v. France*, Case no. 3/1994/450/529, 23 January 1995, para. 36 ("[...] in the instant case some of the highest-ranking officers in the French police referred to Mr Alenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder [...] This was clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority. There has therefore been a breach of Article 6(2)", *ibid.*, para. 41).

582 ECtHR, *Daktaras v. Lithuania*, Application no. 42095/98, 10 October 2000, paras. 41-42.

583 *Ibid.*, para. 43; see also ECtHR, *Butkevičius v. Lithuania*, Application no. 48297/99, 26 March 2002, para. 50.

584 *Op. cit.*, note 225, Rome Statute Article 66(3) and *op. cit.*, note 507, HRC, General Comment No. 13, para. 7.

be relevant in relation to compensation proceedings, which could raise suspicions about an individual's guilt.

The presumption of innocence may also have implications for the media and the manner in which they report stories. Where news stories state or imply the guilt of an individual before their conviction, this can undermine the presumption of innocence. Therefore, the media need to be aware of their responsibilities in this area.⁵⁸⁵ Pre-trial publicity can prejudice a defendant's prospects of a fair trial; therefore, it is possible to limit pre-trial publicity without prejudicing the right to freedom of expression protected by Article 10. However, a proper balance between a fair trial and a free press must be maintained.⁵⁸⁶ The media may also prejudice the course of justice by publishing the names of witnesses, which could lead to intimidation of those witnesses.

The presumption of innocence might not be breached by presumptions of fact or law as long as they are within reasonable limits.⁵⁸⁷ Therefore, an applicant who was found with drugs in his luggage was presumed to have known that they were there.

The right to silence

The European Court has held that the right to a fair trial includes "the right of anyone charged with a criminal offence [...] to remain silent and not to contribute to incriminating himself."⁵⁸⁸

The right to silence is not an absolute right. In a case involving a suspected terrorist who was found destroying potential evidence, it was held that it was incompatible with the right to a fair trial to base a conviction solely or mainly on the accused person's silence or on a refusal to answer questions or to give evidence. However, it was also held that where there was clearly a call for the accused to challenge the persuasiveness of the evidence produced by

585 The Declaration of the Committee of Ministers of the Council of Europe on freedom of expression and information in the media in the context of the fight against terrorism (2 March 2005), is helpful in identifying these responsibilities on the media to respect the presumption of innocence.

586 "[...] Provided that it does not overstep the bounds imposed in the interests of the proper administration of justice, reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement under Article 6(1) of the Convention that hearings be public. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them. This is all the more so where a public figure is involved, such as, in the present case, a former member of the Government. Such persons inevitably and knowingly lay themselves open to close scrutiny by both journalists and the public at large [...] Accordingly, the limits of acceptable comment are wider as regards a politician as such than as regards a private individual [...] However, public figures are entitled to the enjoyment of the guarantees of a fair trial set out in Article 6, which in criminal proceedings include the right to an impartial tribunal, on the same basis as every other person. This must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice", *op. cit.*, note 580, *ECtHR, Worm v. Austria*, para. 50; see also *ECtHR, Craxi (No.1) v. Italy*, Application no. 34896/97, 5 December 2002, paras. 96-107.

587 "[...] Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law [...] Article 6(2) does not [therefore] regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence", *ECtHR, Salabiaku v. France*, Application no. 10519/83, 7 October 1988, para. 28.

588 *Op. cit.*, note 521, *ECtHR, Funke v. France*, para. 44.

the prosecution and that explanation was not forthcoming, it was possible to draw inferences under those limited circumstances.⁵⁸⁹

The Court has also held that where inferences may be drawn from a defendant's silence during police interviews, it is essential that the defendant should have access to a lawyer before the interview. Where an accused exercises his right to silence based on advice given by his or her lawyer, the trial judge must take this into account when drawing inferences from the exercise of the right to silence.⁵⁹⁰

Freedom from self-incrimination

The right not to incriminate oneself is an essential guarantee to ensure that the prosecution in a criminal case prove their case against the defendant without resort to evidence obtained through methods of coercion.⁵⁹¹ Protection from self-incrimination applies to all criminal proceedings and it is not confined to statements of admission of wrongdoing nor to remarks that are directly incriminating.⁵⁹²

In *Saunders v UK*, the applicant, who was a successful business man, was compelled to give evidence under an investigation by the UK Department of Trade. That evidence was then used as the basis of a prosecution against him. The Court found no violation in the compulsory questioning of the applicant, but it did rule that it was a violation of the presumption of innocence and the right to a fair trial to then use the answers in criminal proceedings against him.⁵⁹³

The right to protection from self-incrimination is probably not absolute. For example, a presumption that the owner of a car is responsible for speeding and parking offences does not necessarily breach the protection against self-incrimination.⁵⁹⁴

589 "The question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer. The national court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if the evidence against the accused 'calls' for an explanation which the accused ought to be in a position to give that a failure to give any explanation 'may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty'. Conversely if the case presented by the prosecution had so little evidential value that it called for no answer, a failure to provide one could not justify an inference of guilt [...]", *op. cit.*, note 448, ECtHR, *John Murray v. UK*, para. 51.

590 ECtHR, *Beckles v. UK*, Application no. 44652/98, 8 October 2002, paras. 57-66.

591 *Op. cit.*, note 507, HRC, General Comment No. 13, para. 14. "[...] the wording of article 14(3)(g) i.e., that no one shall 'be compelled to testify against himself or to confess guilt' -must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession", HRC, *Kelly v. Jamaica*, Communication no. 253/1987, doc. CCPR/C/41/D/253/1987, 10 April 1991, para. 5.5; see also ECtHR, *Allan v. UK*, Application no. 48539/99, 5 November 2002, para. 44; ECtHR, *Saunders v. UK*, Case no. 43/1994/490/572, 29 November 1996, paras. 68-69.

592 ECtHR, *Heaney and McGuinness v. Ireland*, Application no. 34720/97, 21 December 2000, para. 57.

593 *Op. cit.*, note 591, ECtHR, *Saunders v. UK*, paras. 67-76.

594 ECommHR, *Tora Tolmos v. Spain*, Application no. 23816/94, 17 May 1995, para. 2.

Specific procedural safeguards in relation to criminal trials⁵⁹⁵

In addition to the guarantees set out above, defendants are entitled to a number of procedural rights or safeguards. These include:

- *To be informed promptly in a language which he understands and in detail, of the nature and cause of the accusation against him.*⁵⁹⁶ This right links directly with the right to liberty.⁵⁹⁷ Its purpose is to enable individuals to begin preparing their defence.⁵⁹⁸ In most circumstances the information concerning the charge should be detailed.⁵⁹⁹ It is perfectly acceptable to amend a charge against a defendant, as long as she or he is informed in a language that is understood and is given adequate time to prepare a defence.
- *To have adequate time and facilities for the preparation of his defence.*⁶⁰⁰ The adequate time requirement depends on the nature and complexity of the case.⁶⁰¹ Where there is a late change of lawyer an adjournment may be necessary.⁶⁰² This right is also directly relevant to equality of arms.⁶⁰³
- *To be given free legal assistance when the interests of justice so require.*⁶⁰⁴ It may be that the state is required to provide legal aid at all stages of the proceedings, where it is in the interests of justice to do so. Where deprivation of liberty is at stake, the interests of justice, in principle, call for free legal assistance.⁶⁰⁵ Relevant to the interests of justice test are:
 - the complexity of the case;
 - the ability of the defendant to understand and present the relevant arguments without assistance; and
 - the severity of the possible penalty.

Despite the absolute language of this right, a court is not prevented from requiring that the defendant be represented by a court-imposed lawyer, and in legal aid cases defendants do

595 In the counter-terrorism context, these safeguards should be read in the light of the Council of Europe Guidelines on Human Rights and the Fight against Terrorism, which elaborate upon them in the context of trials for terrorism.

596 Article 14(3)(a) ICCPR and Article 6(3)(a) ECHR.

597 Article 9(2) ICCPR and Article 5(2) ECHR.

598 ECtHR, *Brožicek v. Italy*, Application no. 11152/84, 19 December 1989, paras. 38-42 (in *Brožicek* the applicant was German and therefore he needed the charge properly explained to him in a language which he could understand).

599 ECtHR, *Pélissier and Sassi v. France*, Application no. 25444/94, 25 March 1999, para. 56.

600 Article 14(3)(b) ICCPR and Article 6(3)(b) ECHR.

601 *Op. cit.*, note 300, ECtHR, *Öcalan v Turkey*, para. 148 (the Court found violation of Article 6 in as far as the applicant “had no assistance from his lawyers during questioning in police custody; he was unable to communicate with his lawyers out of the hearing of third parties; he was unable to gain direct access to the case file until a very late stage in the proceedings; restrictions were imposed on the number and length of his lawyers’ visits; lastly, his lawyers were not given proper access to the case file until late in the day. The Court finds that the overall effect of these difficulties taken as a whole so restricted the rights of the defence that the principle of a fair trial, as set out in Article 6, was contravened”).

602 ECtHR, *Goddi v. Italy*, Application no. 8966/80, 9 April 1984, para. 31.

603 “[...] Under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his or her opponent. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice [...] The Court further considers that respect for the rights of the defence requires that limitations on access by an accused or his or her lawyer to the court file must not prevent the evidence being made available to the accused before the trial and the accused’s being given an opportunity to comment on it through his lawyer in oral submissions”, *op. cit.*, note 300, ECtHR, *Öcalan v Turkey*, para. 140.

604 Article 14(3)(d) ICCPR and Article 6(3)(c) ECHR.

605 ECtHR, *Benham v. UK*, Case no. 7/1995/513/597, 24 May 1996, para. 61.

not have an unqualified right to a lawyer of their choice.⁶⁰⁶ However, allocating a lawyer to the defendant if that lawyer is manifestly unable to provide effective representation does not satisfy the conditions of the right.⁶⁰⁷

- *To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.*⁶⁰⁸ This goes to the heart of equality of arms between the parties before the court.⁶⁰⁹ It requires positive steps to be taken to ensure that the defendant can confront and call witnesses. There are certain circumstances where hearsay evidence is permitted, but these must be kept within strict limits.⁶¹⁰ The question in each case is whether there has been overall fairness. This might include admitting the hearsay evidence of witnesses who are too ill to attend court or who have died.⁶¹¹ In addition, it is possible to admit hearsay evidence of witnesses who genuinely fear reprisals if they attend court, provided that there are counter-balancing factors to protect the defendant. While this may be permissible, it would generally be unfair to base a conviction on such evidence.⁶¹² Similar principles apply in relation to anonymous witnesses, as long as there are effective counter-balancing factors to protect the defendant.⁶¹³ Anonymous evidence from law-enforcement officers, however, should be very strictly justified.⁶¹⁴ By the same token, reliance on the evidence of informers

606 ECtHR, *Croissant v. Germany*, Application no. 13611/88, 25 September 1992, paras. 25-38.

607 “[...] mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations. Adoption of the Government’s restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) and the structure of Article 6 taken as a whole; in many instances free legal assistance might prove to be worthless”, ECtHR, *Artico v. Italy*, Application no. 6694/74, 13 May 1980, para. 33.

608 Article 14(3)(e) ICCPR and Article 6(3)(d) ECHR.

609 *Op. cit.*, note 268, ECtHR, *McKerr v. UK.*, para. 134.

610 *Op. cit.*, note 32, ECtHR, *Van Mechelen and Others v. the Netherlands*, paras. 49-58.

611 ECtHR, *Bricmont v. Belgium*, Application no. 10857/84, 7 July 1989, paras. 87-89.

612 “The testimony [...] constituted the sole basis for the applicant’s conviction, after having been the only ground for his committal for trial. Yet neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial. The Court is fully aware of the undeniable difficulties of the fight against drug-trafficking — in particular with regard to obtaining and producing evidence — and of the ravages caused to society by the drug problem, but such considerations cannot justify restricting to this extent the rights of the defence of ‘everyone charged with a criminal offence’”, ECtHR, *Saidi v. France*, Application no. 14647/89, 20 September 1993, para. 44.

613 “It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify”, *op. cit.*, note 456, ECtHR, *Doorson v. the Netherlands*, paras. 70 and 72-75 (the anonymous witnesses were questioned at the appeals stage by an investigating judge who was aware of their identity (even if the defence was not) and the counsel was put in the position to ask the witnesses any question deemed to be in the interests of the defence except in so far as they might lead to the disclosure of their identity under these conditions, the Court found no violation of Article 6).

614 “[T]he balancing of the interests of the defence against arguments in favour of maintaining the anonymity of witnesses raises special problems if the witnesses in question are members of the police force of the State. Although their interests — and indeed those of their families — also deserve protection under the Convention, it must be recognised that their position is to some extent different from that of a disinterested witness or a victim. They owe a general duty of obedience to the State’s executive authorities and usually have links with the prosecution; for these reasons alone their use as anonymous witnesses should be resorted to only in exceptional circumstances. In addition, it is in the nature of things that their duties, particularly in the case of arresting officers, may involve giving evidence in open court [...] Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied”, *op. cit.*, note 32, ECtHR, *Van Mechelen and others v. the Netherlands*, para. 56 and 58.

and undercover officers is not prohibited but safeguards are necessary to protect the rights of the defence.⁶¹⁵

- *To have the free assistance of an interpreter if he cannot understand or speak the language used in court.*⁶¹⁶ The court has an obligation to ensure the quality of interpretation. The right extends to all documentary material disclosed, but this does not necessarily mean that all translations must be in written form. In limited circumstances some oral translation is acceptable.⁶¹⁷ The right is not subject to qualification, even if the accused is subsequently convicted, she or he cannot be ordered to pay the costs of an interpreter.⁶¹⁸ However, this right does not provide a right to conduct proceedings in the language of the defendant's choice.

Issues arising out of the right to a fair criminal trial

Entrapment

It is unfair under the right to a fair trial to prosecute an individual for a criminal offence incited by undercover agents, which, but for the incitement, would probably not have been committed. Even the public interest in the detection of serious crime cannot justify the instigation of criminal offences by undercover agents.⁶¹⁹

The law governing the use of undercover agents must be clear and precise. It must also provide safeguards against abuse. So long as informers and/or undercover officers keep within the reasonable limits in relation to surveillance, no issues arise under the right to a fair trial, neither does any privacy issue arise under the right to respect for private life.⁶²⁰ The defence must, however, have the opportunity of challenging any evidence obtained in this manner.

Unlawfully obtained evidence

Evidence obtained in breach of absolute rights, such as protection from inhuman and degrading treatment, or torture, must always be excluded from trial.⁶²¹ Article 15 of the UN Convention against Torture specifically requires this, as does the case law of the courts and tribunals responsible for the guarantee of human rights.

615 ECtHR, *Lüdi v. Switzerland*, Application no. 12433/86, 15 June 1992, para. 49 ("In this case the person in question was a sworn police officer whose function was known to the investigating judge. Moreover, the applicant knew the said agent, if not by his real identity, at least by his physical appearance, as a result of having met him on five occasions [...] However, neither the investigating judge nor the trial courts were able or willing to hear Toni as a witness and carry out a confrontation which would enable Toni's statements to be contrasted with Mr Lüdi's allegations; moreover, neither Mr Lüdi nor his counsel had at any time during the proceedings an opportunity to question him and cast doubt on his credibility. Yet it would have been possible to do this in a way which took into account the legitimate interest of the police authorities in a drug trafficking case in preserving the anonymity of their agent, so that they could protect him and also make use of him again in the future"). See also CoE, Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, 20 April 2005.

616 Article 14(3)(f) ICCPR and Article 6(3)(e) ECHR.

617 ECtHR, *Kamasinski v. Austria*, Application no. 9783/82, 19 December 1989, para. 74.

618 ECtHR, *Öztürk v. Germany*, Application no. 8544/79, 21 February 1984, paras. 57-58.

619 ECtHR, *Teixeira de Castro v. Portugal*, Case no. 44/1997/828/1034, 9 June 1998, paras. 31-39.

620 *Op. cit.*, note 615, ECtHR, *Lüdi v. Switzerland*, para. 40 and 49.

621 ECommHR, *Austria v. Italy*, Application no. 788/60, Report of 30 March 1963, paras. 179-180.

The mere fact that evidence has been obtained in breach of other human rights, notably the right to respect for private life, does not automatically lead to its exclusion.⁶²² The question that must be answered is whether the proceedings as a whole, including the way in which evidence was obtained, were fair.⁶²³

In determining whether a trial has been fair where unlawfully obtained evidence in breach of privacy rights has been relied on, the following factors are relevant:

- whether there was a breach of domestic law as well as the Convention;
- whether the breach of Convention rights was in good faith or not;
- whether there was any element of entrapment or inducement;
- whether the unlawfully obtained evidence is the only evidence against the defendant (this is relevant but not determinative).

Victims' rights

The right to a fair trial is not solely concerned with the rights of the defence. It will also protect the rights of victims and witnesses. It does this principally under their right to respect for private life as well as through their standing in criminal proceedings and access to justice through civil proceedings.⁶²⁴

Fair-trial rights and counter-terrorism

The extent to which fair trial rights may be permissibly interfered with in a counter-terrorism context is controversial. Forceful arguments can be put that it is precisely at the point of arresting, charging and prosecuting an individual for terrorism-related crime that the full benefits of due process ought to be guaranteed. The real test of a society's commitment to human rights is the extent to which they are enforced even for the worst criminals. Moreover, if a suspected terrorist is not guaranteed a fair trial as commonly understood, he or she could be seen as a martyr. Providing a fair trial, therefore, averts the danger that an alleged terrorist can be portrayed as a victim.

However, as a result of the nature of terrorist crimes and the difficulties in prosecuting them, the traditional safeguards associated with the right to a fair trial may be inappropriate to ensure those that are guilty are convicted and that witnesses feel able to give evidence without fear of threat.

In the Council of Europe Guidelines on Human Rights and the Fight against Terrorism, the right to a fair trial is expressed in Guideline IX in the following way:

1. A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law.
2. A person accused of terrorist activities benefits from the presumption of innocence.

622 ECtHR, *Khan v. UK*, Application no. 35394/97, 12 May 2000, para. 26; and ECtHR, *Schenk v. Switzerland*, Application no. 10862/84, 12 July 1988, para. 46.

623 See *op. cit.*, note 591, ECtHR, *Allan v. UK*, , para. 42 (where the eliciting of a confession through placing a police informant in the defendant's cell in violation of privacy rights violated the right to a fair trial, an especially the right to silence and privilege against self-incrimination).

624 See for example, *op. cit.* note 33, ECtHR, *Z. v. Finland*, para. 113.

3. The imperatives of the fight against terrorism may nevertheless justify certain restrictions to the right of defence, in particular with regard to:
 - (i) the arrangements for access to and contacts with counsel;
 - (ii) the arrangements for access to the case-file;
 - (iii) the use of anonymous testimony.
4. Such restrictions to the right of defence must be strictly proportionate to their purpose, and compensatory measures to protect the interests of the accused must be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance.

On a case-by-case basis the European Court has accepted that strictly necessary limits can be imposed on the constituent elements of fair trial as long as, in the context of that particular trial, it was fair.⁶²⁵ Paragraph 3 of Guideline IX reflects this case law. However, it remains to be seen how the case law will evolve on this issue.

The Rome Statute of the International Criminal Court includes the following as the basic requirements for a fair trial in the context of international criminal law:⁶²⁶

- the presumption of innocence;
- privilege against self-incrimination;
- the right to communicate with legal representatives freely and in confidence;
- the right to remain silent without such silence being a consideration in the determination of innocence or guilt;
- the right not to make an un-sworn oral or written statement in one's own defence; and
- the right not to have imposed upon the accused any reversal of the burden of proof or onus of rebuttal.

If, in the context of war crimes (which can include acts of terrorism), the traditional notions of the right to a fair trial are guaranteed, it is difficult to accept the necessity for restricting fair-trial rights in relation to terrorism *per se*.

In relation to the right to liberty and the right to a fair trial, the draft UN guidelines on human rights and terrorism point out that “no person shall be arrested based on evidence obtained by means of a search that violates international standards” and “forcible transfers of persons on the pretext of securing evidence without compelling grounds permitted under international law constitute crimes against humanity.” Specifically in the context of a fair trial, persons have “at all times the right to counsel from the moment of arrest”. Furthermore, “the fundamental requirements of fair trial must at all times be respected”. Even if media access is restricted, “there must be some mechanism for observation and review of any trial.” Similarly, “no person can be convicted of a terrorist act unless that person has been fully able to present witnesses and evidence in his or her defence and to cross examine witnesses and evidence

625 “The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court’s task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair”, see for example *op. cit.*, note 456, HR, *Doorson v. the Netherlands.*, para. 67; *op. cit.*, note 32, ECtHR, *Van Mechelen and Others v. the Netherlands*, para. 50.

626 *Op. cit.*, note 225, Rome Statute, Article 67(1)(b, g, h and i).

against him or her, and unless the trial has had all other elements of fairness, impartiality or other requirements of fundamental legal principles.”⁶²⁷

Sentencing of those convicted of terrorism

The fair-trial requirements still apply at the sentencing stage, although different considerations are engaged. For example, the presumption of innocence ceases to apply,⁶²⁸ and evidence that would have been inadmissible at the trial can be relied upon. Previous convictions may also be taken into consideration.

International human rights law protects against retrospective criminal penalties.⁶²⁹ This is an absolute right. It protects individuals from being convicted of criminal offences that did not exist at the time the act was committed, and prohibits the imposition of a more severe penalty for an offence than that which applied at the time the offence was committed.⁶³⁰ As an absolute right, it may not be derogated from even in time of national emergency or war.

Where an individual is sentenced for conduct protected as a qualified right under human rights standards, such as freedom of expression, any punishment must be proportionate. Custodial sentences for offences relating to free speech that fall short of incitement to violence, can rarely, if ever be justified.⁶³¹

Preventive sentencing, where part of the sentence is designed not just to deal with retribution and deterrence but also to protect the community from specific and identifiable danger can be permissible so long as it is lawful and that *habeas corpus* safeguards are built into the process. This means that the lawfulness of the detention can be challenged periodically before a competent court and release can be ordered.

The sentencing of juveniles should reflect their youth and potential to mature and therefore change.

627 *Op. cit.*, note 56, UN Sub-Commission on Human Rights, “Updated framework draft of principles and guidelines concerning human rights and terrorism”, paras. 38-52.

628 “[The presumption of innocence] deals only with the proof of guilt and not with the kind or level of punishment. It thus does not prevent the national judge, when deciding upon the penalty to impose on an accused lawfully convicted of the offence submitted to his adjudication, from having regard to factors relating to the individual’s personality. Before the Supreme Military Court Mr. Dona and Mr. Schul were ‘proved guilty according to law’ as concerns the offences there alleged against them [...] It was for the sole purpose of determining their punishment in the light of their character and previous record that the said Court also took into consideration certain similar, established facts the truth of which they did not challenge. The Court did not punish them for these facts in themselves”, *op. cit.*, note 168, ECtHR, *Engel and Others v. The Netherlands*, para. 90.

629 See Article 7 ECHR, which corresponds with Article 15 ICCPR. Article 15 ICCPR states:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

630 ECtHR, *Welch v. UK*, Case no. 1/1994/448/527, 25 January 1995, paras. 22-36.

631 See pages 227-232 below.

Protection from inhuman and degrading treatment is also relevant in the sentencing process. For example, corporal punishment is unacceptable and the conditions of the punishment regime must not cross the threshold of inhuman or degrading.⁶³²

Avoiding discriminatory treatment and undue damage to family life should also be taken into account in relation to sentencing. For example, the dispersal of prisoners may raise a number of human rights issues including the right of prisoners to manifest their religion effectively.

Penalties for those engaging in terrorism: fines, forfeiture, control orders, confiscation orders and asset freezing

Fines, forfeiture of property, confiscation orders and asset freezing following a conviction will comply with human rights standards as long as they satisfy the tests of proportionality and non-retroactivity.

If such penalties are imposed as a result of administrative or civil actions, the key question will be whether or not the penalties are essentially of a criminal character. If they can be defined as criminal penalties then before they are imposed on an individual, the full benefits of criminal law must be applied. This includes all the procedural safeguards contained in the right to a fair trial in the determination of a criminal charge and the relevant aspects of the right to liberty. The tests to be applied are therefore the same as for a criminal charge.⁶³³ As has been identified above, these are the domestic classification, the nature of the offence, and the severity of the potential penalty that the person risks incurring.

In circumstances where a confiscation order is made and there is no threat of criminal proceedings for failure to pay, then it is unlikely that the confiscation order will be considered a criminal penalty.⁶³⁴

Administrative (i.e., non-criminal) orders that confiscate, or otherwise interfere with property should observe principles of proportionality. Such interferences with property will inevitably involve civil rights; therefore, fair trial guarantees are required. For those countries under the jurisdiction of the European Convention on Human Rights, the property rights of the individuals concerned need to be taken into account.⁶³⁵ Interference with property will be lawful if it is in the public interest and reasonable to do so. If it is not possible to challenge effectively the confiscation order before an independent and impartial tribunal, then

632 "The Court does not consider it relevant that the sentence of judicial corporal punishment was imposed on the applicant for an offence of violence", *op. cit.*, note 137, ECtHR, *Tyrer v. UK*, para. 34.

633 "The Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. This is made especially clear by Article 7. Such a choice, which has the effect of rendering applicable Articles 6 and 7, in principle escapes supervision by the Court. The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a 'mixed' offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 and even without reference to Articles 17 and 18, to satisfy itself that the disciplinary does not improperly encroach upon the criminal", *op. cit.*, note 168, ECtHR, *Engel and others v. Netherlands*, para. 81.

634 ECtHR, *Air Canada v. UK*, Application no. 18465/91, 5 May 1995, paras. 52-55.

635 Cf. Protocol 1 (CETS No. 9), Article 1.

the reasonableness of the order may be in question and there may be an infringement of the right to property.

Control orders that regulate the conduct and movement of individuals may interfere with the right to liberty and therefore have to be justified by reference to that right.⁶³⁶ If they cannot be, the interference with liberty will be unlawful.

Orders limiting an individual person's right to freedom of expression, religious freedom, or freedom of association and assembly, whether they are detained or not, will engage those rights, and therefore have to be compatible with them. The tests of legality, necessity, proportionality and non-discrimination will have to be satisfied. If such orders limit civil rights, they may require a fair trial (although probably not to the criminal standard). Similarly, orders that interfere with privacy rights and physical integrity, falling short of a loss of liberty, will also have to satisfy all the above tests.

The international framework on “blacklisting”, proscribing and asset freezing: UN and EU

Both the United Nations and the European Union have introduced lists of banned or proscribed entities. These procedures have been in place since the early 1990s and were first introduced by the UN as targeted sanctions, thereby improving their effectiveness and reducing the humanitarian costs of a sanctions regime.

From 1992 onwards, the Security Council has attempted to weaken state support for, and strengthen state resistance to, terrorism. Sanctions have been applied against individuals, entities and states that support terrorism — including, in 1999 and 2000, Osama Bin Laden, Al Qaida and the Taliban.⁶³⁷

Immediately after the terrorist attacks of 11 September 2001, Security Council Resolution 1373 (2001) imposed uniform, mandatory counter-terrorist obligations on all states, including listing of proscribed people and entities, and asset freezing. Resolution 1373 established a Counter-Terrorism Committee to monitor compliance and to facilitate the provision of technical assistance to states.

This move away from sanctions against states to sanctions targeted against individuals and non-state entities raises its own issues for those that are affected, particularly in relation to those who may be wrongly proscribed or listed, or for those seeking a review of their status and those seeking to be de-listed. The difficulties that arise are that the UN lists, which proscribe or “blacklist” certain individuals or entities, are not challengeable as a matter of law because they are adopted as resolutions under the UN Security Council. To all intents and purposes such resolutions are non-reviewable.⁶³⁸

636 “The Court recalls that in proclaiming the ‘right to liberty’, paragraph 1 of Article 5 is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement [...] In order to determine whether someone has been ‘deprived of his liberty’ within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question”, *op. cit.*, note 439, ECtHR, *Guzzardi v. Italy*, para. 92 and more generally paras. 89-104.

637 UN Security Council Resolution 1267 of 15 October 1999, doc. S/RES/1267 (1999).

638 Subject to the principle of *ius cogens* — see customary international law section above, pp. 55-57, 149.

While the UN list is concerned with all groups and individuals associated with Al Qaida and the Taliban, the EU list is more extensive and includes groups and individuals “involved in terrorism.” As a matter of international law and practice, the assets for those on the UN list — and the non-EU nationals and entities on the EU list — should be frozen. Domestic regimes in relation to listing and asset-freezing also exist in a number of jurisdictions, including the US and the UK.

The legal effect of inclusion on such lists varies according to the jurisdiction. For example, the US and UK allow for the prosecution of anyone providing financial, material or ideological support for listed entities. The EU list requires EU states to prevent the public from offering “any form of support, active or passive.”

The effects of proscription (or “blacklisting”) are, therefore, serious for the entities or individuals concerned. They cannot use any of their assets, or receive any monies. Intelligence is normally the basis for placing groups and individuals on these lists. Consequently, it is essential that the mechanisms for placing individuals or groups on these lists must be human rights compliant. In particular, proscribing entities will raise issues relating to freedom of association, freedom of expression, peaceful enjoyment of property, the right to a fair trial, the requirement for legality, and protection from discrimination.

Proscription, and its consequences, under these circumstances should also be part of a short-term strategy. Its objective is to disrupt the funding of those believed to be terrorists who have not yet been convicted of terrorist offences. Proscription is not a substitute for a commitment to prosecute for terrorist acts and proscription must be carried out on a case-by-case basis. Any decision to proscribe must at the very minimum satisfy the tests of necessity and proportionality. The impact of proscription on associations will also be considered below, in the chapter dealing with freedom of association.

Proscription raises particularly complex issues in relation to those who seek to have themselves removed from such lists. In the European context, removal from lists will engage questions of domestic law and EU law, as well as case law of the European Court of Human Rights.

Concern about this issue has been raised at both the UN and the Council of Europe.⁶³⁹ In particular, the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism has addressed the issue.⁶⁴⁰ At the same time the consequences of “blacklisting” and the targeted sanctions regime are increasingly being challenged through the courts.⁶⁴¹

The Watson Report⁶⁴² identifies the problems with the current regime as including:

639 See the White Paper of the Watson Institute for International Studies, Brown University (“Targeted Sanctions Project”), *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, 30 March 2006, submitted to the UN General Assembly on 19 May 2006; B. Fassbender, *Targeted Sanctions and Due Process*, Study commissioned by the United Nations Office of Legal Affairs, 20 March 2006; I. Cameron, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, Report commissioned by the Council of Europe, Strasbourg, 6 February 2006.

640 Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, doc. A/61/267, 16 August 2006, para. 30-41.

641 See next section.

642 *Op, cit*, note 639.

- the process for individuals and entities to be removed from the list;
- failure to notify listed individuals and entities of their designation;
- lack of information regarding the basis for listing;
- lack of periodic review of those listed as well as a lack of limited time frames to resolve pending issues such as de-listing requests;
- the open-ended nature of sanctions imposed;
- lack of transparency of the Sanctions Committee procedures and difficulties in obtaining information about the way in which the Committee functions.

Finally, that report points out that under the UN system only the country of the targeted party's residence or citizenship can request de-listing, leading to potential problems of procedural fairness for listed parties in states that oppose or refuse to forward de-listing requests.

The UN High Level Panel on Threats, Challenges and Change has also expressed reservations about the listing process and how successful it is in effectively countering those who engage in terrorism. It pointed out that:⁶⁴³

[...] the Security Council must proceed with caution. The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions. The Al-Qaida and Taliban Sanctions Committee should institute a process for reviewing the cases of individuals and institutions claiming to have been wrongly placed or retained on its watch lists.

Sanctions imposed by the Security Council and the work of its Counter-Terrorism Committee have played an important role in ending the support of some States for terrorism and mobilizing other States in the fight against it. However, Council sanctions against Al-Qaida and Taliban suffer from lagging support and implementation by Member States and affect only a small subset of known Al-Qaida operatives, while a number of States are lagging behind in their compliance with the directives of the Counter-Terrorism Committee. We believe that further action is needed to achieve full implementation of these directives.

A number of human rights issues are raised by targeted sanctions, "blacklisting" and the proscription of entities. Most notably, these practices affect property and freedom-of-association rights. Even more significant, however, is how the practices impact on the right to a fair trial, due process and the right to an effective remedy.

In December 2006, the UN Security Council requested the Secretary-General to establish a focal point to receive de-listing requests. Petitioners seeking to submit a request for de-listing can do so either through the focal-point process outlined in the Resolution 1730 or through their state of residence or citizenship. A state can decide that its citizens (or residents) should address their de-listing requests directly to the focal point. The state will do so by a declaration addressed to the Chairman of the Committee that will be published on the Committee's website.⁶⁴⁴

⁶⁴³ *Op. cit.*, note 25, "A more secure world: our shared responsibility", paras. 152-153.

⁶⁴⁴ UN Security Council Resolution 1730 of 19 December 2006, doc. S/RES/1730(2006).

Applying the right to a fair trial to listing regimes

It is clear that proscription can affect an individual's civil rights. As such, fair-trial provisions in international human rights should apply. There are strong arguments that the consequences of proscription are so grave for the individual(s) concerned that they should be treated in a manner similar to a criminal charge, thus guaranteeing the full scope of human rights protection for criminal matters.

On 12 December 2006, the EU Court of First Instance (CFI) annulled a 2002 decision of the EU Council ordering the freezing of funds of the "Organisation des Modjahedines du peuple d'Iran" (OMPI) — otherwise known as People's Mujahidin of Iran or People's Holy Warriors — on the grounds that the decision infringed the right to a fair hearing, the obligation to state reasons, and the right to effective judicial protection.

The judgment of the CFI expressly constrains the EU, when it exercises its obligation to implement a Security Council resolution, to decide which groups and individuals should have their funds frozen according to principles of "fundamental rights", in particular the right to a fair hearing. The decision is distinguished from the approach taken in September 2005 by the CFI in *Yusuf* and *Kadi*, in which it held that the Community is competent to order the freezing of individuals' funds in connection with the fight against international terrorism on the basis of Security Council resolutions.⁶⁴⁵

Following this judgment of the CFI, the EU is obliged to adjust its measures implementing Security Council Resolution 1373 in order to implement the court's findings as far as possible.⁶⁴⁶

645 CFI, T-306/01, *Yusuf and Al Barakaat International Foundation v. Council and Commission*, [2006] ECR II-3533; CFI, T-315/01, *Kadi v. Council and Commission*, [2006] ECR II-3649, and more recently CFI, T-228/02, *Organisation des Modjahedines du peuple d'Iran (OMPI) v. Council*, 12 December 2006, OJ 2006/C 331/63.

646 At the time of publication, the EU Council was considering whether to appeal the CFI's judgement to the European Court of Justice (ECJ). Appeals in *Yusuf* and *Kadi* are also pending before that Court.

Evidence Collection, Surveillance, Investigation Techniques and the Right to Respect for Private Life

Article 17, ICCPR:

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

Article 8, ECHR:

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

OSCE Moscow 1991:

24. The participating States reconfirm the right to the protection of private and family life, domicile, correspondence and electronic communications. In order to avoid any improper or arbitrary intrusion by the State in the realm of the individual, which would be harmful to any democratic society, the exercise of this right will be subject only to such restrictions as are prescribed by law and are consistent with internationally recognized human rights standards. In particular, the participating States will ensure that searches and seizures of persons and private premises and property will take place only in accordance with standards that are judicially enforceable.

The right to respect for private life is guaranteed by Article 17 of the ICCPR and Article 8 of the ECHR (see box above). The right to privacy is a qualified right, therefore it can be lawfully restricted in certain circumstances, for specific purposes set out in human rights treaties. Once an individual is being formally investigated by a law-enforcement agency on suspicion of having committed a crime or having been involved in terrorism, respect for their private life is almost certainly engaged.

Investigatory and surveillance systems are increasingly sophisticated, which has correspondingly made the need for safeguards to protect private life even more important. The European Court of Human Rights, in particular, places a premium on privacy and the need to protect it from unwarranted state interference. Therefore, there are obligations to respect the principles of necessity, proportionality and non-discrimination during investigations into terrorism or related activity.

Private life is a relevant factor to be taken into account once information about an individual is stored and processed. Sharing of information on individuals is also an interference with privacy rights, which if it is to be lawful, must be justified. Racial and religious profiling can also raise serious issues in relation to privacy and protection from discrimination.

The Council of Europe has produced recommendations that seek to codify the principles established by the case law of the European Court of Human Rights as they relate to surveil-

lance and investigative policing operations (SIT Recommendation).⁶⁴⁷ This recommendation should be considered as the benchmark in setting standards in relation to privacy rights as far as intelligence-led policing is concerned.⁶⁴⁸ The SIT Recommendation, and how to develop effective counter-terrorism strategies that recognize the importance of privacy rights, is explained in full below.

The concept of private life

Privacy has been defined as “the presumption that individuals should have an area of autonomous development, interaction and liberty, a ‘private sphere’ with or without interaction with others and free from state intervention and free from excessive unsolicited intervention by other uninvited individuals.”⁶⁴⁹ The concept of private life therefore incorporates the classic notion of civil liberties, in that the state should not be permitted to intrude into the private sphere in the absence of strict justification. The essence of the right to privacy is the “right to be let alone.”⁶⁵⁰

This broad definition of private life is reflected in human rights case law. Respect for private life encompasses more broadly the rights to be oneself, to live as oneself and to keep to oneself. The concept of privacy rights cannot be narrowly construed. Because privacy rights tend to restrict the activity of the state, privacy rights are politically controversial.⁶⁵¹ Privacy is also essential to maintaining a functioning community. For example, families need privacy to function, as do friends, workplaces and even political parties. Privacy allows groups to form and function without undue interference. The public and private spheres necessarily interact and they are not mutually exclusive. Almost everyone must carry on their life partly in public.

As a matter of human rights law, the concept of private life is made up of concentric rings. At their core, privacy rights provide the individual with the essential and elemental right to exist as who they are. However, the notion of privacy then broadens to include personal relationships, social relationships and other wider interactions. Included, therefore, within the idea of private life are personal freedoms, personal autonomy, personal integrity and personal relations. These ideas form part of a broader notion of the state’s limited role within the private sphere where individual development is concerned. That wider notion of privacy includes limits on state control of individuals within society, as well as limits on regulation of private conduct and surveillance.

647 CoE, Recommendation Rec(2005)10 of the Committee of Ministers on “special investigation techniques” in relation to serious crimes including acts of terrorism (SIT Recommendation), 20 April 2005.

648 Several other instruments of the Council of Europe deal with the question of special investigative techniques. These include, for instance, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS No 141, Article 4), the Criminal Law Convention on Corruption (CETS No. 173, Article 23), the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS No 182, Articles 17-20), or the Committee of Ministers’ Recommendation Rec(2001)11 concerning guiding principles on the fight against organised crime. However, these instruments address issues connected with the use of SIT only in so far as these are being used in relation to their respective scope, whilst the SIT Recommendation offers a comprehensive approach to the use of SIT in connection with all forms of serious crimes, including acts of terrorism.

649 Lord Lester of Herne Hill QC and David Pannick QC (Eds.), *Human Rights Law & Practice*, 2nd edition, (London, Butterworth, 2004), para. 4.82.

650 The origins of this right can be found in T. Cooley, *A Treatise on the Law of Torts*, 2nd edition, (Chicago, Callaghan & Co., 1888), p. 29. The principle was then developed, expanded and consolidated in the seminal work of S.D. Warren and L.D. Brandeis, *The right to privacy*, in “Harvard Law Review”, vol. 4, 1890, pp. 193-220.

651 D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edition, (Oxford, 2002), p. 511.

Developing privacy rights before international courts and tribunals

The focus of this section is on the case law of the European Court of Human Rights. Where appropriate, reference is made to jurisprudence from other international human rights bodies. General principles of privacy are set out below.

- *Physical and moral integrity.* Laws that fail to properly ensure the physical integrity of individuals against interference by other private parties will violate private life rights.⁶⁵² Similarly, unwanted and forced medical examinations may violate the right.⁶⁵³
- *Personal identity.* This includes the right to a name and the right to change names,⁶⁵⁴ as well as to gender reassignment and the right to an identity for transsexuals.⁶⁵⁵ Private life guarantees the right to a sexual identity including the right to a lesbian and gay sexual identity.⁶⁵⁶
- *Group rights as privacy rights.* The right to a personal identity also includes the right to such an identity as a member of a minority group. For example, Roma and indigenous people of northern Finland have found protection within the right to respect private life.⁶⁵⁷ Attempts to restrict, or control the rights of a minority group or community may be unlawful under the right to respect for private life, even if the justification for that interference is national security or the prevention of disorder or crime. For example, if an established community is required to move from, or return to, their property, this must be justified under privacy-rights principles, including satisfying the tests of necessity, proportionality and non-discrimination.

652 *Op. cit.*, note 26, ECtHR, *X. and Y. v. the Netherlands*, para. 23 and *op. cit.*, note 173, ECtHR, *M.C. v. Bulgaria*, paras. 152-153 (and also at 166: “[...] any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy. In accordance with contemporary standards and trends in that area, the member States’ positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim”).

653 The Court found a violation of Article 8 in a case where “[...] the Government failed to demonstrate the existence of a medical necessity or the circumstances defined by law. Nor did they suggest that a request for a medical examination had been made by the public prosecutor. Finally, while the Court accepts the Government’s submission that the medical examination of detainees by a forensic doctor can prove to be a significant safeguard against false accusations of sexual molestation or ill-treatment, it considers that any interference with a person’s physical integrity must be prescribed by law and requires the consent of that person. Otherwise, a person in a vulnerable situation, such as a detainee, would be deprived of legal guarantees against arbitrary acts”, ECtHR, *Y. F. v. Turkey*, Application no. 24209/94, 22 July 2003, para. 43.

654 “Article 8 does not contain any explicit provisions on forenames. However, since they constitute a means of identifying persons within their families and the community, forenames, like surnames [...] do concern private and family life. Furthermore, the choice of a child’s forename by its parents is a personal, emotional matter and therefore comes within their private sphere”, ECtHR, *Guillot v. France*, Case no. 52/1995/558/644, 23 September 1996, paras. 21-22; in the same vein see HRC, *Coeriel and Aurik v. the Netherlands*, Communication no. 453/1991, doc. CCPR/C/52/D/453/1991, 9 December 1994, para. 10.2 (“a person’s surname constitutes an important component of one’s identity and that the protection against arbitrary or unlawful interference with one’s privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one’s own name. For instance, if a State were to compel all foreigners to change their surnames, this would constitute interference in contravention of article 17”).

655 ECtHR, *B. v. France*, Application no. 13343/87, 25 March 1992, para. 43-63; ECtHR, *Christine Goodwin v. UK*, Application no. 28957/95, 1 July 2002, para. 90.

656 “ECtHR, *Norris v. Ireland*, Application no. 10581/83, 26 October 1988, para. 46 (quoting the *Dudgeon* case); *op. cit.*, note 167, HRC, *Toonen v. Australia*, para. 8.6.

657 ECommHR, *G. and E. v. Norway*, Application no. 9278/81 and 9415/81, 3 October 1983, pp. 35-36; ECtHR, *Buckley v. UK*, Case no. 23/1995/529/615, 26 August 1996, paras. 78-84.

- *Personal or private space.* Private space is necessary in order to be able to form relations with others.⁶⁵⁸ The right to private life includes specifically the notion of one's home. This includes business premises as well as private homes. However, this notion of private space is broader than the idea of one's home. It encompasses the notion of a personal realm where one ought to be allowed to go about one's business, even in public, without unjustified interference.
- *Privacy and intrusive publications.* Famous people, royalty and celebrities have sought to rely on private-life rights to protect their private life from media intrusion.⁶⁵⁹ This can also be relevant in relation to media intrusion into the lives of ordinary people. These claims illustrate that the state may have an obligation to ensure that third parties do not unjustifiably interfere with someone else's privacy.
- *Personal data.* This issue is covered in more depth below. In regard to one aspect of the issue, it is unlikely that a census or national identification scheme *per se*, though it touches on the right to respect for private life, would be a violation of that right.
- *National security files.* The way that the state retains information on people who may be considered a security risk will also engage privacy rights. It is accepted that holding relevant information on certain people may be necessary. The key issues are what information is kept, how long it is stored, what is done with it, and whether there is broader access to it.⁶⁶⁰
- *Home and environment.* Private-life rights can have direct relevance to planning laws and protection from severe environmental nuisance affecting a person's wellbeing.⁶⁶¹ Planning controls that affect Travellers and the Roma community will also engage private-life

658 "[...] The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'. However, it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that [...] it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time", ECtHR, *Niemietz v. Germany*, Application no. 13710/88, 16 December 1992, para. 29; see also ECtHR, *Roemen and Schmit v. Luxembourg*, Application no. 51772/99, 25 February 2003, para. 64 and *op. cit.*, note 493; ECtHR, *Elci and Others v. Turkey*, para. 696.

659 About the balance to be struck between the right to private life and the freedom of expression see among others ECommHR, *Earl Spencer and Countess Spencer v. UK*, Applications nos. 28851/95 and 28852/95, 16 January 1998 and ECtHR, *von Hannover v. Germany*, Application no. 59320/00, 24 June 2004, paras. 56-60.

660 ECtHR, *Segerstedt-Wiberg and Others v. Sweden*, Application no. 62332/00, 6 June 2006, paras. 70-103.

661 See *op. cit.*, note 141, ECtHR, *Guerra and Others v. Italy*, paras. 56-60; *op. cit.*, note 232, ECtHR, *López Ostra v. Spain*, paras. 44-58; and *op. cit.*, note 161, ECtHR, *Hatton and Others v. UK*, para. 96 ("There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8").

rights.⁶⁶² In an extreme case, the Court found that the destruction of an applicant's home by the security forces violated their right to home life.⁶⁶³

- *Medical care and access to health information.* The failure to treat, and the treatment of people without their consent, will engage Article 8 ECHR. Disclosure of confidential medical information is tightly controlled under the ECHR.⁶⁶⁴ Where individuals are exposed to a specific health risk, the state may have a duty to give appropriate health advice and information.⁶⁶⁵

Victims' rights and privacy protections

The state has an obligation to protect victims of crime, even when private individuals have carried out those crimes.⁶⁶⁶ This obligation on the state will involve putting in place a legal framework to prosecute crimes. There is also a duty to protect the privacy rights of victims in the courtroom. The Council of Europe Guidelines on the Protection of Victims of Terrorist Acts deal with this issue. Article VIII of the Guidelines, entitled "Protection of the private and family life of victims of terrorist acts", states:

1. States should take appropriate steps to avoid as far as possible undermining respect for the private and family life of victims of terrorist acts, in particular when carrying out investigations or providing assistance after the terrorist act as well as within the framework of proceedings initiated by victims.
2. States should, where appropriate, in full compliance with the principle of freedom of expression, encourage the media and journalists to adopt self-regulatory measures in order to ensure the protection of the private and family life of victims of terrorist acts in the framework of their information activities.
3. States must ensure that victims of terrorist acts have an effective remedy where they raise an arguable claim that their right to respect for their private and family life has been violated.

Privacy and counter-terrorism

As a practical matter, any effective counter-terrorism strategy is likely to interfere with privacy rights. It is, therefore, important to understand the extent to which it is lawful to interfere with these rights. Law-enforcement agencies have at their disposal a comprehensive array of tools and procedures that can be used in counter-terrorism operations. These range from traditional policing methods — such as carrying out a physical search of a suspect — to the use of highly sophisticated eavesdropping surveillance equipment. All of these will engage,

⁶⁶² *Op. cit.*, note 657, ECtHR, *Buckley v. UK*, paras. 75-76.

⁶⁶³ "The Court has found it established that the applicant's home and possessions were destroyed by the security forces, thus depriving the applicant of his livelihood and forcing him and his family to leave Yukarıgören [...] There can be no doubt that these acts constituted grave and unjustified interferences with the applicant's rights to respect for his private and family life and home, and to the peaceful enjoyment of his possessions", *op. cit.*, note 337, ECtHR, *Bilgin v. Turkey* para. 108.

⁶⁶⁴ *Op. cit.*, note 33, ECtHR, *Z. v. Finland*, para. 95.

⁶⁶⁵ In relation to Article 2, cf. *op. cit.*, note 247, ECtHR, *L.C.B. v. UK*, para. 41.

⁶⁶⁶ "[...] although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life [...] These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves", *op. cit.*, note 26, ECtHR, *X. and Y. v. The Netherlands*, para. 23.

to varying degrees, the right to respect for private life. To be lawful, they must be justified as prescribed by law, necessary in a democratic society, and proportionate.⁶⁶⁷ Techniques that must be justified on these bases include:

- collection and systematic retention of private information by state security services;⁶⁶⁸
- closed circuit television schemes where any images are recorded, processed and stored;⁶⁶⁹
- use of tracking devices; and
- collecting samples such as fingerprints and DNA.⁶⁷⁰

Surveillance operations require independent, preferably judicial, supervision.⁶⁷¹

If traditional policing methods are capable of responding to an identified threat, more invasive interferences with privacy should be avoided. The general principles to be observed are as follows:

- The expression “private life” must not be interpreted restrictively: it includes the right to establish and develop relationships with other human beings and also activities of a professional or business nature.⁶⁷²
- The existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications can be, under exceptional conditions, necessary in a democratic

667 ECtHR, *Malone v. UK*, Application no. 8691/79, 2 August 1984, para. 65 and ECtHR, *Halford v. UK*, Case no. 73/1996/692/884, 27 May 1997, paras. 49-60.

668 This is particularly so in respect of information concerning an individual’s distant past. Retention of personal data is different from collection, and must be separately justified, see ECtHR, *Rotaru v. Romania*, Application no. 28341/95, 4 May 2000, para. 43.

669 ECtHR, *Peck v. UK*, Application no. 44647/98, 28 January 2003, paras. 76-87.

670 “In the case-law of the Convention organs, both the storing and release of information relating to an individual’s private life in a secret police register have been found to constitute an interference with the person’s right to respect for his private life [...] Furthermore, a compulsory public census, including questions relating to personal details of the inhabitants of a particular household, or the requirement, pursuant to the relevant tax legislation, to produce a list of one’s private expenditure amount to such an interference [...] The examination of a person in the course of his detention, including measures such as his search, questioning about his private life, taking of fingerprints and photographs, and the retention of the records of this examination, was also regarded as interference with the person’s right to respect for his private life [...]”, ECommHR, *Friedl v. Austria*, Application no. 15225/89, 19 May 1994, para 46. Cf. also *op. cit.*, note 472, ECtHR, *Murray v. UK*, para. 83-95.

671 “[...] relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis. Compliance with article 17 requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited. Searches of a person’s home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment”, HRC, General Comment No. 16 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)), 8 April 1988, para. 8.

672 ECtHR, *Amann v. Switzerland*, Application no. 27798/95, 16 February 2000, para. 44; *op. cit.*, note 668, ECtHR, *Rotaru v. Romania*, para. 43.

society in the interests of national security and/or for the prevention of disorder or crime. However, the legislation at issue must be accessible and foreseeable as to its effects.⁶⁷³

- The law must indicate the degree of the discretion conferred on the competent authorities and the manner of its exercise with adequate precision.⁶⁷⁴
- States do not enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The European Court has affirmed that states may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate. The Court has pointed out that it must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. Whether such guarantees are effective depends on all the circumstances of the case, such as the nature, scope and duration of the measures, the grounds required for ordering the measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law.⁶⁷⁵
- Legal safeguards should be established concerning the supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faith-

673 “[...] the phrase ‘in accordance with the law’ does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention [...] The phrase thus implies – and this follows from the object and purpose of Article 8 – that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 [...] Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident [...] Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference”, *op. cit.*, note 667, ECtHR, *Malone v. UK*, paras. 67-68. See also *op. cit.*, note 672, ECtHR, *Amann v. Switzerland*, paras. 55-56; *op. cit.*, note 668, ECtHR, *Rotaru v. Romania*, para. 52; ECtHR, *Silver and Others v. UK*, Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, 25 March 1983, paras. 86-88; *op. cit.*, note 159, ECtHR, *The Sunday Times v. UK*, paras. 47-49. Moreover, “tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a ‘law’ that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated”, ECtHR, *Kopp v. Switzerland*, Case no. 13/1997/797/1000, 25 March 1998, para. 72.

674 *Op. cit.*, note 668, ECtHR, *Rotaru v. Romania*, para. 55. The HRC pointed out that “arbitrary interference can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances,” *op. cit.*, note 671, HRC, General Comment No. 16, para. 4.

675 ECtHR, *Klass and Others v. Germany*, Application no. 5029/71, 6 September 1978, paras. 49-50, and also para. 42; ECtHR, *Leander v. Sweden*, Application no. 9248/81, 26 March 1987, para. 60; *op. cit.*, note 667, ECtHR, *Malone v. UK*, para. 81; *op. cit.*, note 144, ECtHR, *Chahal v. UK*, para. 131 (“The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved [...] there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice”); and ECtHR, *Tinnelly & Sons LTD and Others and McElduff and Others v. UK*, Case nos. 62/1997/846/1052-1053, 10 July 1998, para. 77.

fully as possible, in particular the rule of law. Accordingly, the judiciary is best placed to check effectively any interference with the right to private life.⁶⁷⁶

Unlawfully obtained evidence

As a general principle, any evidence obtained in breach of private-life rights should not form part of a criminal prosecution, because to include such evidence may violate the right to a fair trial.⁶⁷⁷ As has been shown, human rights standards require the proceedings as a whole, including the way in which evidence is submitted, to be fair.⁶⁷⁸

The European Court has, however, accepted that the right to a fair trial is not necessarily breached by evidence obtained in violation of the right to respect for private life. For example, where the impugned evidence (an illegal telephone tap) was not the only evidence against an accused in a case involving a serious crime, there was no violation of the right to a fair trial when that evidence was admitted.⁶⁷⁹ Similarly, where the police had not acted illegally as a matter of domestic law, but had nonetheless breached the right to respect for private life through the use of eavesdropping devices, the applicant's fair-trial rights were not violated in a serious drug case in which he pleaded guilty to the offence. There was no violation of the right to a fair trial; notwithstanding that this was the only evidence against the applicant.⁶⁸⁰

Subsequent cases before the European Court have found a violation of the right to a fair trial where there has been an unlawful interference with privacy. This took place when the police

676 "Review of surveillance may intervene at three stages: when the surveillance is first ordered, while it is being carried out, or after it has been terminated. As regards the first two stages, the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual's knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of his own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding the individual's rights. In addition, the values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 para. 2 are not to be exceeded. One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble to the Convention [...] The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure", *op. cit.*, note 675, ECtHR, *Klass and Others v. Germany*, para. 55.

677 *Op. cit.*, note 591, ECtHR, *Allan v. UK*, paras. 50-51; see also *op. cit.*, note 622, ECtHR, *Schenk v. Switzerland*, paras. 45-46 and *op. cit.*, note 622, ECtHR, *Khan v. UK*, para. 29-40.

678 *Op. cit.*, note 619, ECtHR, *Teixeira de Castro v. Portugal*, para. 34; *op. cit.*, note 591, ECtHR, *Allan v. UK*, para. 42-44.

679 *Op. cit.*, note 622, ECtHR, *Schenk v. Switzerland*, para. 48.

680 *Op. cit.*, note 622, ECtHR, *Khan v. UK*, paras. 38-40.

used surveillance methods to obtain evidence against the applicant while he was being detained in police custody on suspicion of having committed murder.⁶⁸¹

Unlike evidence obtained through torture or ill-treatment — which is never admissible — evidence obtained through infringements of privacy will not necessarily render the trial unfair. Relevant questions in determining the fairness of the trial will include:

- who authorized the breach of privacy and how;
- whether the evidence could have been collected in another way; and
- the weight and probative value of the evidence.

Special investigative techniques, surveillance and policing

Special Investigative Techniques (SITs) are methods and procedures that involve serious interference with an individual's privacy rights, normally through covert practices on the part of law-enforcement agencies. They include the practices identified above, the most common of which may be interception of communication.

Before someone is put under a SIT, there need to be “sufficient reasons to believe”, that the individual is involved in the commission or likely commission of terrorist activity.⁶⁸² The essentially subjective nature of “sufficient reasons to believe” makes a legal definition of it almost impossible. To help clarify the concept, the right to liberty can be of some assistance. As has already been shown, that right includes the requirement for “reasonable suspicion” prior to detaining someone.⁶⁸³ This test, or some form of it, could be used to justify placing someone under surveillance. The European Court of Human Rights has found that “having a ‘reasonable suspicion’ presupposes the existence of facts or information which would satisfy

681 “[...] in his interviews with the police following his arrest the applicant had, on the advice of his solicitor, consistently availed himself of his right to silence. H., who was a long-standing police informer, was placed in the applicant's cell in Stretford police station and later at the same prison for the specific purpose of eliciting from the applicant information implicating him in the offences of which he was suspected. The evidence adduced at the applicant's trial showed that the police had coached H. and instructed him to ‘push him for what you can.’ In contrast to the position in Khan, the admissions allegedly made by the applicant to H., and which formed the main or decisive evidence against him at trial, were not spontaneous and unprompted statements volunteered by the applicant, but were induced by the persistent questioning of H., who, at the instance of the police, channelled their conversations into discussions of the murder in circumstances which can be regarded as the functional equivalent of interrogation, without any of the safeguards which would attach to a formal police interview, including the attendance of a solicitor and the issuing of the usual caution. While it is true that there was no special relationship between the applicant and H. and that no factors of direct coercion have been identified, the Court considers that the applicant would have been subjected to psychological pressures which impinged on the ‘voluntariness’ of the disclosures allegedly made by the applicant to H.: he was a suspect in a murder case, in detention and under direct pressure from the police in interrogations about the murder, and would have been susceptible to persuasion to take H., with whom he shared a cell for some weeks, into his confidence. In those circumstances, the information gained by the use of H. in this way may be regarded as having been obtained in defiance of the will of the applicant and its use at trial impinged on the applicant's right to silence and privilege against self-incrimination”, *op. cit.*, note 591, ECtHR, *Allan v. UK*, para. 52.

682 *Op. cit.*, note 647, SIT Recommendation, para. 4.

683 See p. 154 above.

an objective observer that the person concerned may have committed the offence. What may be regarded as 'reasonable' will however depend upon all the circumstances."⁶⁸⁴

Interception of communications must meet minimum requirements of confidentiality, integrity and availability. These requirements mean that the information should be accessible only to certain authorized persons (confidentiality), that the information should be authentic and complete, thus granting a minimum standard of reliability (integrity), and that the technical system in place to intercept telecommunications is accessible whenever necessary (availability).

When is it proportionate to interfere with privacy rights?

Surveillance or telephone tapping as part of the fight against terrorism will often satisfy the requirement that there be a pressing social need to interfere with the right to private life. However, whether the particular interference is proportionate will depend on a number of context-specific factors. These include:

- Special investigation techniques should only be used where there is sufficient reason to believe that a serious crime has been committed or prepared, or is being prepared, by one or more particular persons or an as-yet-unidentified individual or group of individuals.⁶⁸⁵
- "Member States [of the Council of Europe] should ensure that competent authorities apply less intrusive investigation methods than special investigation techniques if such methods enable the offence to be detected, prevented or prosecuted with adequate effectiveness."⁶⁸⁶

In regard to telephone tapping, the law should:

- set out the categories of persons whose telephones may be tapped;
- spell out the nature of the offences justifying the use of tapping;
- indicate the duration of the measure;
- explain the procedure for drawing up the summary reports containing intercepted conversations;
- identify the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and the defence; and
- clarify the circumstances in which they are to be erased or destroyed (in particular following discharge or acquittal of the accused).⁶⁸⁷

⁶⁸⁴ "In this respect, terrorist crime falls into a special category. Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court to support a charge", *op. cit.*, note 470, ECtHR, *Fox, Campbell and Hartley v. UK*, para. 32. Finding a violation of Article 5, the Court stressed that the applicants "have previous convictions for acts of terrorism connected with the IRA [...] although it could reinforce a suspicion linking them to the commission of terrorist-type offences, cannot form the sole basis of a suspicion justifying their arrest in 1986, some seven years later. The fact that all the applicants, during their detention, were questioned about specific terrorist acts, does no more than confirm that the arresting officers had a genuine suspicion that they had been involved in those acts, but it cannot satisfy an objective observer that the applicants may have committed these acts", *ibid.*, para. 35.

⁶⁸⁵ *Op. cit.*, note 647, SIT Recommendation, para. 4.

⁶⁸⁶ *Ibid.*, para. 6.

⁶⁸⁷ ECtHR, *Huvig v. France*, Case no. 4/1989/164/220, 27 March 1990, paras. 32-33; ECtHR, *Kruslin v. France*, Application no. 11801/85, 24 April 1990, para. 35; ECtHR, *Greuter v. The Netherlands*, Application no. 40045/98, 19 March 2002.

The European Court has laid down the principle that telephone tapping must comply with the law. Where it does not, it is prohibited, regardless of whether it is for judicial purposes or for reasons of national security.⁶⁸⁸

Judicial Supervision of SITs

The Court has also pointed out that to allow a non-judicial authority alone to decide on SIT operations may constitute a violation of the Convention. Depending on the scope of the measures and the guarantees provided by domestic law,⁶⁸⁹ states should therefore take appropriate legislative measures to ensure adequate control by judicial authorities or other independent bodies over the implementation of special investigation techniques, through prior authorization, supervision during the investigation or *ex post facto* review.⁶⁹⁰

States should also ensure that there is adequate training of competent authorities in charge of deciding to use, supervising and using special investigation techniques. Such training should comprise training on technical and operational aspects of special investigation techniques, training on criminal procedural legislation in connection with them, and relevant training in human rights.⁶⁹¹

Key to the Court's concerns is recognition that intrusive techniques may not only affect the rights of the person who is suspected of having committed or prepared the offence, but also, directly or indirectly, the rights of other persons. For this reason it is important that the offence in question is a particularly serious one, and that no other method of obtaining the evidence is available.

From a review of the case law of the European Court concerning the right to respect for private life in the context of counter-terrorism strategies, two conclusions can be drawn. First, the right to respect for private life, as a qualified right, can accommodate measures to facilitate effective counter-terrorist action. Second, persons developing counter-terrorism strategies should understand the demands that human rights principles will make. For instance, if the relationship between adequate and effective safeguards and the proportionality test is not taken into account, the measures adopted as part of a strategy for gathering counter-ter-

688 ECtHR, *A. v. France*, Application no. 14838/89, 23 November 1993, paras. 33-39.

689 "At the material time [...] the customs authorities had very wide powers; in particular, they had exclusive competence to assess the expediency, number, length and scale of inspections. Above all, in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law, which were emphasised by the Government [...] appear too lax and full of loopholes for the interferences with the applicant's rights to have been strictly proportionate to the legitimate aim pursued", *op. cit.*, note 521, ECtHR, *Funke v. France*, para. 57; ECtHR, *Crémieux v. France*, Application no. 11471/85, 25 February 1993, para. 40; ECtHR, *Miailhe v. France (No. 1)*, Application no. 12661/87, 25 February 1993, paras. 38-40.

690 *Op. cit.*, note 647, SIT Recommendation, para. 3. Its explanatory memorandum notes that among the various types of control envisaged the most effective would be a system of prior authorization, although it would not always be appropriate to establish such a control (doc. CM(2005)41 Addendum 2, 23 March 2005, para. 42). Whether prior authorization or *ex post facto* review is required may depend on the nature of the operation and the power in question. However it is clear from the *Klass* case that prior judicial authorization may not always be required. In that case the court accepted that a mechanism for supervision of telephone tapping which involved a confidential committee which reviewed authorizations, rather than prior judicial authorization, was sufficient in the circumstances for the measure not to constitute a disproportionate interference with privacy rights. In reaching this conclusion the Court acknowledged the serious nature of the interference and the real possibilities of abuse, however it was willing to accept it because it was convinced that the safeguards were both adequate and effective in the circumstances, *op. cit.*, note 675, ECtHR, *Klass and Others v. Germany*, paras. 47-60.

691 *Op. cit.*, note 647, SIT Recommendation, para 12.

rorist evidence may not be human rights compliant. In turn, this may mean that the evidence gathered may not be accepted by a court.

Protection of personal data

The ability to exchange relevant information quickly and efficiently among the police, the security services and other public bodies is essential to developing an intelligence-led approach to counter-terrorism. As a result of the international nature of terrorism, this can also require sharing information across borders. Mutual assistance agreements between states are therefore a key requirement in countering terrorism. These will often contain requirements regarding the protection of personal data, in particular where countries within the EU and/or the Council of Europe are concerned.

In addition to the right to respect for private and family life, home and communications, the EU Charter of Fundamental Rights has a separate provision for the protection of personal data, Article 8, which reads:

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

The exchange of private information about an individual between public bodies — for whatever reason and whether internally or internationally — will engage private-life rights and will almost certainly interfere with them. The question is, therefore, is that interference lawful? To tackle this problem the Council of Europe as long ago as 1981 adopted the “Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.”⁶⁹² To this day, it remains the world’s only binding international legal instrument in this field. It is open to signature by any country, including countries that are not members of the Council of Europe. It therefore has the potential for worldwide scope and application. The Convention defines a number of principles for the fair and lawful collection and use of data. These include:

- data can only be collected for a specific purpose and should not be used for any other reason;
- data must be accurate, adequate for the specified purpose, and stored only for as long as is necessary;
- there must be a right of access to, and rectification of, data for the person concerned (data subject); and
- special protection must be made for data of a sensitive nature, for example on religion, political beliefs, sexual orientation, genetics or medical information.

⁶⁹² Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No. 108, entered into force on 1 October 1985. See also Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, CETS No. 181, entered into force on 1 July 2004.

To become a party to the Convention, states must ensure that their national legislation contains these basic principles in respect of personal data. Having thus created a common, minimum, level of protection, the free flow of personal data between states is authorized among parties to the Convention. In order to adapt the general principles set out in the Convention to specific issues, the Council of Europe has adopted a number of further recommendations. Of particular relevance to counter-terrorism and human rights are:

- use of personal data in the police sector (1987);⁶⁹³
- communication to third parties of personal data held by public bodies (1991);⁶⁹⁴
- protection of personal data in the area of telecommunication services, with particular reference to telephone services (1995);⁶⁹⁵
- protection of medical data (1997);⁶⁹⁶
- protection of personal data collected and processed for statistical purposes (1997);⁶⁹⁷ and
- protection of privacy on the Internet (1999).⁶⁹⁸

The European Court of Human Rights has accepted that a refusal of full access to a national secret police register might be necessary where the state might legitimately fear that the provision of such information could jeopardize the efficacy of a secret surveillance system designed to protect national security and to combat terrorism. As such, the Court has concluded that a state was entitled to consider that the interests of national security and the fight against terrorism prevailed over the interests of the applicants in being advised of the full extent to which information was kept about them on the security police register.⁶⁹⁹ The Court has, however, expressed concern that the use of secret surveillance can have a negative effect on the enjoyment of other human rights, in particular freedom of expression and association.⁷⁰⁰

Drawing upon the Council of Europe framework, the EU also has an extensive range of provisions dealing with data protection, most notably what is known as the Data Protection

693 CoE, Recommendation Rec(87)15E of the Committee of Ministers to Member States regulating the use of personal data in the police sector, 17 September 1987.

694 CoE, Recommendation Rec(91)10E of the Committee of Ministers to Member States on the communication to third parties of personal data held by public bodies, 9 September 1991.

695 CoE, Recommendation Rec(95)4E of the Committee of Ministers to Member States on the protection of personal data in the area of telecommunication services, with particular reference to telephone services, 7 February 1995.

696 CoE, Recommendation Rec(97)5E of the Committee of Ministers to Member States on the protection of medical data, 13 February 1997.

697 CoE, Recommendation Rec(97)18E of the Committee of Ministers to Member States concerning the protection of personal data collected and processed for statistical purposes, 30 September 1997.

698 CoE, Recommendation Rec(99)5E of the Committee of Ministers to Member States on the protection of privacy on the Internet, 23 February 1999. Concerning the impact of new technologies, see also: Progress report on the application of the principles of convention 108 to the collection and processing of biometric data, February 2005; Guiding principles for the protection of personal data with regard to smart cards, May 2004; Report containing guiding principles for the protection of individuals with regard to the collection and processing of data by means of video surveillance, May 2003; Report on the impact of data protection principles on judicial data in criminal matters including in the framework of judicial co-operation in criminal matters (2002).

699 *Op. cit.*, note 660, ECtHR, *Segerstedt-Wiberg and Others v. Sweden*, paras. 102-104.

700 “[...] the Court considers that the storage of personal data related to political opinion, affiliations and activities that is deemed unjustified for the purposes of Article 8(2) *ipso facto* constitutes an unjustified interference with the rights protected by Articles 10 and 11”, *ibid.*, para. 107.

Directive (1995).⁷⁰¹ The Directive also requires the establishment of national data protection commissions or ombudsman institutions to provide easy access for handling complaints.

Racial and religious profiling

An area of developing concern in the context of counter-terrorism strategies is the use of racial and religious profiling, which involves the collection of personal information and therefore involves interference with data-protection and privacy rights. The general collection and processing of information solely by reference to criteria such as race or religion, and the use of that information as a starting point for investigations, without any specific reason to suspect the persons involved, raises serious doubts about whether such activities are compliant with privacy rights and the protection from discrimination.⁷⁰²

In finding a violation of Article 14 ECHR, the European Court of Human Rights recently stated

[...] the Kabardino-Balkarian senior police officer ordered traffic police officers not to admit 'Chechens'. As, in the Government's submission, a person's ethnic origin is not listed anywhere in Russian identity documents, the order barred the passage not only of any person who actually was of Chechen ethnicity, but also of those who were merely perceived as belonging to that ethnic group. [...] Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds. A differential treatment of persons in relevant, similar situations, without an objective and reasonable justification, constitutes discrimination [...] Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination [...] Once the applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that the difference in treatment could be justified [...] the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.⁷⁰³

The German Constitutional Court held in a case challenging the constitutionality of a state police law allowing for racial and other profiling that such profiling could only be compatible with the human rights protection contained in the German Basic Law if there were a "concrete" danger to highly protected rights, such as the life and security of the German Federa-

701 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; see also Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. Concerning intergovernmental co-operation on criminal matters, see for instance the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, doc. COM(2005) 475 final. The proposal is to be seen in the context of the Hague programme adopted by the European Council on 4 November 2004 and the action plan for its implementation adopted by the Council and the Commission in June 2005.

702 On the topic, see most recently EU Network of Independent Experts on Fundamental Rights, *Opinion 4 (Ethnic profiling)*, doc. CFR-CDF.Opinion4-2006, December 2006; see also Justice Initiatives, *Terror, Crime and Suspect Communities: Ethnic Profiling in Europe* (OSI, June 2007) (draft).

703 ECtHR, *Timishev v. Russia*, Applications nos. 55762/00 and 55974/00, 13 December 2005, paras. 54-57.

tion, or the life of a specific person. The court, therefore, held that such racial profiling by the so-called grid search method could not be used preventively to avert danger in the absence of a concrete and identifiable risk to either the person or the state. The court went on to hold that the general level of threat that has been in place since 11 September 2001 was not, in and of itself, sufficient to justify the use of the grid search method. The court also held that the threat must be specific beyond a general level and relate to the preparation or realization of actual terrorist attacks.⁷⁰⁴

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

The Council of Europe Guidelines on Human Rights and the Fight against Terrorism are particularly helpful with regard to privacy rights:

Guideline V (Collection and processing of personal data by any competent authority in the field of State security):

Within the context of the fight against terrorism, the collection and the processing of personal data by any competent authority in the field of State security may interfere with the respect for private life only if such collection and processing, in particular:

- (i) are governed by appropriate provisions of domestic law;
- (ii) are proportionate to the aim for which the collection and the processing were foreseen;
- (iii) may be subject to supervision by an external independent authority.

Guideline VI (Measures which interfere with privacy):

1. Measures used in the fight against terrorism that interfere with privacy (in particular body searches, house searches, bugging, telephone tapping, surveillance of correspondence and use of undercover agents) must be provided for by law. It must be possible to challenge the lawfulness of these measures before a court.

2. Measures taken to fight terrorism must be planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force and, within this framework, the use of arms by the security forces must be strictly proportionate to the aim of protecting persons against unlawful violence or to the necessity of carrying out a lawful arrest.

The European Court has also accepted that the use of confidential information is essential in combating terrorist violence and the threat that it poses to citizens and to democratic society as a whole:

The Court would firstly reiterate its recognition that the use of confidential information is essential in combating terrorist violence and the threat that organised terrorism poses to the lives of citizens and to democratic society as a whole [...] This does not mean, however, that the investigating authorities have *carte blanche* under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts or by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved.⁷⁰⁵

704 BVerfG, 1 BvR 518/02 vom 4.4.2006, Absatz-Nr. (1 - 184), available at http://www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html.

705 *Op. cit.*, note 472, ECtHR, *Murray v. UK*, para. 58.

In *Rotaru*, the Court spelled out its concerns in relation to adequate data-protection provisions:

No provision of domestic law, however, lays down any limits on the exercise of those powers. Thus, for instance, domestic law does not define the kind of information that may be recorded, the categories of people against whom surveillance measures such as gathering and keeping information may be taken, the circumstances in which such measures may be taken or the procedure to be followed. Similarly, the Law does not lay down limits on the age of information held or the length of time for which it may be kept. [...] The Court notes that this section contains no explicit, detailed provision concerning the persons authorised to consult the files, the nature of the files, the procedure to be followed or the use that may be made of the information thus obtained [...] It also notes that although section 2 of the Law empowers the relevant authorities to permit interferences necessary to prevent and counteract threats to national security, the ground allowing such interferences is not laid down with sufficient precision.⁷⁰⁶

With regard to confidential communications between lawyers and their clients, the Court has accepted that due to the nature of terrorist offences, it may be necessary, in exceptional circumstances, to intercept correspondence between a lawyer and his/her client once the client has been sentenced for terrorist acts.⁷⁰⁷ As has been pointed out above, however, the Rome Statute for the International Criminal Court recognizes the right to consult legal advisers in confidence in relation to war crimes and other crimes under its jurisdiction.

⁷⁰⁶ *Op. cit.*, note 668, ECtHR, *Rotaru v. Romania*, paras. 57-58.

⁷⁰⁷ ECtHR, *Erdem v. Germany*, Application no. 38321/97, 5 July 2001, para. 69. See also *op. cit.*, note 615, ECtHR, *Lüdi v. Switzerland*, para. 40.

PART III

Human Rights and the Guarantee of Democratic Pluralism

The participating States express their conviction that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for progress in setting up the lasting order of peace, security, justice and co-operation that they seek to establish in Europe.

(1990 Copenhagen Document)

OSCE participating States have recognized the integral role that human rights have in guaranteeing democratic pluralism. Democratic and participatory rights include:

- freedom of expression;
- freedom of association;
- freedom of assembly; and
- freedom of religion.

The following chapters explain why controls upon these freedoms in a counter-terrorism context must be applied with care. All of the rights described in the chapters are qualified rights and therefore can be lawfully interfered with, subject to satisfying the tests of legality, necessity, proportionality and non-discrimination. If necessary, it is also possible to derogate from some of these rights. The jurisprudence of the European Court of Human Rights in relation to these rights is considerably more sophisticated and detailed than that of any other international court or tribunal. Of necessity, therefore, the explanation of those rights draws on the case law of the European Court of Human Rights.

Controls on Terrorist Organizations

One way of combating terrorism is to outlaw organizations that promote or foster it. By controlling these organizations, whether by confiscating their finances and other resources, or curbing their publicity, it may be possible to minimize and control the threat of terrorism. Making an organization illegal raises issues relating to the freedoms of association, assembly, and expression, and to property rights. All of these rights permit qualification. It can therefore be lawful to interfere with them if there is a legal basis to do so and if it is also necessary, proportionate and non-discriminatory to limit those rights.

Assuming the tests of legality, necessity, proportionality and non-discrimination can be met, there can be an intrinsic value in proscribing certain organizations. Proscription sends a clear message to the general public that the organization in question engages in criminal, dangerous and random acts of violence. As such, persons tempted to join its ranks should be aware of the risks involved. At the same time, criminalizing organizations that support the use of violence means that individuals cannot speak at their meetings, raise money for them or print and distribute material glorifying the organization, without the threat of prosecution.

UN counter-terrorism treaties and Security Council Resolution 1373 have recognized that interrupting the funding mechanism of organizations that promote terrorism is particularly important. Prohibiting apologists for terrorism from airing their views on politically motivated violence on radio and television can also be worthwhile.⁷⁰⁸

One argument against the proscription of organizations associated with terrorism is that in many cases it may not, in itself, be effective. Such groups are unlikely to issue membership cards. Al Qaida, for example, has been described as “franchised terror.” The threat it poses is not from an association as such, but from groups that have a common ideology and identity, a loose chain of command and some common training, but that often operate independently. The organization is inspired but not controlled by its leaders. There is therefore no formal organization to proscribe. Organizations can also simply change their name and thus avoid (temporarily) some of the consequences of proscription. There are also concerns that outlawing an organization may elevate its status and its cause. This is particularly because to proscribe organizations may involve an interference with human rights. Furthermore, once an organization is outlawed, it may then operate underground. From a policing perspective, keeping the organization legal would make it more straightforward to monitor.

From a more profound (and also a human rights) perspective, it can be argued that it is what an organization does that should be illegal, not necessarily the organization itself. The Eu-

⁷⁰⁸ That said, the attempts in the United Kingdom and Ireland to apply broadcasting bans during the Troubles in Northern Ireland that were very extensive in nature brought that tactic into disrepute.

ropean Court has emphasized this point. It is only when an organization acts illegally that measures should be taken to interfere with the right to freedom of association.⁷⁰⁹

There is also the danger that granting states the power to proscribe can be abused. These powers can be used to undermine elements of civil society that are critical of the state generally. Such powers to control civil society and non-governmental organizations in particular must be used carefully.

⁷⁰⁹ “The irresponsible publications of a newspaper could not be used as evidence by a court, or indeed by the government of a State which respected the rule of law. Territorial integrity, national security and public order were not threatened by the activities of an association whose aim was to promote a region’s culture, even supposing that it also aimed partly to promote the culture of a minority; the existence of minorities and different cultures in a country was a historical fact that a ‘democratic society’ had to tolerate and even protect and support according to the principles of international law”, ECtHR, *Sidiropoulos and Others v. Greece*, Case no. 57/1997/841/1047, 10 July 1998, para. 41.

Freedom of Expression

Article 19, ICCPR:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 10, ECHR:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for prevent-

ing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

OSCE Budapest Document:

36. The participating States reaffirm that freedom of expression is a fundamental human right and a basic component of a democratic society. In this respect, independent and pluralistic media are essential to a free and open society and accountable systems of government. They take as their guiding principle that they will safeguard this right.
37. They condemn all attacks on and harassment of journalists and will endeavour to hold those directly responsible for such attacks and harassment accountable.
38. They further note that fomenting hatred and ethnic tension through the media, especially by governments, can serve as an early warning of conflict.

OSCE 1999 Istanbul Document:

27. [...] We are deeply concerned about the exploitation of media in areas of conflict to foment hatred and ethnic tension and the use of legal restrictions and harassment to deprive citizens of free media. We underline the need to secure freedom of expression, which is an essential element of political discourse in any democracy. We support the Office of the Representative on Freedom of the Media in its efforts to promote free and independent media.

The main guarantees for freedom of expression are found in Article 19 of the ICCPR and Article 10 of the ECHR (see box). The OSCE has further and extensive commitments in relation to freedom of expression and freedom of the media, has consistently expressed concern about media that promote hatred and tension, as well as about restrictions on media, and has created a Representative on Freedom of the Media.

What is included in the definition of freedom of expression in international human rights law?

The main elements of freedom expression as guaranteed by international human rights law include:

- freedom of opinion;
- freedom of speech — orally, in writing, in print, in art or any other media;

- freedom of information — orally, in writing, in print, in art or any other media;
- freedom of the media;
- freedom of international communication;
- freedom of electronic communication.

General considerations

Freedom of expression is one of the essential foundations of a democratic society, without which it may not be possible to enjoy many of the other rights protected by human rights standards. Any restrictions on freedom of expression should be subject to very close scrutiny and must be convincingly established. The media, in particular, attracts special protection because of its role as a public watchdog. It is impossible to imagine a modern democratic society without a free press.

Although free speech may irritate the government or even undermine its policies, the broader value of freedom of expression must be remembered. Restrictions on free speech are a restriction on democracy. For all its faults, democracy is considered to be the most effective form of government and the only system accepted for OSCE participating States.⁷¹⁰ One of the strengths of democracy is that democratic governments are subject to the glare and scrutiny of a free media. Democratic governments have their policies exposed and analysed by the media on a day-to-day basis.

The Inter-American Court of Human Rights has formulated the importance of freedom of expression succinctly:

Freedom of expression is a corner stone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.⁷¹¹

The scope of freedom of expression protection

The first sentence of Article 10(1) of the ECHR and Article 19(2) of the ICCPR⁷¹² assert that everyone has the right to freedom of expression. “Everyone” includes both “legal” and “natural” persons.⁷¹³ It is essential to understand that not all forms of expression are accorded the same protection. Some speech, because of its direct relationship with protecting democratic values, is given more protection than other speech. The extent to which speech is protected can be broken down into five broad categories:

- political and public interest expression;
- moral and religious expression;

⁷¹⁰ “We undertake to build, consolidate and strengthen democracy as the only system of government of our nations.” *Op. cit.*, note 307, 1990 Paris Charter.

⁷¹¹ IACtHR, *Compulsory membership in an association prescribed by law for the practice of journalism* (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, 13 November 1985, Series A No. 5, para. 70.

⁷¹² See HRC, General Comment No. 10 - Freedom of expression (Art. 19), 29 June 1983.

⁷¹³ ECtHR, *Autronic AG v. Switzerland*, Application no. 12726/87, 22 May 1990, para. 47.

- artistic and cultural expression;
- commercial expression; and
- “valueless”⁷¹⁴ or offensive expression.

The strongest protection tends to be accorded to political and public interest expression, while the least protected is “valueless” expression. However, all categories of speech are to some extent covered by the right to freedom of expression. Moreover, as described below, some forms of speech may be proscribed entirely in a democratic society, including hate speech and war propaganda.

From the perspective of counter-terrorism, political expression is of most relevance. However, without understanding how expression is protected as a whole it may not be possible to grasp the importance that is attached to political expression and why such speech may rarely, if ever, be interfered with. In the counter-terrorism context, therefore, it is important to identify precisely where it can be lawful to prohibit certain forms of speech. Most notably, restrictions are permissible if free speech becomes incitement to violence.⁷¹⁵

Freedom of expression is particularly vulnerable to becoming a casualty of counter-terrorism measures. Taking just one example, the Special Representative of the UN Secretary-General on Human Rights Defenders has pointed out that the use of security legislation against human rights defenders and the role and situation of human rights defenders in emergencies is of significant concern, particularly since 11 September 2001. Among her findings, she has stated:

Despite protection under international and regional human rights instruments and national constitutions, the right to freedom of expression has suffered the most severe adverse impact of restrictions imposed by national security or anti-terrorism laws.⁷¹⁶

The concern is that counter-terrorism *per se* is being used as a justification for restrictions on free speech and that this justification is presented as being sufficient without regard to the established grounds spelt out in human rights treaties. Additionally, counter-terrorism, in and of itself, is being presented as a proportionate and necessary justification for the interference.

Political and public interest expression

Political expression, which includes expression concerning the public interest, is the most protected form of freedom of speech.⁷¹⁷ Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political

714 *Op. cit.*, note 141, K. Starmer, *Human Rights Digest*, p. 284.

715 The Council of Europe Declaration on freedom of expression and information in the media in the context of the fight against terrorism, adopted by the Committee of Ministers on 2 March 2005 is of particular assistance in addressing these issues.

716 Report of the UN Special Representative on Human Rights Defenders, Ms. Hina Jilani, doc. A/58/380, 18 September 2003, para. 17.

717 “As set forth in Article 10, this freedom is subject to exceptions. Such exceptions must, however, be construed strictly, and the need for any restrictions must be established convincingly, particularly where the nature of the speech is political rather than commercial [...] in the present case the extent of the margin of appreciation is reduced, since what is at stake is not a given individual’s purely “commercial” interests, but his participation in a debate affecting the general interest”, ECtHR, *VgT Verein gegen Tierfabriken v. Switzerland*, Application no. 24699/94, 28 June 2001, paras. 66 and 71.

leaders. Therefore, where political expression is engaged, it will be very difficult to justify an interference with the press and media by the state.⁷¹⁸

A broad area of issues falls within political expression. The European Court has made clear that it regards expression about matters of public interest as encompassing far more than just party-political issues.⁷¹⁹ Other matters of public interest can include, among other things, police conduct, impartiality of a court, public health, and state housing policy. Criticism of the government and criticism of politicians and public figures may also fall within the scope of public interest, and this criticism may be done in a way that might amount to insulting them.⁷²⁰ To a limited degree, it may include criticisms of senior civil servants.⁷²¹

Comments on counter-terrorism strategies are likely to fall into the category of most protected speech. This does not mean the state cannot impose any constraints on such speech, but the state would require strong justification for doing so and those constraints should be strictly drawn so as to have the minimum impact possible on freedom of expression.

In a string of cases involving freedom of expression and its relationship with terrorism issues, all raising slightly different facts, the European Court has set down a coherent set of principles. These include:

- States are entitled to adopt special measures to combat terrorism⁷²² and these can extend to media restrictions. Such restrictions remain subject to the principles of freedom of expression.
- Even in a context of political violence, the right to freedom of expression protects ideas and information that may “offend, shock or disturb the state or any section of the population.”⁷²³

718 “These principles [related to Article 10] are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the ‘interests of national security’ or for ‘maintaining the authority of the judiciary’, it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’”, ECtHR, *Observer and Guardian v. UK*, Application no. 13585/88, 26 November 1991, para. 59.

719 “[...] the Court observes that there is no warrant in its case-law for distinguishing, in the manner suggested by the Government, between political discussion and discussion of other matters of public concern. Their submission which seeks to restrict the right to freedom of expression on the basis of the recognition in Article 10 that the exercise thereof ‘carries with it duties and responsibilities’ fails to appreciate that such exercise can be restricted only on the conditions provided for in the second paragraph of that Article”, ECtHR, *Thorgeir Thorgeirson v. Iceland*, Application no. 13778/88, 25 June 1992, para. 64.

720 “The limits of acceptable criticism are accordingly wider with regard to a politician acting in his public capacity than in relation to a private individual. The former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism. A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues”, ECtHR, *Oberschlick v. Austria*, Application no. 11662/85, 23 May 1991, para. 59.

721 K. Reid, *A Practitioners Guide to the European Convention on Human Rights* (Sweet and Maxwell, 2004), p. 235.

722 *Op. cit.*, note 457, ECtHR, *Brogan and Others v. UK*, para. 61.

723 *Op. cit.*, note 159, ECtHR, *Handyside v. UK*, para. 49.

- There is an essential role for the media in the context of terrorism. The media has not only a right but something close to a duty to impart information and ideas to the public and to facilitate the free expression of analysis and opinions even on difficult political issues.⁷²⁴
- The highest protection of freedom of expression is accorded to criticism of governments and their policies. The public, through the media, must be free to scrutinize government actions. Governments, given their dominant position, must be prepared to accept criticism without resorting to criminal sanctions,⁷²⁵ even if the criticism can be regarded as provocative or insulting or if it involves serious allegations against security forces.⁷²⁶
- Any media ban that has a significantly detrimental effect on the communication of information and ideas would be hard to make compatible with human rights standards.⁷²⁷
- The Court is wary that states may use the fact of background political violence to create criminal offences in respect of political speech. In particular, media reporting of banned organizations that, though provocative, insulting, offensive, shocking or disturbing, does not incite violence should be protected.⁷²⁸
- Criminal sanctions cannot be justified based on the simple fact of interviewing the leader of a proscribed organization.⁷²⁹
- The proportionality of restrictions on publications can depend on the prosecution and penal practice of the state, whether the state moves straight to prosecution rather than seeking changes in content,⁷³⁰ the persistency of the prosecution authorities and — if there is a conviction — the severity of the penalty.⁷³¹

724 “[...] the applicant’s conviction amounted to a kind of censure, which was likely to discourage him or other from expressing their views on the situation in south-east Turkey again in the future. In the context of political debate such sentences are likely to deter citizens from contributing to public discussion of important political issues”, ECommHR, *Aslantaş v. Turkey*, Application No. 25658/94, 1 March 1999, para. 53.

725 “[...] the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries”, ECtHR, *Başkaya and Okçuoğlu v. Turkey*, Applications nos. 23536/94 and 24408/94, 8 July 1999, para. 62.

726 ECtHR, *Özgür Gündem v. Turkey*, Application no. 23144/93, 16 March 2000, para. 60.

727 ECtHR, *Sürek and Özdemir v. Turkey*, Applications nos. 23927/94 and 24277/94, 8 July 1999, paras. 57-64. See also more generally H. Davis, “Lessons from Turkey: Anti-Terrorism Legislation and the Protection of Free Speech”, in *European Human Rights Law Review*, 2005:1, p. 80.

728 “[...] expressions such as ‘If they want us to leave our territory, they must know that we will never agree to it’ or ‘The war will go on until there is only one single individual left on our side’ or ‘The Turkish State wants to oust us from our territory. It is driving people out of their villages’ or ‘They want to annihilate us’ are a reflection of the resolve of the opposing side to pursue its goals and of the implacable attitudes of its leaders in this regard. Seen in this vein, the interviews had a newsworthy content which allowed the public both to have an insight into the psychology of those who are the driving force behind the opposition to official policy in south-east Turkey and to assess the stakes involved in the conflict [...] the views expressed in the interviews could not be read as an incitement to violence; nor could they be construed as liable to incite to violence”, *ibid.*, ECtHR, *Sürek and Özdemir v. Turkey*, para. 61.

729 *Ibid.*, para. 61; see also ECtHR, *Sürek v. Turkey (No. 4)*, Application no. 24762/94, 8 July 1999, para. 58 (“[...] the impugned interview [...] contained hard-hitting criticism of the Turkish authorities such as the statement that ‘the real terrorist is the Republic of Turkey’. For the Court, however, this is more a reflection of the hardened attitude of one side to the conflict, rather than a call to violence”).

730 *Op. cit.*, note 526, ECtHR, *Incal v. Turkey*, para. 55.

731 *Op. cit.*, note 725, ECtHR, *Başkaya and Okçuoğlu v. Turkey*, para. 66.

- The “duties and responsibilities” clause in relation to limits on freedom of expression imposes particular burdens on the media in situations of conflict and tension, lest by the publication of views of representatives of organizations that resort to violence against the state, it becomes a vehicle for the dissemination of hate speech and the promotion of violence.⁷³²
- The words in issue must be capable of being an incitement to violence. Initially, this can be addressed independently of context. The key factor is whether violence, armed resistance or insurrection is encouraged.⁷³³
- Words such as “resistance”, “struggle” or “liberation”,⁷³⁴ used approvingly, or accusations of “state terrorism” or “genocide”,⁷³⁵ are in themselves insufficient to constitute incitement.
- Acerbic criticism of state policy is not, in itself, incitement.⁷³⁶
- The authorities may claim that words have a hidden or implicit meaning of support for violence. The Court recognizes this as a possibility but the burden is on the authorities to produce evidence of the double meaning.⁷³⁷
- A determination of whether a restriction on words capable of being inciting is proportionate will also have regard to the context in which the words were published. Contextual matters can occasionally be significant in confirming whether words constitute incitement. Words spoken by political leaders, for example, may have this effect.⁷³⁸
- Naming (of politicians, officials, military officers and others involved in counter-terrorism) in a way that incites hatred and possibly violence can legitimately be suppressed.⁷³⁹
- Restrictions on the identification of officials for the reason that they might then become terrorist targets can be justified under Article 10(2).⁷⁴⁰ This reason, however, may not be sufficient, particularly if identification is linked to serious allegations of misconduct.

732 “The Court stresses that the ‘duties and responsibilities’ which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. At the same time, where such views cannot be categorised as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media”, *op. cit.*, note 728, ECtHR, *Sürek and Özdemir v. Turkey*, para. 63. This duty is not confined to the media but to “persons addressing the public”, cf. *op. cit.*, note 724, ECommHR, *Aslantaş v. Turkey*, para. 47.

733 ECtHR, *Ceylan v. Turkey*, Application no. 23556/94, 8 July 1999, paras. 33-36.

734 ECtHR, *Gerger v. Turkey*, Application no. 24919/94, 8 July 1999, para. 10.

735 *Op. cit.*, note 733, ECtHR, *Ceylan v. Turkey*, para. 8.

736 *Ibid.*, paras. 33-34.

737 ECtHR, *Zana v. Turkey*, Case no. 69/1996/688/880, 25 November 1997, paras. 57-62. See also ECtHR, *Hogefeld v. Germany*, Application no. 35402/97, 20 January 2000, p. 7 (“[...] those statements alone do not necessarily have to be understood as a promotion of terrorist activities. They must, however, be seen in the light of the applicant’s personal history, who was most probably one of the main representatives of an organisation, the RAF, which had waged a murderous fight against the public order of the Federal Republic of Germany for more than twenty years. In these circumstances, the words of the applicant could possibly be understood by supporters as an appeal to continue the activities of the RAF [...]”).

738 *Ibid.*, ECtHR, *Zana v. Turkey*, para. 60 (the applicant was the former mayor of Diyarbakır); *op. cit.*, note 733, ECtHR, *Ceylan v. Turkey*, para. 36 (the applicant was a trade-union leader).

739 ECtHR, *Sürek v. Turkey (No. 1)*, Application no. 26682/95, 8 July 1999, paras. 62-65.

740 ECtHR, *Sürek v. Turkey (No. 2)*, Application no. 24122/94, 8 July 1999, paras. 36-38.

- The positive duty to protect life may require appropriate restraints on the media to prevent reporting that may amount to an incitement.⁷⁴¹

From this brief examination of the case law from the European Court, it is clear that political speech in the context of terrorist activity can be limited in very specific contexts. For example, attempts to justify interferences with freedom of expression on the basis of the territorial integrity of the state will be unlikely to succeed unless these include incitement to violence. However unpalatable some free speech may be for the state, it must be allowed.⁷⁴² As a general rule, speech that falls short of incitement to hatred and incitement to violence is lawful, and, furthermore, needs to be protected.

Moral and religious expression

The Court has distinguished between expressions in the public interest and the expression of intimate personal convictions within the sphere of morals and religion. In doing so, it has recognized wider discretion for states when regulating freedom of expression in relation to morals and religion.⁷⁴³ However, within a counter-terrorism strategy, attempts to control the expression of religious beliefs still need to be justified to a high standard.

For example, the banning of a radio advertisement to encourage people to attend a particular church need not amount to a violation of freedom of expression if the ban applies to all religious advertising. The state, in its desire to maintain religious pluralism, is entitled to exclude all religious groupings from broadcasting advertisements if it chooses to.⁷⁴⁴ However, where an advertisement engages more than religious belief and includes an element of political conviction, such a ban may not be proportionate.⁷⁴⁵ By contrast, as we have seen, political expression is recognized by the European Court as contributing to a net positive outcome for a democratic society as a whole, even if it offends some members of that society.

741 UK High Court (Family Division), *Venables and Thompson v. News Group Newspapers Ltd and others*, 8 January 2001, 1 All ER 908 (citing *op. cit.*, note 28, ECtHR, *Osman v. UK*, para. 116).

742 *Op. cit.*, note 729, ECtHR, *Sürek v. Turkey (No. 4)*, paras. 55-61.

743 “Whereas there is little scope under Article 10 para. 2 of the Convention for restrictions on political speech or on debate of questions of public interest [...] a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of ‘the protection of the rights of others’ in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the ‘necessity’ of a ‘restriction’ intended to protect from such material those whose deepest feelings and convictions would be seriously offended [...]”, ECtHR, *Wingrove v. UK*, Case no. 19/1995/525/611, 22 October 1996, para. 58.

744 ECtHR, *Murphy v. Ireland*, Application no. 44179/98, 10 July 2003, paras. 70-82.

745 In *Vgt* the banning of the applicants’ advertisement did constitute a violation of Article 10, and the Swiss Government’s desire to prevent powerful financial groups from exploiting the political process was not a sufficient reason to completely ban all political advertising on the broadcast media (“[...] the applicant association’s film fell outside the regular commercial context inciting the public to purchase a particular product. Rather, it reflected controversial opinions pertaining to modern society in general [...] The Swiss authorities themselves regarded the content of the applicant association’s commercial as being ‘political’ within the meaning of section 18(5) of the Federal Radio and Television Act. Indeed, it cannot be denied that in many European societies there was, and is, an ongoing general debate on the protection of animals and the manner in which they are reared [...] As a result, in the present case the extent of the margin of appreciation is reduced, since what is at stake is not a given individual’s purely ‘commercial’ interests, but his participation in a debate affecting the general interest”), *op. cit.*, note 717, ECtHR, *Vgt (Verein gegen Tierfabriken) v. Switzerland*, paras. 70-71.

Artistic expression

Art may be political expression and, if so, will be protected as such. But artistic expression more generally is also protected under freedom of expression, even where it involves shocking images. Even though freedom of expression permits interference on the basis of morality, this cannot be used to justify wholesale censorship.⁷⁴⁶ Pornography, for example, may be controlled but it cannot be prohibited.⁷⁴⁷

Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions that is essential for a democratic society, even if some of the ideas may be offensive. This principle means that the state is under an obligation not to encroach unduly on artistic freedom of expression. Artistic expression also includes light entertainment.

Commercial expression

Commercial expression is even less protected speech. The state, therefore, has more leeway in deciding whether to impose limits and constraints on such speech. Commercial speech includes promoting commercial, economic or financial interests. However, a book may still constitute political, religious, or artistic expression, even if it has commercial value. Commercial speech includes advertising.⁷⁴⁸

Relatively wide restrictions are permitted in relation to commercial speech because there is a recognized need to protect commercial and confidential information. Preventing unfair competition has also been accepted as pursuing a legitimate aim in protecting the rights of others.

746 In *Müller* there was no violation of freedom of expression because the Swiss authorities could justify closing down an exhibition and fining the applicant because the exhibition was accessible to the general public, free of charge and without any age restrictions, ECtHR, *Müller and Others v. Switzerland*, Application no. 10737/84, 24 May 1988, para. 35-36.

747 ECommHR, *Scherer v. Switzerland*, Application no. 17116/90, 14 January 1993, paras. 61-62. The Court did not rule on this issue because after the death of the applicant, the case was struck out of the list, see ECtHR, *Scherer v. Switzerland*, Case no. 19/1993/414/493, 23 March 1994, para. 32.

748 "The Court recalls that the writer of the article in question reported the dissatisfaction of a consumer who had been unable to obtain the promised reimbursement for a product purchased from a mail-order firm, the Club; it asked for information from its readers as to the commercial practices of that firm. It is clear that the contested article was addressed to a limited circle of tradespeople and did not directly concern the public as a whole; however, it conveyed information of a commercial nature. Such information cannot be excluded from the scope of Article 10, para. 1 which does not apply solely to certain types of information or ideas or forms of expression", ECtHR, *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, Application no. 10572/83, 20 November 1989, para. 26. Similarly Article 19 ICCPR protects advertising. The HRC found a violation of Article 19 in *Ballantyne* in relation to the prohibition of advertising in English in Quebec, see HRC, *Ballantyne v. Canada*, Communication no. 385/1989, doc. CCPR/C/47/D/385/1989, 5 May 1993, para. 11.3 ("Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression. In the Committee's opinion, the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression from the scope of protected freedom. The Committee does not agree either that any of the above forms of expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others").

“Valueless” expression

Free speech also protects “valueless” and offensive speech and ideas that “offend, shock or disturb.” This is because freedom of expression seeks to create “pluralism, tolerance and broad-mindedness without which there is no democratic society”.⁷⁴⁹

Public officials are entitled to be protected from verbal attacks in the performance of their duties unless the remarks form part of an open discussion on matters of public concern or involve the freedom of the press.⁷⁵⁰

Hate speech and related issues

Article 5, ICCPR:

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognised or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognise such rights of that it recognises them to a lesser extent.

Article 20, ICCPR:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 17, ECHR:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The principle that the individual exercise of rights cannot be exploited to deny the rights and freedoms of others is of particular relevance to freedom of expression. Put simply, free-speech rights might be abused to seek the destruction of other’s rights through, for example, the promotion of racial or religious hatred. Under those circumstances, the right to freedom of expression is forfeited in relation to that particular expression.⁷⁵¹ This principle is likely to form a key aspect of a state’s arsenal in its fight against terrorism. From its inception, the OSCE has highlighted the problems of hate speech. Extensive commitments have been adopted to combat acts motivated by prejudice, intolerance and hatred.⁷⁵²

The prohibition of activities aimed at the destruction of rights of others is contained in Article 5 ICCPR and Article 17 ECHR (see box above). The general purpose of these articles is to prevent undemocratic groups from exploiting, to the detriment of human rights, the principles enunciated by the treaties. Article 5 ICCPR and Article 17 ECHR can be applied only to those rights that are capable of being exercised so as to destroy the rights of others; they cannot be used to restrict rights designed to protect the individual, such as the right to liberty

⁷⁴⁹ *Op. cit.*, note 159, ECtHR, *Handyside v. UK*, para. 49.

⁷⁵⁰ “[...] civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty. In the present case the requirements of such protection do not have to be weighed in relation to the interests of the freedom of the press or of open discussion of matters of public concern since the applicant’s remarks were not uttered in such a context”, ECtHR, *Janowski v. Poland*, Application no. 25716/94, 21 January 1999, para. 33.

⁷⁵¹ ECommHR, *Glimmerveen and Hagenbeek v. The Netherlands*, Applications nos. 8348/78 and 8406/78, 11 October 1979, pp. 193-196.

⁷⁵² See in particular the OSCE’s detailed commitments in this area which reflect and develop international human rights law, *op. cit.*, note 164, OSCE/ODIHR, *OSCE Human Dimension Commitments*, Volume 1, pp. 186-203.

or to a fair trial. Any measure taken under these articles must be strictly proportionate to the threat to the rights of others.⁷⁵³

Incitement, racial hatred and hate speech

In a Joint Declaration in 2005, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the Organization of American States Special Rapporteur on Freedom of Expression sought to clarify the extent to which freedom of expression can be limited in the context of incitement to terrorism. That Joint Declaration states:

The right to freedom of expression is universally recognised as a cherished human right and to respond to terrorism by restricting this right could facilitate certain terrorist objectives, in particular the dismantling of human rights.

While it may be legitimate to ban incitement to terrorism or acts of terrorism, States should not employ vague terms such as 'glorifying' or 'promoting' terrorism when restricting expression. Incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.⁷⁵⁴

The relationship between incitement to violence, racial hatred and freedom of expression is complex and controversial. As we have seen, there needs to be a direct link between the expression used and the violence intended. It is therefore necessary to distinguish between the publication of views that incite or might incite violence on the one hand and, on the other, the publication of views that are intransigent and convey unwillingness to compromise with the authorities, without actually inciting violence.

Article 20 ICCPR prohibits hate speech. In this respect there is a close relationship between the ICCPR and the UN Convention on the Elimination of all Forms of Racial Discrimination (ICERD).⁷⁵⁵ ICERD also has a right of individual petition and the state's failure to protect people from racial insults has been found to be a violation.⁷⁵⁶

Hate speech tends to arise in two ways. The first is relatively straightforward and relates to such speech being used by extremists to target certain individuals and/or communities. Hate speech is used by these perpetrators to blame and/or defame people whom they consider to be

753 ECtHR, *Lehideux and Isorni v. France*, Case no. 55/1997/839/1045, 23 September 1998, paras. 46-58; HRC, *Faurisson v. France*, Communication no. 550/1993, doc. CCPR/C/58/D/550/1993, 16 December 1996, paras. 9.1-10. Mr. Faurisson was fined for having said during an interview that: "No one will have me admit that two plus two make five, that the earth is flat, or that the Nuremberg Tribunal was infallible. I have excellent reasons not to believe in this policy of extermination of Jews or in the magic gas chamber [...] I would wish to see that 100 per cent of all French citizens realize that the myth of the gas chambers is a dishonest fabrication ('est une gredinerie'), endorsed by the victorious powers of Nuremberg in 1945-46." The HRC found no violation of Article 19 for a fine.

754 Joint declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005.

755 See also CERD, General Recommendation No. 15 - Organized violence based on ethnic origin (Art. 4), 23 March 1993, para. 4; and also HRC, General Comment No. 11 - Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983, para. 2.

756 CERD, *Ahmad v. Denmark*, Communication no. 16/1999, doc. CERD/C/56/D/16/1999, 8 May 2000, para. 6.1-6.4.

enemies. Holocaust denial is a classic example of such hate speech. It can be appropriate to stop publication of hate speech and to use criminal sanctions to prevent it.

The second category can be less obvious and more complex. It can occur where groups or communities are perceived as being associated with a threat. This has occurred, for example, in regard to some gay communities over the AIDS crisis and in regard to some Muslim communities following 11 September 2001. Management of this form of hate speech requires particular vigilance on the part of the authorities.

The following case example from the European Court helps explain hate speech and how it is appropriate to take measures to prevent it.

CASE EXAMPLE: *Norwood v. UK*⁷⁵⁷

The applicant was a regional organizer for an extreme right wing political party. Between November 2001 and 9 January 2002 he displayed in the window of his first-floor flat a poster (60 cm x 38 cm) supplied by that political party, with a photograph of the Twin Towers in flames, the words “Islam out of Britain — Protect the British People” and a symbol of a crescent and star in a prohibition sign.

The poster was removed by the police following a complaint from a member of the public. The following day a police officer contacted the applicant by telephone and invited him to come to the local police station for an interview. The applicant refused to attend.

The applicant was then charged with an aggravated offence under public order legislation for displaying, with hostility towards a racial or religious group, any writing, sign or other visible representation that is threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress by it.

The applicant pleaded not guilty and argued, in his defence, that the poster referred to Islamic extremism and was not abusive or insulting, and that to convict him would infringe his right to freedom of expression under Article 10 of the Convention. He was convicted and fined £300.

The applicant appealed. The appeal was dismissed. The appeal court held that the poster was “a public expression of attack on all Muslims in this country, urging all who might read it that followers of the Islamic religion here should be removed from it and warning that their presence here was a threat or a danger to the British people”.

Before the European Court, the applicant submitted that free speech includes not only the inoffensive but also the irritating, contentious, eccentric, heretical, unwelcome and provocative, provided that it does not tend to provoke violence. Criticism of a religion, he argued, is not to be equated with an attack upon its followers. In any event, the applicant pointed out that he lived in a rural area not greatly afflicted by racial or religious tension, and there was no evidence that a single Muslim had seen the poster.

The Court, however, recognized the poster as hate speech and relied therefore on the prohibition of the abuse of rights contained in Article 17 of the Convention. The general purpose of which, they pointed out, is to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention, including freedom of expression. Freedom of expression, the Court explained, may not be invoked in a sense contrary to Article 17.

The Court agreed with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant’s display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of freedom of expression.

⁷⁵⁷ ECtHR, *Norwood v. UK*, Application no. 23131/03, 16 November 2004.

Holocaust denial

In cases involving the denial of the Holocaust, the European Court has held that Article 17 ECHR (the prohibition on the abuse of rights) prevents the individuals concerned from relying upon free speech as a defence in denying the Holocaust.⁷⁵⁸

The European Court has recognized, however, that as time passes, the appropriate response to certain types of publication changes. The lapse of time makes it unsuitable to deal with some remarks 40 years later with the same severity as 10 or 20 years previously. This forms part of the effort that every country must make to debate its own history openly and dispassionately.⁷⁵⁹

Apologie or the glorification of terrorism

UN Security Council Resolution 1624 (2005) calls on states “to prohibit by law incitement to commit a terrorist act”.⁷⁶⁰ This obligation, in a European context, is given substance by the Council of Europe Convention on the Prevention of Terrorism (16 May 2005) adopted a few months before the UN resolution. That Convention requires that certain acts that may lead to the commission of terrorist offences be made criminal offences. Such acts would include the public provocation of terrorism, as well as the recruitment and training of people to join and/or support terrorist organizations. Article 5 of the Convention reads as follows:

1. For the purposes of this Convention, “public provocation to commit a terrorist offence” means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

758 “Article 17 covers essentially those rights which will facilitate the attempt to derive therefore a right to engage personally in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention. In particular, the Commission has found that the freedom of expression enshrined in article 10 of the Convention may not be invoked in a sense contrary to Article 17”, ECommHR, *Kühnen v. Germany*, Application no. 12194/86, 12 May 1988, in Decisions and Reports (D.R.) 56, p. 209. See in particular op. cit., note 753, HRC, *Faurisson v. France*, paras. 9.1-10. “National Socialism is a totalitarian doctrine incompatible with democracy and human rights and [that] its adherents undoubtedly pursue aims of the kind referred to in Article 17”, ECommHR, *H., W., P. and K. v. Austria*, Application no. 12774/87. In *Garaudy*, a case dealing with the publication of a revisionist book about the Holocaust, the Court found that “the main content and general tenor of the applicant’s book and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. It considers that the applicant attempts to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention”, ECtHR, *Garaudy v. France*, Application No. 65831/01, 24 June 2003, p. 23.

759 *Op. cit.*, note 181, ECtHR, *Lehideux and Isorni v. France*, paras. 46-58: the case dealt with an attempt to reconsider the role of Marshall Petain in French history.

760 The United Nations Security Council (UNSC) Resolution 1624, doc. S/RES/1624 (2005), adopted on 14 September 2005 states: “Condemning also in the strongest terms the incitement of terrorist acts and repudiating attempts at the justification or glorification (apologie) of terrorist acts that may incite further terrorist acts [...] Calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

- (a) Prohibit by law incitement to commit a terrorist act or acts;
- (b) Prevent such conduct;
- (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.”

2. Each State Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

The Convention also has built in safeguards under Article 12:

1. Each State Party shall ensure that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that State Party, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.
2. The establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.

Conscious of the difficulties that such new offences could create in the context of human rights law, the preamble to that Convention makes it clear that it is not intended to affect established principles relating to freedom of expression and freedom of association. Therefore, to give effect to the obligation in Security Council Resolution 1624 and the Council of Europe Convention, special attention must be paid to freedom of expression, particularly in relation to the regulation and control of public interest speech.

The UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism has endorsed the concept in Article 5 of the Council of Europe Convention on the Prevention of Terrorism, which includes a definition of “public provocation” of terrorism based on a double requirement of subjective intent to incite (encourage) the commission of terrorist offences and an objective danger that one or more such offences would be committed.⁷⁶¹

Incitement, terrorism and the Internet

Governments are under various obligations by international law and conventions, including OSCE commitments safeguarding freedom of expression, when it comes to dealing, regulating or even interfering with the Internet.

The following general principles apply:⁷⁶²

⁷⁶¹ Report by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, doc. E/CN.4/2006/98, 28 December 2005, para. 56 (c) and more recently in doc. A/61/267, 16 August 2006, para. 28.

⁷⁶² See on the topic, OSCE Office of the Representative on Freedom of the Media (RFoM) and ODIHR, “Issues relating to freedom of the media, the right to freedom of expression and the right to respect for private life and data protection” (October 2005), available at <http://www.osce.org/item/16705.html>; and also OSCE/RFoM, *The media freedom internet cookbook*, (Vienna, 2004).

- The Internet is an infrastructure combining different kinds of media (email, chat groups, World Wide Web, etc.). It forms a public space, and Internet media are protected under international law and media commitments to the same degree as traditional media.
- The Internet offers unprecedented means for people worldwide to distribute, exchange and access information. The positive aspects of the Internet outweigh the risks caused by the comparatively small amount of problematic content. Therefore any regulation must be applied carefully in order not to endanger the free flow of information.

Regulation by governments

The essence and the added value of the Internet stem from the very fact that the Internet developed outside of any governmental regulation or interference. However, if governments do feel the need to regulate (parts of) the Internet as a measure to counter terrorism, the following safeguards should be applied:

- Combating the use of the Internet for terrorist purposes must not be used as a pretext to curb the free flow of information. Prosecution of cyber-crime should only target illegal activities and in no way affect the technical infrastructure of the Internet as such.
- No restriction on freedom of expression on the ground of national security or anti-terrorism may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity and effectiveness of the restriction rests with the government.
- A clear distinction must be made between unwanted and illegal content as defined by law. Unwanted (or “harmful” or “problematic”) content, though contested, deserves the full protection of the right of freedom of expression.

If there is a need to take down illegal content from the Internet, this should happen according to the following principles:

- Internet content can only be declared illegal on the basis of a law and by a ruling of a court of justice.
- When it comes to regulating the Internet, there is a worrying tendency to shift responsibility to private operators, such as Internet Service Providers (ISPs). Private bodies or companies are not appropriate instances to decide whether content is “legal” or “illegal”.
- The procedure must be transparent and the right of appeal must be granted. The right to put back on the Internet any content that was wrongly removed should also be observed.
- The principle of the “upload rule” must apply. All Internet content should be subject to the legislation of the country of its origin, not to the legislation of the country where it is downloaded.

Filtering and blocking

- Blocking or filtering of online content by governments is not in accordance with OSCE standards. In a democratic and open society it is up to the citizens/users to decide what they wish to access and view on the Internet.
- Any policy of filtering conflicts with the principle of free flow of information and might endanger the technical infrastructure of the Internet. Filters should only be installed by

Internet users themselves. Such tools are commercially available and can be installed by users.

Education

- As with any risks or threats, education is a crucial element in reducing their negative effects. This is equally true for the risk of terrorist usage of the Internet. Especially among young Internet users, this educational potential has not been exploited to its full extent. Education proves to be a better way of combating bad content than blocking or filtering. An educated mind is the best “filter”.
- Education, media awareness activities and development of Internet literacy should be seen as the most effective way of combating bad content, including crime, hate speech or incitement to terrorist activities.
- The Internet also offers unique opportunities to promote tolerance and foster mutual understanding. This function of the Internet should not be forgotten in the discussion about illegal usage and criminal content.

Right of access to information

In relation to the right of access to information, the European Court of Human Rights has consistently held that Article 10(1) ECHR only gives the right to receive information that people wish you to receive. As such, Article 10 cannot be relied upon to require the release of information that the state does not wish to disclose.

Therefore, the refusal of the state to disclose a secret police register could not constitute an interference with the applicant’s right to receive information, as he had no right to that information and the state did not wish him to receive it.⁷⁶³ However, if an individual can show that his or her private life is directly affected by the state’s refusal to provide information, a positive obligation under the right to respect for private life may oblige the state to provide the information in question.⁷⁶⁴ Similarly, there have been violations of the state’s positive obligations in relation to private-life rights where there was a failure to provide essential information that would enable the applicants’ to assess for themselves the necessary environmental risks that they and their families ran by continuing to live in the area in which they did.⁷⁶⁵

763 “[...] the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him”, *op. cit.*, note 675, ECtHR, *Leander v. Sweden*, para. 74.

764 “In the Court’s opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8, taking into account the State’s margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent. No such procedure was available to the applicant in the present case”, ECtHR, *Gaskin v. UK*, Application no. 10454/83, 7 July 1989, para. 49.

765 *Op. cit.*, note 138, ECtHR, *Guerra and Others v. Italy*, para. 60. Concerning the right to life, see *op. cit.*, note 247, ECtHR, *L.C.B. v. UK*, paras. 36-41.

The Inter-American Court of Human Rights recently produced a judgment asserting the existence of a full right of access to information held by governments and other bodies in the public sphere.⁷⁶⁶ It was the first time that an international tribunal recognized explicitly that:

[...] in a democratic society, it is essential that the State authorities are governed by the principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to a limited system of exceptions.⁷⁶⁷

These exceptions must be established by law, respond to a purpose allowed by the American Convention, be necessary in a democratic society and proportionate.

The European Union Charter of Fundamental Rights (CFR) addresses the right of access to information in a number of ways. The right to freedom of expression expressly includes freedom of information.⁷⁶⁸ There are also provisions guaranteeing a right of access to documents of the EU Institutions⁷⁶⁹ and workers' right to information.⁷⁷⁰

Truth

One element of freedom of expression is the need not to have to prove the truth of statements, if the author has satisfied the standards of professional journalism in that the opinions expressed are based, as far as can be established, on objective facts. To require otherwise would undermine the value of free speech. Indeed, freedom of expression protects the right to criticise, speculate, have opinions and make value judgements and is not limited to "true" statements. This is particularly the case in relation to political expression or speech concerning the public interest. Once statements are presented as fact, it must be established whether the author acted in good faith and sought to verify a factual statement.

In a case in which an author was punished for the publication of a value judgement on the grounds that its truth should have been, and had not been, proven, the Court found that his

⁷⁶⁶ IACtHR, *Reyes et al. v. Chile*, Judgement of 19 September 2006, paras. 58-102. In the case, a Chilean environmental NGO requested information from the government on a massive logging project being undertaken by a foreign company. The NGO requested information on the company's environmental record from the Chilean Foreign Investment Committee, a government body that assesses foreign investment proposals in Chile. The NGO's request was ignored by the Committee and subsequent appeals were summarily dismissed by Chilean courts. In March 2005, the Inter-American Commission reached a decision on the merits and found that Chile had violated Article 13 of the ACHR on the right to freedom of thought and expression. The case was subsequently referred to the Court for adjudication. For a wider range of jurisprudence from the IACtHR on the right to freedom of thought and expression see, among others, IACtHR, *López Álvarez v. Honduras*, Judgement of 1 February 2006, Serie C No. 141, paras. 160-174 (liberty to speak minority languages in places of detention); IACtHR, *Palamara Iribarne v. Chile*, Judgement of 22 November 2005 (Spanish only), Serie C No. 135, paras. 67-95 (prior censorship); IACtHR, *Ricardo Canese v. Paraguay*, Judgement of 31 August 2004, Serie C No. 111, paras. 75-109 (freedom of expression during electoral campaigns); IACtHR, *Herrera Ulloa v. Costa Rica*, Judgement of 2 July 2004, Serie C No. 107, paras. 108-136 (criminal sanctions to a journalist); IACtHR, *Ivcher Bronstein v. Peru*, Judgement of 6 February 2001, Serie C No. 74, paras. 145-164 (freedom of expression and of the media); IACtHR, *"The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*, Judgement of 5 February 2001, Serie C No. 73, paras. 63-73 (prior censorship); and also IACtHR, *Compulsory membership in an association prescribed by law for the practice of journalism* (Articles 13 and 29 ACHR), Advisory Opinion OC-5/85, 13 November 1985, Series A No. 5.

⁷⁶⁷ *Ibid.*, IACtHR, *Reyes et al. v. Chile*, para. 92.

⁷⁶⁸ *Op. cit.*, note 39, CFR, Article 11.

⁷⁶⁹ *Ibid.*, Article 42.

⁷⁷⁰ *Ibid.*, Article 27.

freedom of expression had been violated.⁷⁷¹ Similarly, the Court held that it was unreasonable to require a journalist to prove the truth of rumours or stories relating to police brutality that he reported. This was particularly so because the articles urged setting up a body to investigate complaints of police brutality which was in the public interest.⁷⁷²

In the context of freedom of expression and reporting on terrorism the protection of journalists acting in good faith is a vital guarantee to ensure their freedom of expression.

Responsibilities

The right to freedom of expression imposes responsibilities upon those seeking to rely on the right. This is in recognition of the powerful nature of the right and an acknowledgement that there can be no freedom of expression without responsibility. The medium of expression is an important factor in relation to the type of responsibilities. Therefore, as the audio-visual media have a more immediate and powerful effect than print media, greater responsibilities arise in relation to those media.

As has been seen in cases before the European Court, in the context of counter-terrorism, where there is an identifiable threat, there is a particular onus on journalists to act according to the ethics of good journalism. In relation to conflict-zone situations, there is a need for journalists and others to take particular care when expressing themselves to avoid ambiguous statements that could be interpreted as inciting violence or disorder.

Similarly, there is an obligation on civil servants requiring a degree of reserve on their part. Judges are expected to show restraint in exercising their freedom of expression, particularly where their authority and impartiality may be called into question. Special conditions are also considered to attach to military life. Human rights standards recognize that restrictions can be imposed on the police, the armed forces and civil servants.⁷⁷³ The Court found that a ban on political activities by the police (in relation to freedom of expression) was justifiable on the basis that a politically neutral police force is in the public interest.⁷⁷⁴ Similarly, the

771 "The applicant was convicted because he had used certain expressions ('basest opportunism', 'immoral' and 'undignified') apropos of Mr. Kreisky, who was Federal Chancellor at the time, in two articles published in the Viennese magazine *Profil* on 14 and 21 October 1975 [...] The articles dealt with political issues of public interest in Austria which had given rise to many heated discussions concerning the attitude of Austrians in general -and the Chancellor in particular- to National Socialism and to the participation of former Nazis in the governance of the country. The content and tone of the articles were on the whole fairly balanced but the use of the aforementioned expressions in particular appeared likely to harm Mr. Kreisky's reputation", ECtHR, *Lingens v. Austria*, Application no. 9815/82, 8 July 1986, para. 43.

772 *Op. cit.*, note 719, ECtHR, *Thorgeir Thorgeirson v. Iceland*, paras. 65-67.

773 These rights are explicit in Article 11(2) ECHR and Article 22 ICCPR.

774 "The Government contended that for decades preceding Hungary's return to democracy in 1989 to 1990, the police had been a self-avowed tool of the ruling party and had taken an active part in the implementation of the party policies. Career members of the police were expected to be politically committed to the ruling party. Given Hungary's peaceful and gradual transformation towards pluralism without a general purge in the public administration, it was necessary to depoliticise, *inter alia*, the police and restrict the political activities of its members so that the public should no longer regard the police as a supporter of the totalitarian regime but rather as a guardian of democratic institutions. Neither the applicant nor the Commission expressed an opinion on this point [...] Bearing in mind the role of the police in society, the Court has recognised that it is a legitimate aim in any democratic society to have a politically neutral police force [...] In view of the particular history of some Contracting States, the national authorities of these States may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve this aim by restricting the freedom of police officers to engage in political activities and, in particular, political debate", ECtHR, *Rekvényi v. Hungary*, Application no. 25390/94, 20 May 1999, paras. 44-46.

Court held that it was legitimate to interfere with the freedom of expression rights of civil servants who wish to engage in political activity.⁷⁷⁵

Not all those involved in the administration of the state will be subject to restrictions on freedom of expression under these circumstances. Schoolteachers, for example, may technically be part of the administration of the state; however, they are still considered to have freedom of expression.⁷⁷⁶

Restrictions on freedom of expression

Freedom of expression does not just protect expression itself but the conditions necessary for it. The ability of journalists to protect their sources, for example, is one of the basic conditions for press freedom. Other conditions for effective journalism include holding meetings, obtaining information and respecting confidentiality. Therefore, counter-terrorism legislation that limits access to proscribed organizations will inevitably raise issues in relation to freedom of expression.

States have a positive obligation to protect journalists and to promote the conditions necessary for freedom of expression. Even minor restrictions on freedom of expression can have a chilling effect, thus undermining the right. Any restriction should be justified on the basis of legality, necessity, proportionality and non-discrimination. Below are listed some examples of restrictions on freedom of expression that have been considered by the European Court and other tribunals. This is not a finite list.

Prior restraint versus subsequent liability

There are two main kinds of restriction on freedom of expression that states may use in the context of terrorism. These are prior censorship of public expressions and subsequent liability. Prior restraints are of particular relevance in cases where it is known that a particular statement is to be broadcast or distributed or where a person who is known to espouse particular ideas is to be interviewed in the press and a state wishes to take preventive action or where the publication of statements at a certain time may put lives in danger by compromising a counter-terrorism operation.

Prior restraint, where publication is prevented from going ahead, may be a justified restriction on freedom of expression, but it calls for the most careful scrutiny on the part of a court, particularly where it concerns news. This is because news is such a perishable commodity.

⁷⁷⁵ ECtHR, *Ahmed and Others v. UK*, Case no. 65/1997/849/1056, 2 September 1998, paras. 62-64.

⁷⁷⁶ “[...] Since teachers are figures of authority to their pupils, their special duties and responsibilities to a certain extent also apply to their activities outside school. However, there is no evidence that Mrs Vogt herself, even outside her work at school, actually made anti-constitutional statements or personally adopted an anti-constitutional stance. The only criticisms retained against her concerned her active membership of the DKP [German Communist Party, a lawful organization], the posts she had held in that party and her candidature in the elections for the Parliament of the Land. Mrs Vogt consistently maintained her personal conviction that these activities were compatible with upholding the principles of the German constitutional order. The disciplinary courts recognised that her conviction was genuine and sincere, while considering it to be of no legal significance [...] and indeed not even the prolonged investigations lasting several years were apparently capable of yielding any instance where Mrs Vogt had actually made specific pronouncements belying her emphatic assertion that she upheld the values of the German constitutional order”, ECtHR, *Vogt v. Germany*, Case no. 7/1994/454/535, 2 September 1995, para. 60.

An injunction prohibiting publication must be the option of last resort even when national security is concerned.⁷⁷⁷

The public interest is that there should be publication and then, if necessary, further actions can be taken as a result of that decision to broadcast or publish. This is particularly the case where the broadcast or publication involves criticisms of the government.⁷⁷⁸

The use of prior restraint is, however, highly contentious and the situations where it may be used are extremely limited. This is reflected in the fact that the Inter-American Convention on Human Rights specifically introduces a virtually complete ban on prior censorship although this is not explicitly found in other international human rights instruments.⁷⁷⁹ The Inter-American Court stated that:

[...] freedom of expression is not exhausted in the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate method to disseminate thought and allow it to reach the greatest number of persons. In this respect, the expression and dissemination of thought and information are indivisible, so that a restriction of the possibilities of dissemination represents directly, and to the same extent, a limit to the right to free expression [...] it is necessary to indicate that freedom of expression is a way of exchanging ideas and information between persons; it includes the right to try and communicate one's point of view to others, but it also implies everyone's right to know opinions, reports and news. For the ordinary citizen, the knowledge of other people's opinions and information is as important as the right to impart their own [...] The Court considers that both dimensions are of equal importance and should be guaranteed simultaneously in order to give total effect to the right to freedom of thought and expression in the terms of Article 13 of the Convention.⁷⁸⁰

In the US context, the importance of freedom of expression contained in the First Amendment is shown by the fact that it will rarely be capable of restriction through prior restraint.

777 "Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. [...] On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest", *op. cit.*, note 718, ECtHR, *Observer and Guardian v. UK*, para. 60.

778 "The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. Nevertheless it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith", ECtHR, *Castells v. Spain*, Application no. 11798/85, 23 April 1992, para. 46.

779 IACHR, Article 13 (2) reads: "The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary in order to ensure: a) respect for the rights or reputations of others; or b) the protection of national security, public order, or public health or morals."

780 *Op. cit.*, note 766, IACtHR, "*The Last Temptation of Christ*" (*Olmedo-Bustos et al.*) *v. Chile*, paras. 65-67.

The Government must prove that publication would “surely result in direct, immediate, and irreparable damage”⁷⁸¹ to the nation before publication can be blocked.

The European Court has by and large taken a different stand, allowing states to restrict freedom of expression *ex ante* on a national security basis or on one of the other grounds recognized by Article 10(2) ECHR. This has been the case in a number of decisions concerning the publication of interviews with terrorists. The Court rejected as inadmissible the application regarding the refusal by a domestic court to allow a terrorist to be interviewed before the end of the trial⁷⁸² and the European Commission on Human Rights (ECommHR) did not find a violation of freedom of expression for a blanket ban on interviews with members of Sinn Féin, an organization not proscribed though deemed to represent the political wing of the Irish Republican Army (IRA). The Commission emphasized that:

[...] the exercise of that freedom ‘carries with it duties and responsibilities’ and that the defeat of terrorism is a public interest of the first importance in a democratic society. In a situation where politically motivated violence poses a constant threat to the lives and security of the population and where the advocates of this violence seek access to the mass media for publicity purposes, it is particularly difficult to strike a fair balance between the requirements of protecting freedom of information and the imperatives of protecting the State and the public against armed conspiracies seeking to overthrow the democratic order which guarantees this freedom and other human rights.⁷⁸³

In another case, the ECommHR found no violation of freedom of expression for an eight week restriction on the broadcasting of a programme based on the transcripts of the trial of six alleged IRA terrorists pending the verdicts. The ECommHR emphasized the fact that the dramatic reconstruction of court proceedings on television appreciably differs from reporting of those proceedings in the press.⁷⁸⁴

States may also choose to punish people after a criminal act is committed and, at least in an American context, it can clearly be seen that “subsequent punishment for such abuses as may exist is the appropriate remedy consistent with constitutional privilege.”⁷⁸⁵

781 US Supreme Court, *New York Times Co. v. United States*, 403 US 713 (1971). The Supreme Court ruled that First Amendment did protect the New York Times’ right to publish the so called “Pentagon Papers”. The Papers, commissioned in 1967 by the Secretary of Defence, focussed on the history of the war in Viet-Nam, including the internal planning and policy decisions within the U.S. Government. “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity”, US Supreme Court, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The Government “thus carries a heavy burden of showing justification for the imposition of such a restraint”, US Supreme Court, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

782 The ECtHR noted “that terrorism by the Red Army Faction (RAF) had been a major threat to national security and public safety in Germany for more than twenty years and that fighting terrorism is a legitimate interest of every State. This includes the taking of measures intended to prevent the recruitment of members and supporters for terrorist organisations.” The Court found that the state had enough margin of appreciation due to the applicant’s personal history (she is one of the main representatives of the terrorist group RAF) and because of some ambiguity in messages previously released by her, see *op. cit.*, note 737, ECtHR, *Hogefeld v. Germany*, pp. 5-8. In a case involving a prisoner and the possibility for him to call journalists from the prison, the Commission ruled the application inadmissible because of the impossibility for the prison authorities to exercise effective control over the telephone communications, see ECommHR, *Bamber v. UK*, Application no. 33742/96, 11 September 1997.

783 ECommHR, *Purcell and Others v. Ireland*, Application no. 15404/89, 16 April 1991.

784 The Commission considered that “such a television programme would not normally affect the judgment of the Court, but that the appellants had the right to be assured that the Court was unaffected by external matters and that they would have understandable doubts of this if the programme was in fact shown before the judgment was given”, ECommHR, *C. Ltd v. UK*, Application no. 14132/88, 13 April 1989.

785 US Supreme Court, *Near v. Minnesota*, 283 U.S. 697 (1931).

The existence of offences such as incitement to commit terrorist acts should serve in itself as a deterrent. This second type of restriction of freedom of expression, the liability *ex post*, is particularly significant in cases of incitement to commit terrorist acts, of *apologie*-glorification of terrorism and, in general, in cases of speech involving advocacy of violence or of other criminal behaviour. Subsequent liability for expression, providing the law is drafted clearly and that prosecution of such offences is carried out in accordance with international standards of fair trial, is likely to have a lesser impact on the core of the right to freedom of expression and therefore should be viewed as preferable to prior restraint, which should only be used in truly exceptional circumstances.

The prosecution of individuals for exercising their freedom of expression, particularly where it engages political expression and/or other ECHR rights, would need to be strictly justified. It is unlikely that a custodial sentence could ever be justified for a prosecution relating to political speech that falls short of incitement to violence, hate speech or war propaganda.⁷⁸⁶

It will rarely be in the public interest to restrict freedom of expression through the use of criminal sanctions. For example, the European Court considered a case in which journalists breached criminal law in reproducing the confidential tax documents of the managing director of a large multi-national car manufacturer during industrial unrest. The Court found there was no public interest in prosecuting the journalists. The public interest lay in the disclosure that the managing director received large salary increases while he opposed salary increases for employees. Therefore, to convict the journalist was disproportionate given the importance of the journalist's article, and the fact that the information on the tax returns was already available to the public via their local municipality.⁷⁸⁷

Accordingly, even if a journalist breaks the criminal law for the purpose of publishing, his conviction may not be justified under freedom of expression rights if the breach of the criminal law appears minor when compared to the public importance of the matters on which he is reporting.

Defamation

Reputation is specifically protected in the right to freedom of expression. Privacy rights also protect it. For example, in one case the European Court ruled that prosecution for criminal defamation did not violate an applicant's right to freedom of expression because the programme in which he unjustifiably criticized a police chief had been transmitted at peak

⁷⁸⁶ In *Incal*, a criminal conviction for the dissemination of a pamphlet was in violation of Article 10 ECHR, considering the severity of the sanction, the fact that the applicant sought an authorization from the prefecture before circulating the leaflet, the fact that the applicant is a member of one of the opposition's political parties (and the consequent importance of openness to criticism by governments in democratic societies), and most importantly because the document was not considered by the ECtHR as clearly inciting violence or hatred among citizens, *op. cit.*, note 526, ECtHR, *Incal v. Turkey*, paras. 46-60.

⁷⁸⁷ ECtHR, *Fressoz and Roire v. France*, Application no. 29183/95, 21 January 1999, paras. 50-56.

viewing times and had not sought to balance the assertions in any way.⁷⁸⁸ The use of criminal defamation as the basis for prosecution, however, should be rare and must be strictly proportionate.

Journalists' sources

The need to protect journalists' sources to ensure freedom of expression, and therefore a democratic society, is a key principle of freedom of expression.⁷⁸⁹ The Court has emphasized the need to protect journalists' sources, for example in a case where the office of a journalist's lawyer was searched, as well as the journalist's own home and office, in order to gain information concerning the journalist's source.⁷⁹⁰

Fair trial

As discussed above in the section on fair-trial rights, there may be a justification for a ban on reporting on ongoing judicial proceedings in order to protect the right to a fair trial.

788 “[...] protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide ‘reliable and precise’ information in accordance with the ethics of journalism [...] Under the terms of paragraph 2 of Article 10 of the Convention, freedom of expression carries with it ‘duties and responsibilities’, which also apply to the media even with respect to matters of serious public concern. Moreover, these ‘duties and responsibilities’ are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the ‘rights of others’. Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations [...] Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under Article 6 (2) of the Convention individuals have a right to be presumed innocent of any criminal offence until proved guilty”, ECtHR, *Pedersen and Baadsgaard v. Denmark*, Application no. 49017/99, 17 December 2004, para. 78 and more generally paras. 71-95.

789 “Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms (see, amongst others, the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and Resolution on the Confidentiality of Journalists’ Sources by the European Parliament, 18 January 1994, Official Journal of the European Communities No. C 44/34). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest”, ECtHR, *Goodwin v. UK*, Case no. 16/1994/463/544, 22 February 1996, para. 39.

790 “In the Court’s opinion, there is a fundamental difference between this case and *Goodwin*. In the latter case, an order for discovery was served on the journalist requiring him to reveal the identity of his informant, whereas in the instant case searches were carried out at the first applicant’s home and workplace. The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist’s source is a more drastic measure than an order to divulge the source’s identity. This is because investigators who raid a journalist’s workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. The Court reiterates that ‘limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court’ (see *Goodwin, cit.*, para. 40). It thus considers that the searches of the first applicant’s home and workplace undermined the protection of sources to an even greater extent than the measures in issue in *Goodwin*”, *op. cit.*, note 658, ECtHR, *Roemen and Schmit v. Luxembourg*, para. 57.

Freedom of Association and the Right to Peaceful Assembly

Article 21, ICCPR:

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22, ICCPR:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 11, ECHR:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The right to peaceful assembly and the right to associate are protected by Article 21 and Article 22 ICCPR and Article 11 ECHR (see box above). These rights are of particular significance for human rights defenders and civil society in general.

Peaceful assembly and the right to association may also engage economic and social rights. Therefore, for a complete picture, treaties that protect these rights such as the UN International Covenant on Economic, Social and Cultural Rights and the Council of Europe Social Charter and Revised Social Charter should also be examined. Additionally, the OSCE has affirmed its commitment to freedom of association and peaceful assembly as recognized in international human rights law (see box below).

Launched in March 2007, the OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly⁷⁹¹ were prepared by the ODIHR Panel of Experts on Freedom of Assembly in consultation with the European Commission for Democracy through Law (the Venice Commission) of the Council of Europe. The Guidelines demarcate a clear minimum baseline in relation to relevant international standards, thereby establishing a threshold that must be met by national authorities in their regulation of freedom of peaceful assembly. The following overview draws on these Guidelines.

⁷⁹¹ OSCE/ODIHR, *Guidelines on Freedom of Peaceful Assembly*, (Warsaw, 2007) available at www.osce.org/odihr/item_11_23835.html.

The OSCE participating States will:

(7.6) – respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations [...]

(9) The participating States reaffirm that [...]

(9.2) - everyone will have the right of peaceful assembly and demonstration. Any restrictions which may be placed on the exercise of these rights will be prescribed by law and consistent with international standards;

(9.3) - the right of association will be guaranteed [...]

(10) [...] the participating States express their commitment to [...]

(10.3) - ensure that individuals are permitted to exercise the right to association, including the right to form, join and participate effectively in non-governmental organizations which seek the promotion and protection of human rights and fundamental freedoms, including trade unions and human rights monitoring groups; [...]

(32) [...] Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic,

cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will. In particular, they have the right [...]

(32.6) - to establish and maintain organizations or associations within their country and to participate in international non-governmental organizations

(1990 Copenhagen Document)

In the context of countering terrorism, in the OSCE participating States:

[...] are convinced of the need to address conditions that may foster and sustain terrorism, in particular by fully respecting democracy and the rule of law, by allowing all citizens to participate fully in political life, by preventing discrimination and encouraging intercultural and inter-religious dialogue in their societies, by engaging civil society in finding common political settlement for conflicts, by promoting human rights and tolerance and by combating poverty.

(2002 Porto Charter)

Peaceful Assembly: Overview and Definition

Freedom of peaceful assembly guarantees the right for groups to express and defend common interests, including the right to protest peacefully. This is one of the freedoms that lie at the heart of a democratic society. For many, peacefully voicing their message in public is their only mechanism to promote change. Guaranteeing the exercise of freedom of assembly can protect against radicalization and violence by giving groups a peaceful outlet for their grievances. Demonstrators, however, cannot rely upon their right to peaceful assembly in order to destroy the rights of others.

A clear understanding of what constitutes an assembly is key to ensuring that freedom of assembly is interpreted and its exercise is regulated in a uniform and non-discriminatory manner. A public assembly may be defined as the intentional and temporary presence of a number of individuals in a public place which is not a building or structure for a common expressive purpose. Nevertheless, the right to freedom of peaceful assembly covers both public and private meetings.⁷⁹²

The OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly identify the following guiding principles:

Principle 1. Presumption in favour of holding assemblies. As a basic and fundamental right, freedom of peaceful assembly **should, insofar as possible, be enjoyed without regulation.** Anything not expressly forbidden in law should be presumed to be permissible, and those wishing to assemble should not be required to obtain permission to do so. A presump-

⁷⁹² “As such this right covers both private meetings and meetings in public thoroughfares as well as static meetings and public processions; in addition, it can be exercised by individuals and those organising the assembly”, ECtHR, *Djavit An v. Turkey*, Application no. 20652/92, 20 February 2003, para. 56. Cf. also ECommHR, *Rassemblement Jurassien and Unité Jurassienne v. Switzerland*, Application no. 8191/78, 10 October 1979, p. 119.

tion in favour of the freedom of peaceful assembly should be clearly and explicitly established in law.

Principle 2. The state's duty to protect peaceful assembly. It is the responsibility of the state to put in place adequate mechanisms and procedures to ensure that the freedom of peaceful assembly is enjoyed in practice and is not subject to unduly bureaucratic regulation.

Principle 3. Legality. Any restrictions imposed must have a formal basis in law. The law itself must be compatible with international human rights law, and must be sufficiently precise to enable an individual to assess whether or not his or her conduct would be in breach of the law, and what the consequences of such breaches are likely to be.

Principle 4. Proportionality. Any restrictions imposed on freedom of assembly must be proportional. The least intrusive means of achieving the legitimate objective being pursued by the authorities should always be given preference. The dispersal of assemblies may only be a measure of last resort. The principle of proportionality thus requires that authorities do not routinely impose restrictions that would fundamentally alter the character of an event, such as routing marches through less central areas of a city. The blanket application of legal restrictions tends to be over-inclusive and will thus fail the proportionality test because no consideration is given to the specific circumstances of the case in question.

Principle 5. Good administration. The public should know which body is responsible for taking decisions about the regulation of freedom of assembly, and this must be clearly stated in law. The regulatory authority should ensure that the general public has adequate access to reliable information, and operate in an accessible and transparent manner.

Principle 6. Non-discrimination.

- Freedom of peaceful assembly is to be enjoyed equally by all persons. In regulating freedom of assembly, the relevant authorities must not discriminate against any individual or group on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The freedom to organize and participate in public assemblies must be guaranteed to both individuals and corporate bodies; to members of minority and indigenous groups; to both nationals and non-nationals (including stateless persons, refugees, foreign nationals, asylum seekers, migrants and tourists); to both women and men; and to persons without full legal capacity, including persons with mental illness.
- The law must recognize the child's right to participate in and organize peaceful assemblies. With due regard to the evolving capacity of the child, the right of children to organize an assembly may be subject to restrictions such as a certain minimum age for organizers or a requirement that the consent by their parents or legal guardians be obtained.
- Freedom of assembly of police or military personnel should not be restricted unless the reasons for the restriction are directly connected with their service duties, and only to the extent absolutely necessary in light of considerations of professional duty.

Lawful restrictions

While international and regional human rights instruments affirm and protect the right to freedom of peaceful assembly, they also allow states to impose certain limitations on that

freedom.⁷⁹³ Legitimate grounds for restriction (such as the prevention of disorder or crime, or the protection of the rights and freedoms of others) are prescribed by the relevant international and regional human rights instruments, and these should not be supplemented by additional grounds in domestic legislation.

The regulatory authorities must not raise obstacles to freedom of assembly unless there are compelling arguments to do so. The legitimate aims listed below (as provided in the limiting clauses in Article 21 of the ICCPR and Article 11 of the ECHR) are not a licence to impose restrictions, and the onus rests squarely on the authorities to substantiate any justifications for the imposition of restrictions.

Overbroad public order legislation is likely to have a chilling effect and therefore violate the right to assemble and protest.⁷⁹⁴ Prior restrictions imposed on the basis of the possibility of minor incidents of violence are likely to be disproportionate, and any isolated outbreak of violence should be dealt with by way of subsequent arrest and prosecution rather than prior restraint.

Private space

Participants in public assemblies have as much a claim to use public places for a reasonable period as everyone else. Indeed, public protest, and freedom of assembly in general, should be regarded as an equally legitimate use of public space as the more routine purposes for which public space is used (such as pedestrian and vehicular traffic). Other public facilities that are buildings and structures — such as publicly owned auditoriums, stadiums or lobbies of public buildings — are proper sites for public assemblies to the same extent that such facilities are made available for similar activities. Their use is subject to relevant health and safety laws, and to anti-discrimination laws.

Furthermore, private property capable of accommodating assemblies, meetings or gatherings may, of course, be used for such activities, but the property owner may open his or her property to whoever he or she chooses, subject only to relevant health and safety laws, and applicable anti-discrimination laws. Provisions in public order and criminal law will also often generally apply to private property. This ensures that appropriate action can be taken if events on private property harm other members of the public.

It is, however, important to note that there has been a discernable trend towards the privatization of public spaces in a number of jurisdictions. This raises serious concerns about the regulation of such space and the implications for assembly, expression and dissent, and is an

⁷⁹³ “The proportionality principle demands that a balance be struck between the requirements of the purposes listed in Article 11(2) and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places. The pursuit of a just balance must not result in avocats being discouraged, for fear of disciplinary sanctions, from making clear their beliefs on such occasions [...] Admittedly, the penalty imposed on Mr. Ezelin was at the lower end of the scale of disciplinary penalties [...]; it had mainly moral force, since it did not entail any ban, even a temporary one, on practising the profession or on sitting as a member of the Bar Council. The Court considers, however, that the freedom to take part in a peaceful assembly - in this instance a demonstration that had not been prohibited - is of such importance that it cannot be restricted in any way, even for an avocat, so long as the person concerned does not himself commit any reprehensible act on such an occasion”, ECtHR, *Ezelin v. France*, Application no. 11800/85, 26 April 1991, paras. 52-53. In *Ezelin*, the applicant was a lawyer who attended a protest which then turned violent, and he was then reprimanded for breach of discretion by his professional body. This sanction was held to be disproportionate and to amount to a chilling effect on his ability to peacefully protest.

⁷⁹⁴ HRC, *Kivenmaa v. Finland*, Communication no. 412/1990, doc. CCPR/C/50/D/412/1990, 10 June 1994, para. 9.2.

issue deserving of close attention.⁷⁹⁵ In the freedom of expression case of *Appleby*, the European Court of Human Rights stated that the effective exercise of freedom of expression “does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals”.⁷⁹⁶ Freedom of assembly in privately owned spaces may be deserving of protection where the essence of the right has been destroyed.

The right of association

Freedom of association is one of the rights vital to the functioning of democratic societies. The joining together of individuals for a common purpose — for example, to bring about change — furthers social development and strengthens democracy. From the trade union movement to environmental protection, progress has been achieved through associations.

The right of association, however, may raise particular issues for counter-terrorism strategies when associations are not considered conducive for the public good and are banned. Therefore, for those devising and implementing such strategies, a detailed understanding of the right to association is required. As there is sparse case law on freedom-of-association rights under the ICCPR the focus of this explanation of the right to association will be on Article 11 ECHR.

What is an association?

Individuals exercise their right to freedom of association by coming together on a voluntary basis to further a common interest. For the right to association to be engaged there needs to be a formal association and there needs to be a deliberate effort to set up an organizational structure. Political parties are therefore classic examples of associations. Since political parties are essential to the proper functioning of a democracy, any interference with the right to form political parties must be strictly justified.⁷⁹⁷

795 See, for example, D. Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York, 2003) and M. Kohn, *Brave New Neighbourhoods: The Privatization of Public Space* (New York, 2004); see also K. Gray, S. Gray, “Civil Rights, Civil Wrongs and Quasi-Public Space”, in *European Human Rights Law Review*, 1999:46; J. Rowbottom, “Property and Participation: A Right of Access for Expressive Activities” in *European Human Rights Law Review*, 2005, 2, pp. 186-202.

796 ECtHR, *Appleby v. United Kingdom*, Application no. 44306/98, 6 May 2003, para. 39 (citing *op. cit.*, note 726, *Özgür Gündem v. Turkey*, paras. 42-46, and ECtHR, *Fuentes Bobo v. Spain*, Application no. 39293/98, 29 February 2000, para. 38. In *Cissé*, the European Court of Human Rights held that the evacuation of a group of approximately 200 illegal immigrants who had occupied a church in Paris for several months did amount to an interference with the applicant’s right to freedom of peaceful assembly, but in this case, the interference was both necessary and proportionate primarily on health grounds. The applicable domestic laws stated that “[...] assemblies for the purposes of worship in premises belonging to or placed at the disposal of a religious association shall be open to the public. They shall be exempted from [certain requirements], but shall remain under the supervision of the authorities in the interests of public order”, ECtHR, *Cissé v. France*, Application no. 51346/99, 9 April 2002, paras. 24 and 52.

797 “In the political sphere that responsibility means that the State is under the obligation, among others, to hold, in accordance with Article 3 of Protocol No. 1, free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. Such expression is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country’s population. By relaying this range of opinion, not only within political institutions but also - with the help of the media - at all levels of social life, political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society [...] Consequently, the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties’ freedom of association”, ECtHR, *United Communist Party of Turkey and Others v. Turkey*, Case no. 133/1996/752/951, 30 January 1998, paras. 44 and 46.

The right to associate does not give the right to be a member of a particular association. Generally speaking, associations are free to regulate their own membership and activities.⁷⁹⁸

What is not an association?

Most professional regulatory bodies are excluded from being associations for the purposes of international human rights law. This is because membership is non-voluntary and their public nature usually excludes them.⁷⁹⁹

What is a non-governmental organization?

Council of Europe Fundamental Principles on the Status of Non-Governmental Organisations in Europe (Strasbourg, 13 November 2002):

a) Scope

- NGOs are essentially voluntary, self-governing bodies and are not therefore subject to direction by public authorities. The terms used to describe them in national law may vary, but they include associations, charities, foundations, funds, non-profit corporations, societies and trusts;
- NGOs encompass bodies established by individual persons (natural and legal) and groups of such persons. They may be national or international in their composition and sphere of operation;
- NGOs are usually organisations which have a formal membership, but this is not necessarily the case;
- NGOs do not have the primary aim of making a profit. They do not distribute profits arising from their activities to their members or founders, but use them for the pursuit of their objectives;
- NGOs can be either informal bodies, or organisations that have legal personality. They may enjoy different statuses under national law in order to reflect differences in the financial or other benefits, which they are accorded in addition to legal personality.

b) Basic principles

- NGOs come into being through the initiative of individuals or groups of persons. The national legal and fiscal framework applicable to them should therefore permit and encourage their creation;

- All NGOs enjoy the right to freedom of expression;
- NGOs with legal personality should have the same capacities as are generally enjoyed by other legal persons and be subject to the same administrative, civil and criminal law obligations and sanctions generally applicable to them;
- Any act or omission by a governmental organ affecting an NGO should be subject to administrative review and be open to challenge in an independent and impartial court with full jurisdiction.

c) Objectives

- An NGO is free to pursue its objectives, provided that both the objectives and the means employed are lawful. These can, for instance, include research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with stated government policy;
- An NGO may also be established to pursue, as an objective, a change in the law;
- An NGO that supports a particular candidate or party in an election should be transparent in declaring its motivation. Any such support should also be subject to legislation on the funding of political parties. Involvement in political activities may be a relevant consideration in any decision to grant it financial or other benefits in addition to legal personality;
- An NGO with legal personality may engage in any lawful economic, business or commercial activities in order to support its non-profit making activities without there being any need for special authorisation, but always subject to any licensing or regulatory requirements applicable to the activities concerned;
- NGOs may pursue their objectives through membership of federations and confederations of NGOs.

Attempts to control, regulate, even criminalize organizations protected by the right to association may be a concern for those devising counter-terrorism strategies. It is therefore

⁷⁹⁸ ECommHR, *Cheall v. UK*, Application no. 10550/83, 13 May 1985, pp. 185-186.

⁷⁹⁹ “[...] the Belgian *Ordre des médecins* is a public-law institution. It was founded not by individuals but by the legislature; it remains integrated within the structures of the State and judges are appointed to most of its organs by the Crown. It pursues an aim which is in the general interest, namely the protection of health, by exercising under the relevant legislation a form of public control over the practice of medicine. Within the context of this latter function, the *Ordre* is required in particular to keep the register of medical practitioners. For the performance of the tasks conferred on it by the Belgian State, it is legally invested with administrative as well as rule-making and disciplinary prerogatives out of the orbit of the ordinary law [...] and, in this capacity, employs processes of a public authority [...] Having regard to these various factors taken together, the *Ordre* cannot be considered as an association within the meaning of Article 11”, *op. cit.*, note 526, ECtHR, *Le Compte, van Leuven and de Meyere v. Belgium*, paras. 64-65.

essential for there to be a clear understanding of what NGOs are and how they work. There is no single, accepted definition of an NGO. Most commonly, however, an organization will fall into the category of NGO if it meets the criteria set out in the Council of Europe *Fundamental Principles on the Status of Non-Governmental Organisations in Europe* (see box above).

The OSCE has adopted strong commitments to support and protect NGOs. For example:

[...] The participating States will recognize as NGOs those which declare themselves as such, according to existing national procedures, and will facilitate the ability of such organizations to conduct their national activities freely on their territories [...].

(1991 Moscow Document)

[...] Non-governmental organizations (NGOs) can perform a vital role in the promotion of human rights, democracy and the rule of law. They are an integral component of a strong civil society. We pledge ourselves to enhance the ability of NGOs to make their full contribution to the further development of civil society and respect for human rights and fundamental freedoms.

(1999 Istanbul Document)

Human rights defenders

Human rights NGOs, often known as human rights defenders (HRDs), which according to the accepted UN activity-based definition contained in its Declaration on Human Rights Defenders include human rights NGOs but also individuals and groups striving for the defence of human rights, are often concerned with counter-terrorism strategies.⁸⁰⁰ HRDs can play an invaluable role in ensuring such strategies are carried out in compliance with international human rights law and standards. They can also provide a check on any abuse of state power. Domestically, HRDs are often a key element of civil society contributing to democratic development and vitality. In many countries, HRDs are often the guardians of the rule of law.

Because of their essential role, HRDs should be protected and promoted. This is particularly the case in national security and the counter-terrorism context where, throughout the OSCE region, HRDs have been instrumental in shedding light on government policies, thereby helping to ensure that counter-terrorism strategies do not undermine the democracy they seek to protect.

Governments tend to be uncomfortable, to some extent, with HRDs because often their *raison d'être* are to criticize government excesses, to hold the government to account and to ensure that policy complies with human rights. Too often, governments react by seeking to control HRDs, using both lawful and unlawful mechanisms to do so. HRDs should be aware of the threats they face, while remaining focused on the unique opportunities they may have to bring an element of accountability to government policy, which in turn can bring about its change.

In recognition of the importance of HRDs and the problems that they face, the UN Secretary General has appointed a Special Representative on Human Rights Defenders. The Special Representative has pointed out that governments may be using the global war on terrorism

⁸⁰⁰ For further information on human rights defenders, see UN OHCHR, *Human rights defenders: protecting the right to defend human rights*, Fact sheet No. 29, Geneva, April 2004.

as a pretext to infringe human rights and to clamp down on HRDs.⁸⁰¹ This has included violations of HRDs' rights to freedom of association, expression and access to information. There are also examples of the arbitrary arrest and detention, prosecution, conviction and sentencing of rights defenders, all under security legislation provisions.

According to the Special Representative, these attacks have aimed at concealing human rights abuses or punishing defenders for their human rights work and to discouraging others from continuing it. A group of UN Special Representatives and Special Rapporteurs has "deplored the fact that, under the pretext of combating terrorism human rights defenders are threatened and vulnerable groups are targeted and discriminated against on the basis of origin and socio-economic status, in particular migrants, refugees and asylum-seekers, indigenous peoples and people fighting for their land rights or against the negative effects of economic globalization policies."⁸⁰²

The dilemma faced by governments developing counter-terrorism strategies is that while NGOs in general are essential to a democratic society, some may also engage in attempts to destroy it. In relation to this last point, UN bodies and other institutions responsible for promoting and protecting human rights have provided much guidance.

Trade unions

Freedom of association specifically recognizes the right to join a trade union. OSCE participating States are committed to this principle.⁸⁰³ This right has also been interpreted to include a right not to join a trade union.⁸⁰⁴ Freedom of association can also be relied upon by trades unions to protect the broader interests of their members, for example, by requiring there to be facilities to enable a union to do its job properly – thus incorporating elements of the European Social Charter into the ECHR.⁸⁰⁵

Inherent in the right to associate is the right to take industrial action, although this right may be limited.⁸⁰⁶ OSCE participating States have recognized the freedom to strike, subject to

801 "There is a danger worldwide that, under the guise of combating terrorism, some Governments may increase their efforts to stifle peaceful dissent and suppress opposition. In the current climate, those who question the legitimacy of some of the post-11 September so-called anti-terrorist measures, or simply anyone who does not socially conform – be they migrants, refugees, asylum-seekers, members of religious or other minorities, or simply people living at the margins of society – may be branded as terrorists and may end up being caught in a web of repression and violence", Report of the Special Representative of the UN Secretary General on Human Rights Defenders, Ms. Hina Jilani, doc. E/CN.4/2002/106, 27 February 2002, para. 97.

802 Joint statement by the Special Rapporteurs/Representatives, Experts and Chairpersons of the working groups of the special procedures of the United Nations Commission on Human Rights, 30 June 2003, UN Information Service, Press Release HR/4682.

803 *Op. cit.*, note 6, 1990 Copenhagen Document, para 9.3.

804 "[...] a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present instance, it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union [...] such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11 [...] An individual does not enjoy the right to freedom of association if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value", ECtHR, *Young, James and Webster v. UK*, Applications nos. 7601/76 and 7806/77, 13 August 1981, paras. 55-56.

805 "The Court [...] considers that it may infer from Article 11 of the Convention, read in the light of Article 28 of the European Social Charter (Revised), that workers' representatives should as a rule, and within certain limits, enjoy appropriate facilities to enable them to perform their trade-union functions rapidly and effectively", ECtHR, *Sanchez Navajas v. Spain*, Application no. 57442/00, 21 June 2001, para. 2.

806 ECtHR, *Schmidt and Dahlström v. Sweden*, Application no. 5589/72, 6 February 1976, para. 36.

limitations prescribed by law and consistent with international standards.⁸⁰⁷ Article 8 of the ICESCR also recognizes the right to strike, provided it is exercised in conformity with the laws of the particular country.

The International Labour Organization also has detailed conventions and standards on freedom of association, which are binding on most OSCE participating States.⁸⁰⁸

Restricting association

The right to freedom of association is not necessarily violated by requirements to register or license the association, so long as these schemes do not impair the activities of an association.⁸⁰⁹

Freedom of association will be violated if a political party or NGO is banned when it did not call for the use of violence, even if the state authorities think that it might. If a political party is not rejecting democratic principles, it should not be restricted.⁸¹⁰ Associations should not be banned on the basis that once they are up and running they could lawfully be banned if they carried out certain activities. They need to be given the benefit of the doubt in the first instance.

Organizations should not be considered terrorist for pursuing unpopular causes or causes which oppose state policies — for example, self-determination for a minority group — as long as such support is peaceful and lawful. It is only when an association engages in, supports or calls for the use of deadly or otherwise serious violence that it can be characterized as a terrorist group, and its rights or existence can be limited and possibly subjected to the application of criminal law. The application of specific counter-terrorism legislation to associations should only take place following serious consideration of whether such action is necessary and proportionate. The notion of terrorism should not be used as a shortcut that bypasses case-by-case assessment.

The UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism has expressed

807 *Op. cit.*, note 6, 1990 Copenhagen Document, para 9.3.

808 Notably ILO Convention CO87 (1948) on Freedom of Association and Protection of the Right to Organise, which is one of the most basic and widely applicable ILO conventions (Convention No. C087 was ratified by 147 countries).

809 “That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly States have a right to satisfy themselves that an association’s aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions. Consequently, the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on freedom of association”, *op. cit.*, note 709, ECtHR, *Sidiropoulos and Others v. Greece*, para. 40. In *Sidiropoulos*, the Court found that the right to associate was violated when the Greek authorities refused to register an organization which sought to promote the traditions, history and symbols of Macedonia, cf. paras. 44-47.

810 “Having analysed Mr Perinçek’s statements, the Court finds nothing in them that can be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles. On the contrary, he stressed on a number of occasions the need to achieve the proposed political reform in accordance with democratic rules, through the ballot box and by holding referenda. At the same time, he spoke out against ‘the former culture idolising violence and advocating the use of force to solve problems between nations and in society’”, ECtHR, *The Socialist Party and Others v. Turkey*, Case no. 20/1997/804/1007, 25 May 1998, para. 46 and more generally paras. 41-52.

[...] concern that much of the recent counter terrorism legislation provides for stricter regulation of the founding and status of associations. Vague and broad definitions of terrorism, or the absence of such a definition, inhibit the work of associations that do not pursue terrorist tactics. While some control over the existence and work of associations is necessary for the State, as a measure to prevent terror, the State must not disproportionately obstruct the work of all associations. The Special Rapporteur would like to recall that the HRC has often expressed its concern about overly strict regulation requirements for NGOs. He also notes that this is a key issue addressed in the excellent work of the Special Representative of the Secretary General on human rights defenders.⁸¹¹

When can a political party be banned?

From a counter-terrorism perspective, the European Court of Human Rights' decision upholding the ruling of the Turkish courts to ban the Refah Party is particularly instructive in relation to how the right to freedom of association works. The ban was justified on the basis that even though it is lawful to advocate change, some of those in the Refah Party were proposing undemocratic values such as the introduction of certain aspects of Sha'ria law that do not conform with the values of the ECHR.

The European Court held that the state had a duty to protect its institutions, and even though it is perfectly lawful and human rights compliant for a political party to campaign for changes in the law and the structure of the state, those political parties must satisfy the following requirements:

- the means used must be legal and democratic in every respect; and
- the changes proposed must be compatible with fundamental democratic principles.

It is clear that associations that advocate undemocratic values can be outlawed, even when they have the electoral support of the population.

Proscribing, or "blacklisting" organizations

Both the UN and the EU have lists proscribing or sanctioning certain terrorist organizations or people.⁸¹² Additionally, domestic frameworks may also "blacklist" certain groups connected with terrorism. The act of proscribing organizations will raise issues under freedom of association, unless those organizations are using their freedom-of-association rights to promote terrorism or destroy the rights and freedoms of others. Any action against an association should meet the tests of being necessary, proportionate and non-discriminatory. There should be a clear legal basis for such action.⁸¹³

The UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism has stressed that the decision to proscribe an organization must be done on a case-by-case basis. He points out, affirming the general principles in relation to the right to association identified above, that:⁸¹⁴

811 *Op. cit.*, note 640, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr. Martin Scheinin, para. 23.

812 See pp. 192-194 above.

813 The issues raised by proscription affecting fair trial rights, are dealt with above at p. 195.

814 *Op. cit.*, note 640, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Mr. Martin Scheinin, para. 26.

- The State may not make a determination that an organisation is a terrorist organisation on the basis of presumptions before that association has started to engage in its activities;
- The decision to proscribe must be made by an independent judicial body and there must always be a possibility to appeal a proscription decision to a judicial body;
- Decisions to criminalise an individual for belonging to a terrorist organisation should only apply after that organisation has been declared as such by a judicial body. This will not absolve an individual from their own criminal responsibility for the preparation of terrorist acts.

Obligation to Protect Religious Pluralism

Article 18, ICCPR:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 9, ECHR:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Religious freedom is protected in international human rights law by Article 18 ICCPR and Article 9 ECHR (see box above). The OSCE also has adopted many commitments on religious freedom, beginning with the Helsinki Final Act in 1975.⁸¹⁵ More recently, OSCE participating States have reiterated “that the struggle against terrorism is not a war against religions or peoples.”⁸¹⁶ They have “firmly reject[ed] identification of terrorism with any nationality or religion.”⁸¹⁷

Understanding how religion is protected in international human rights law is essential when considering measures that could limit the activities of clerics or result in closure or surveillance of religious institutions. Human rights law and commitments also relate to persons who have been detained or convicted on charges of terrorism.

The right to freedom of thought, conscience and religion is absolute, as is the right to change one's religion and belief.⁸¹⁸ No one can be required to believe or follow a particular religion.⁸¹⁹ This aspect is often referred to as the “internal” quality of the right. Because the right is to religion *or* belief, it extends also to belief systems that the state might not officially regard as religions, as well as to unregistered religious groups.

815 Final Act of the Conference on Security and Co-operation in Europe (1975 Helsinki Final Act), Chapter VII, available at <http://www.osce.org/documents>.

816 *Op. cit.*, note 23, 2001 Bucharest Document, Ministerial Declaration, para. 3.

817 *Ibid.*, Ministerial Council Decision No. 1, para. 3.

818 HRC, General Comment No. 22: the right to freedom of thought, conscience and religion (Art. 18), 30 July 1993, para. 3 and 5.

819 HRC, *Kang v. Republic of Korea*, Communication no. 878/1999, doc. CCPR/C/78/D/878/1999, 23 July 2003, para. 7.2.

The qualified element, or external nature, of the right arises in relation to the manifestation of religion or belief. It is for the applicant to prove that their right to manifest religion and belief has been interfered with, and it is then for the state to justify its actions on the basis of legality, necessity, proportionality and non-discrimination. Once again, the main case law in this area is derived from the ECHR.

The existence of a state-established faith does not offend the right to religion as long as membership is not compulsory.⁸²⁰ The promulgation of policies based on religious beliefs is also compatible,⁸²¹ although a requirement to take an oath that includes swearing allegiance to a particular religion is not compatible with Article 9 ECHR.

The elements of freedom of religion or belief

A further element of religious freedom, which marks it out as slightly different from some other rights, is that it recognizes the notion of collective rights — i.e., that the exercise of this right may be in community with others. Therefore, religious communities also have rights.

Neither the HRC nor the European Court of Human Rights has been willing to specify what a religion or a belief is. However, for the right to be engaged there needs to be a degree of structure to the belief system, i.e., identifiable elements that are coherently set out.⁸²² All genuinely held belief systems are protected. This includes all the main world faiths such as Islam, Christianity, Judaism, Buddhism, Hinduism and Sikhism. The right to religion or belief also extends to smaller faiths such as the Krishna Consciousness, the Church of Scientology and Druidism.

Non-religious beliefs can also be protected, such as pacifism, veganism and atheism. The right is, therefore, “[...] also a precious asset for atheists, agnostics, sceptics and the unconcerned.”⁸²³ It is important to emphasize that the right includes a right not to adhere to a religion or belief system. Idealistic, altruistic or political beliefs are not covered. These are almost certainly protected by freedom of expression and/or association. The HRC found, in two cases it considered, that the “Assembly of the Church of the Universe”, whose beliefs and practices involved the cultivation of marijuana, and “God’s tree of life” had not established a belief system to give them the protection of Article 18.⁸²⁴

820 ECommHR, *Darby v. Sweden*, Application no. 11581/85, 9 May 1989, paras. 48-60.

821 The “right” to divorce and the legal status of children born in and out of the wedlock were examined in ECtHR, *Johnston and Others v. Ireland*, Application no. 9697/82, 18 December 1986.

822 “In its ordinary meaning the word ‘convictions’, taken on its own, is not synonymous with the words ‘opinions’ and ‘ideas’, such as are utilised in Article 10 of the Convention, which guarantees freedom of expression; it is more akin to the term ‘beliefs’ (in the French text: ‘convictions’) appearing in Article 9 - which guarantees freedom of thought, conscience and religion - and denotes views that attain a certain level of cogency, seriousness, cohesion and importance”, ECtHR, *Campbell and Cosans v. UK*, Applications nos. 7511/76; 7743/76, 25 February 1982, para. 36.

823 ECtHR, *Kokkinakis v. Greece*, Application no. 14307/88, 25 May 1993, para 31.

824 “[...] a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot conceivably be brought within the scope of article 18 of the Covenant (freedom of religion and conscience), nor can arrest for possession and distribution of a narcotic drug conceivably come within the scope of article 9 (1) of the Covenant (freedom from arbitrary arrest and detention)”, HRC, *M.A.B., W.A.T. and J.-A.Y.T. v. Canada*, Communication No. 570/1993, doc. CCPR/C/50/D/570/1993, 25 April 1994, para. 4.2.

Manifesting religion or thought

The question of what constitutes a manifestation of religious belief sometimes arises in the context of counter-terrorism. The issue is not one of theology and doctrine. Rather, the question is whether an alleged manifestation is motivated or influenced by a religious belief.

The manifestation of religion and belief in practice may include actions or behaviour that are not strictly required by the belief system. Therefore, to be able to rely upon a right to manifest a belief in practice, the applicant must show that it is a “necessary part” of the practice.⁸²⁵

The wearing of headscarves for Muslim women will almost certainly engage issues under the right to manifest religious belief. Therefore if women are prevented from wearing scarves under certain circumstances, the questions to be addressed are:

- How serious an interference is this with their rights to manifest religion?
- Is it a necessary and proportionate response?
- Can limiting the wearing of headscarves be justified?

The European Court has found that within the context of Turkey’s secular constitution it is a lawful interference with the right to manifest religious belief to require that headscarves are not worn in public institutions.⁸²⁶ The Court has also held that ritual slaughter of animals may form part of manifesting religious belief.⁸²⁷

Neither the HRC nor the Court has been willing to accept arguments that manifestation of a particular belief system requires breaking a law of general application.⁸²⁸

825 In *X*, a Buddhist prisoner sought to argue that his religion required him to communicate with others and therefore he should not be prevented from publishing articles in a religious magazine. However, it was held that this was not a necessary part of the practice of his Buddhist faith, see ECommHR, *X. v. UK*, Application no. 5442/72, 20 December 1974, p. 42.

826 ECtHR, *Leyla Şahin v. Turkey*, Application no. 44774/98, 10 November 2005, paras. 111 and 115-116; ECtHR, *Dahlab v. Switzerland*, Application No. 42393/98, 15 February 2001 (“[...] it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant’s pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which [...] is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils”). See also ECommHR, *Karaduman v. Turkey*, Application no. 16278/90, 3 May 1993.

827 ECtHR, *Cha’are Shalom Ve Tsedek v. France*, Application no. 27417/95, 27 June 2000, para. 73.

828 In *C.*, which involved members of the Quaker faith not wishing to pay tax that would go to fund nuclear weapons, the European Court held that “the obligation to pay taxes is a general one which has no specific conscientious implications in itself. Its neutrality in this sense is also illustrated by the fact that no tax payer can influence or determine the purpose for which his or her contributions are applied, once they are collected [...] Article 9 does not confer on the applicant the right to refuse, on the basis of his convictions, to abide by legislation, the operation of which is provided for by the Convention, and which applies neutrally and generally in the public sphere, without impinging on the freedoms guaranteed by Article 9. If the applicant considers the obligation to contribute through taxation to arms procurement an outrage to his conscience he may advertise his attitude and thereby try to obtain support for it through the democratic process”, ECommHR, *C. v. UK*, Application no. 10358/83, 15 December 1983, p. 147. For similar conclusions cf. HRC, *J.P. v. Canada*, Communication no. 446/1991, doc. CCPR/C/43/D/446/1991, 8 November 1991, para. 4.2. Another example where the right to manifest religious belief could not be used to get around a law of general application is the *Khan* case: the applicant failed in his attempt to rely on Article 9 (1) ECHR and the teachings of Islam to permit him to marry a 14-year-old girl, ECommHR, *Janis Khan v. UK*, Application no. 11579/85, 7 July 1986, p. 255.

In a case brought by students who were Jehovah's Witnesses, who objected to having to attend national day celebrations because the parades involved the military, the Court held that the military aspect was only an element of the parade and therefore the requirement to attend could not amount to a significant interference with the applicant's belief system.⁸²⁹ Similarly, it was held that the act of distributing leaflets to soldiers was not a clear manifestation of the belief system of pacifism.⁸³⁰

In relation to conscientious objectors, the UN Commission on Human Rights has recognized the right of everyone to have conscientious objection to military service.⁸³¹ OSCE participating States have also adopted commitments in regard to conscientious objection, and have agreed to consider introducing, where it has not already been done, alternatives to military service of a non-punitive nature.⁸³² Likewise, the Council of Europe Committee of Ministers has called on member states to recognize conscientious objection to compulsory military service.⁸³³ The European Court, however, has held that objectors cannot derive the right not to do military service or alternatives to military service, from the right to religion.⁸³⁴ The Court has ruled, however, that to prosecute someone repeatedly for failing to carry out their military service can amount to harassment and even to inhuman and degrading treatment.⁸³⁵ It also found there should be no discrimination against someone on the basis of their criminal conviction in relation to conscientious objection.⁸³⁶

In relation to teaching, the right to religion specifically protects the idea of religious schools.⁸³⁷ The right to education also requires that education must protect the parents' belief systems.⁸³⁸

Controversially, the Court has held that proselytizing is protected by the right to religion, although a careful balance should be struck between the rights of those who want to convert others, and the rights of those who do not want to be converted. It is legitimate to prohibit

829 ECtHR, *Efstathiou v. Greece*, Case no. 77/1996/696/888, 27 November 1996, para. 38.

830 "[...] It is true that public declarations proclaiming generally the idea of pacifism and urging the acceptance of a commitment to non-violence may be considered as a normal and recognised manifestation of pacifist belief. However, when the actions of individuals do not actually express the belief concerned they cannot be considered to be as such protected by Article 9.1, even when they are motivated or influenced by it [...] The leaflets were not addressed and distributed to the public in general but to specific soldiers who might shortly be posted to Northern Ireland. The soldiers were, according to the contents of the leaflet, given the advice to go absent without leave, or openly to refuse to be posted to Northern Ireland. This advice was not clearly given in order to further pacifist ideas", ECommHR, *Arrowsmith v. UK*, Application no. 7050/75, 12 October 1978, paras. 71 and 74, in Decision and Reports (D.R.) 19, p. 20.

831 UN Commission on Human Rights, Resolution 1998/77, 22 April 1998.

832 *Op. cit.*, note 6, 1990 Copenhagen Document, para. 18.

833 CoE, Recommendation R(87)8 of the Committee of Ministers to member states regarding conscientious objection to compulsory military service, 9 April 1987.

834 ECommHR, *X. v. Austria*, Application no. 5591/72, December 1973.

835 ECtHR, *Ülke v. Turkey*, Application no. 39437/98, 24 January 2006, para. 60.

836 Finding a violation of Article 14 taken in conjunction with Article 9, the Court held that "[...] as a matter of principle, States have a legitimate interest to exclude some offenders from the profession of chartered accountant. However, the Court also considers that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession", ECtHR, *Thlimmenos v. Greece*, Application no. 34369/97, 6 April 2000, para. 47.

837 General Comment No. 22 on Article 18(4) requires that alternatives are offered to parents and guardians to ensure that their religious beliefs are protected, *op. cit.*, note 818, para. 6.

838 Article 2 of the First Protocol ECHR, reads: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

improper forms of proselytizing, such as exerting improper pressure on people in distress or in need, or the use of violence or brainwashing.⁸³⁹

In relation to the armed forces, it has been held that military discipline implies by its very nature the possibility of placing certain limitations on the rights and freedoms of members of the armed forces, which could not be imposed on civilians.⁸⁴⁰ Similarly, in cases where professional obligations required individuals to work on Sundays for Christians or Friday afternoon for Muslims, there was no violation of the right to manifest religious belief.⁸⁴¹

Guaranteeing the protection of religion or belief for those who are detained

The HRC has affirmed that “persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint.”⁸⁴² The Third and Fourth Geneva Conventions make it clear that states are obliged to respect the religion and religious practices of persons deprived of their liberty in the context of an armed conflict, including prisoners of war, interned persons and other types of detainees. This includes the freedom to practice one’s own religion, access to clergy and the prohibition of discrimination on the basis of religion.⁸⁴³

The UN Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, has pointed out that the removal from detainees of religious items, such as the Koran, constitutes an impermissible limitation on religious belief.⁸⁴⁴ She has commented that to leave detainees unattended by religious clerics is a violation of the Standard Minimum Rules for the Treatment of Prisoners.⁸⁴⁵

State interference with religious communities

As described above, the right to freedom of association should enable people to form a legal entity in order to act collectively in a field of mutual interest.⁸⁴⁶ This includes religion.⁸⁴⁷ The right to form an association, and to obtain legal personality, can be restricted by the state, for

839 See *op. cit.*, note 823, ECtHR, *Kokkinakis v. Greece*, para. 48.

840 ECommHR, *Yanasik v. Turkey*, Application no. 14524/89, 6 January 1993. In *Kalaç*, there was no violation of Article 9 concerning the dismissal from the army of a judge advocate who was a member of a religious sect, ECtHR, *Kalaç v. Turkey*, Case no. 61/1996/680/870, 23 June 1997, paras. 27-28 (“States may adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service”).

841 See for instance ECommHR, *Ahmad v. UK*, Application no. 8160/78, 12 March 1981; ECommHR, *Konttinen v. Finland*, Application no. 24949/94 and ECommHR, *Stedman v. UK*, Application No. 29107/95, 9 April 1997.

842 *Op. cit.*, note 818, HRC, General Comment No. 22, para. 8.

843 Third Geneva Convention, Articles 34 and 35; Fourth Geneva Convention, Articles 76, 86 and 93; see also Common Article 3 of the Four Geneva Conventions.

844 *Op. cit.*, note 181, *Situation of detainees at Guantánamo Bay*, para. 61.

845 *Ibid.*, para. 64. The Special Rapporteur also raised concerns in relation to allegations of forced grooming, including shaving beards, heads and eyebrows, at para. 63.

846 See pp. 244 above.

847 “[...] since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one’s religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords”, ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, Application no. 45701/99, 13 December 2001, para. 118.

example by requiring prior authorization or imposing restrictions serving specified public interests. Such restrictions, however, must be provided for by law and be proportionate to the public-interest reason for them. Consistent with freedom-of-association principles, states are entitled to verify whether a movement or an association carries out – ostensibly in pursuit of religious aims – activities that are harmful to the population or public safety.⁸⁴⁸

Laws enabling state authorities to interfere with a religious community should include safeguards to ensure against arbitrary actions. These laws should be clear and foreseeable.⁸⁴⁹

Religious communities must have the right of access to courts on issues relating to their civil rights and obligations,⁸⁵⁰ or otherwise to ensure judicial protection of the community, its members or its assets,⁸⁵¹ including judicial review of decisions to refuse legal personality.

Refusals to grant legal personality may not be based on speculation as to the dangers posed to public interests, but should be clearly based on the acts of the association in question. Vague threats to the constitutional order, territorial integrity or public order are not acceptable as justifications for refusals of recognition.⁸⁵² The tolerance of the activities of a religious community cannot replace legal recognition.⁸⁵³

The granting of legal personality for the religious community should guarantee that:

- the right to manifestation of one's religion or beliefs includes worship, teaching, practice and observance;
- there is access to an effective remedy before an independent authority;
- there is a fair and speedy procedure available to challenge any alleged violation of its human rights.

Religious associations, like other associations, enjoy property rights, including the right to manage and acquire property. The state cannot, through legislation, impose special limitations on ownership by religious communities as compared to the general law. Neither may the state discriminate between different religious associations' right to acquire property or impose undue duties to restore properties that have been acquired.

848 See ECtHR, *Manoussakis and Others v. Greece*, Case no. 59/1995/565/651, 29 August 1996, paras. 44-53.

849 ECtHR, *Supreme Holy Council of the Muslim Community v. Bulgaria*, Application no. 39023/97, 16 December 2004, paras. 88-89.

850 "The Court cannot accept the Government's argument that the applicant church should have carried out the formalities necessary for acquiring one or other form of legal personality provided for in the Civil Code as there was nothing to suggest that it would one day be deprived of access to a court in order to defend its civil rights. Settled case-law and administrative practice had, over the course of the years, created legal certainty, both in property matters and as regards the representation of the various Catholic parish churches in legal proceedings, and the applicant church could reasonably rely on that [...]", ECtHR, *Catholic Church of Canea v. Greece*, Case no. 143/1996/762/963, 29 November 1997, para. 40.

851 ECtHR, *Holy Monasteries v. Greece*, Applications nos. 13092/87 and 13984/88, 9 December 1994, paras. 83-84.

852 *Op. cit.*, note 847, ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, paras. 123-130.

853 "[...] the Court notes that in the absence of recognition the applicant Church may neither organise itself nor operate. Lacking legal personality, it cannot bring legal proceedings to protect its assets, which are indispensable for worship, while its members cannot meet to carry on religious activities without contravening the legislation on religious denominations. As regards the tolerance allegedly shown by the government towards the applicant Church and its members, the Court cannot regard such tolerance as a substitute for recognition, since recognition alone is capable of conferring rights on those concerned. The Court further notes that on occasion the applicants have not been able to defend themselves against acts of intimidation, since the authorities have fallen back on the excuse that only legal activities are entitled to legal protection [...] Lastly, it notes that when the authorities recognised other liturgical associations they did not apply the criteria which they used in order to refuse to recognise the applicant Church and that no justification has been put forward by the Government for this difference in treatment", *ibid.*, para. 129.

In a democratic society in which several religions coexist within the same population, the state may place restrictions on the freedom of religion in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.⁸⁵⁴ When exercising its regulatory power, the state has, however, a duty to remain neutral and impartial.⁸⁵⁵

State measures favouring a particular leader of a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will constitute an infringement of freedom of religion,⁸⁵⁶ as does refusing to accept a religious leader supported by the community.⁸⁵⁷

Protecting religious and other beliefs

In relation to protecting the religious rights of others, the Human Rights Committee has observed that:

the State party should extend its criminal legislation to cover offences motivated by religious hatred and should take other steps to ensure that all persons are protected from discrimination on account of their religious beliefs.⁸⁵⁸

The Court has found that blasphemy laws that protect the Anglican Christian faith from insult are compatible with the ECHR.⁸⁵⁹ Therefore, such laws can in some cases take precedence over another person's right to freedom of expression.

In *Choudhury* the applicant sought to challenge the failure of the UK authorities to prosecute Salman Rushdie for blasphemy for insulting the Islamic faith in *The Satanic Verses*. The applicant argued that the blasphemy laws in the United Kingdom were discriminatory because they only applied to the Anglican Christian faith and to no other religious beliefs. The application was ruled inadmissible under the ECHR on the basis that there was no indication

854 *Op. cit.*, note 823, ECtHR, *Kokkinakis v. Greece*, para. 33.

855 "[...] in exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial [...] What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principle characteristics of which is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome [...] Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other [...] in principle the right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed. State measures favouring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under a single leadership, would also constitute an infringement of the freedom of religion. In democratic societies the State does not need to take measures to ensure that religious communities remain or are brought under a unified leadership [...] Similarly, where the exercise of the right to freedom of religion or of one of its aspects is subject under domestic law to a system of prior authorisation, involvement in the procedure for granting authorisation of a recognised ecclesiastical authority cannot be reconciled with the requirements of paragraph 2 of Article 9", *op. cit.*, note 847, ECtHR, *Metropolitan Church of Bessarabia and Others v. Moldova*, paras. 116-117.

856 *Op. cit.*, note 849, ECtHR, *Supreme Holy Council of the Muslim Community v. Bulgaria*, para. 76.

857 "[...] the domestic courts that convicted the applicant did not mention in their decisions any specific acts by the applicant with a view to producing legal effects. The domestic courts convicted the applicant on the mere ground that he had issued messages of religious content and that he had signed them as the Mufti of Xanthi. Moreover, it has not been disputed that the applicant had the support of at least part of the Muslim community in Xanthi. However, in the Court's view, punishing a person for merely presenting himself as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democratic society", ECtHR, *Agga v. Greece (No. 2)*, Applications nos. 50776/99 and 52912/99, 17 October 2002, para. 58.

858 *Op. cit.*, note 499, HRC, Concluding observations: *UK*, para. 14.

859 ECommHR, *X. Ltd and Y. v. UK*, Application no. 8710/79, 7 May 1982, para. 12 and *op. cit.*, note 743, ECtHR, *Wingrove v. UK*, paras. 52-64.

in this case of a link between freedom of thought, conscience and religion and the applicant's complaints. The European Commission of Human Rights was of the view that freedom of thought, conscience and religion does not extend to guarantee a right to bring any specific form of proceedings against those who, by authorship or publication, offend the sensitivities of an individual or of a group of individuals. As the substantive right to freedom of religion was not engaged, the European Commission of Human Rights did not go on to consider the issue of discrimination.⁸⁶⁰

In a case concerning a prosecution for insulting Catholic beliefs, the Court reaffirmed the principle that pluralism demands tolerance of views that are critical of religion and that there must be toleration and acceptance for the denial by others of faith and belief systems. However, the Court held that a balance must be struck and therefore, in that case, the respect for religious feelings of believers, as protected by Article 9, was violated by provocative portrayals of objects of religious veneration. The Court's argument was that such portrayals violated the spirit of tolerance inherent in the Convention as a whole. Local circumstances played an important part in the Court's decision.⁸⁶¹

In another case, also involving Catholics who considered that their right to manifest religious belief had been violated as a result of insults to the Catholic faith, it was held that:

there may be certain positive obligations on the part of a State inherent in an effective respect for rights guaranteed under Article 9 of the Convention, which may involve the adoption of measures designed to secure respect for freedom of religion even in the sphere of the relations of individuals between themselves [...] Such measures may, in certain circumstances, constitute a legal means of ensuring that an individual will not be disturbed in his worship by the activities of others.⁸⁶²

However, in that case there was no violation of the right to manifest religion when the public prosecutor decided not to prosecute for insulting the Catholic faith. This was because it was considered sufficient that the prosecutor had examined whether, on the facts, an offence had been committed and formed the view that no such criminal activity had taken place.

From these principles it is clear that the state has to put in place measures that protect religion and belief. However, those measures must be compatible with and applied in a way that is complaint with both freedom of expression and the prohibition on discrimination.

860 "[...] the applicant sought to have criminal proceedings brought against the author and the publisher of the book 'Satanic Verses' in order to vindicate his claim that the book amounted to a scurrilous attack on, *inter alia*, his religion. He does not claim, and it is clearly not the case, that any State authority, or any body for which the United Kingdom Government may be responsible under the Convention, directly interfered in the applicant's freedom to manifest his religion or belief. The question in the present case is therefore whether the freedom of Article 9 of the Convention may extend to guarantee a right to bring any specific form of proceedings against those who, by authorship or publication, offend the sensitivities of an individual or of a group of individuals. The Commission finds no indication in the present case of a link between freedom from interference with the freedoms of Article 9(1) of the Convention and the applicant's complaints", ECommHR, *Choudhury v. UK*, Application no. 17439/90, 5 March 1991, para. 2.

861 "The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court does not consider that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect", ECtHR, *Otto-Preminger-Institut v. Austria*, Case no. 11/1993/406/485, 23 August 1994, para. 56 and more generally paras. 52-57.

862 ECommHR, *Dubowska and Skup v. Poland*, Applications nos. 33490/96 and 34055/96, 18 April 1997, para. 2.

Conclusion

The only fully successful counter-terrorism strategy will be one that recognizes the essential OSCE principle that genuine security can only be maintained through the promotion and protection of human rights. Human rights should, therefore, be mainstreamed into all elements of counter-terrorism strategies. To ensure the effectiveness of this approach, counter-terrorism proposals should be carefully examined and regularly reviewed to assess their impact upon all human rights standards and obligations.

In the fight against terrorism, human rights standards have been set aside too often in favour of illegal arrests, renditions, torture or inhuman treatment, discrimination and other human rights violations. Rights have been further undermined by populist attempts to portray human rights activists or critics of government policies as terrorist sympathizers; the willingness of some decision makers to include diluted human rights standards into policies to make the policies appear acceptable; and an effort to justify some policies as human rights compliant when in fact they are not.

All of these trends compromise the true value of human rights. As explained throughout this manual, respect for human rights is not at odds with the struggle against terrorism, but can contribute to the success of that struggle. Indeed, when human rights have been violated to combat terrorism, courts have tended to invalidate government actions and overturn convictions. This provides ample evidence that a strategy will not be successful in the long run if it does not comply with human rights standards.

By giving effect to the human rights principles identified in this manual, those responsible for devising and implementing counter-terrorism strategies can be more effective in their efforts and can help ensure the survival of the democratic values that terrorists seek to destroy.

About the OSCE's Office for Democratic Institutions and Human Rights

The Office for Democratic Institutions and Human Rights (ODIHR) is the OSCE's principal institution to assist participating States "to ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and (...) to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society" (1992 Helsinki Document).

The ODIHR, based in Warsaw, Poland, was created as the Office for Free Elections at the 1990 Paris Summit and started operating in May 1991. One year later, the name of the Office was changed to reflect an expanded mandate to include human rights and democratization. Today, it employs more than 120 staff.

The ODIHR is the leading agency in Europe in the field of **election observation**. It co-ordinates and organizes the deployment of several observation missions with thousands of observers every year to assess whether elections in the OSCE area are in line with national legislation and international standards. Its unique methodology provides an in-depth insight into all elements of an electoral process. Through assistance projects, the ODIHR helps participating States to improve their electoral framework.

The Office's **democratization** activities include the following thematic areas: rule of law, civil society and democratic governance, freedom of movement, gender equality, and legislative support. The ODIHR implements more than 100 targeted assistance programmes every year, seeking both to facilitate and enhance state compliance with OSCE commitments and to develop democratic structures.

The ODIHR promotes the protection of **human rights** through technical-assistance projects and training on human dimension issues. It conducts research and prepares reports on different human rights topics. In addition, the Office organizes several meetings every year to review the implementation of OSCE human dimension commitments by participating States. In its anti-terrorism activities, the ODIHR works to build awareness of human dimension issues and carries out projects that address factors engendering terrorism. The ODIHR is also at the forefront of international efforts to prevent trafficking in human beings and to ensure a co-ordinated response that puts the rights of victims first.

The ODIHR's tolerance and non-discrimination programme provides support to participating States in implementing their OSCE commitments and in strengthening their efforts to respond to, and combat, hate crimes and violent manifestations of intolerance. The programme also aims to strengthen civil society's capacity to respond to hate-motivated crimes and incidents.

The ODIHR provides advice to participating States on their policies on **Roma and Sinti**. It promotes capacity-building and networking among Roma and Sinti communities and encourages the participation of Roma and Sinti representatives in policy-making bodies. The Office also acts as a clearing house for the exchange of information on Roma and Sinti issues among national and international actors.

All ODIHR activities are carried out in close co-ordination and co-operation with OSCE institutions and field operations, as well as with other international organizations.

More information is available on the ODIHR website (www.osce.org/odihhr).

