



**UNODC**

United Nations Office on Drugs and Crime



**4**

## **Human Rights and Criminal Justice Responses to Terrorism**

**COUNTER-TERRORISM  
LEGAL TRAINING CURRICULUM**



UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

Counter-Terrorism Legal Training  
Curriculum

MODULE 4

**Human Rights and  
Criminal Justice Responses  
to Terrorism**



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# Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ArCHR	Arab Charter on Human Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
COE	Council of Europe
CODEXTER	Council of Europe Committee of Experts on Terrorism
CPED	International Convention for the Protection of all Persons from Enforced Disappearance
CPT	European Committee for the Prevention of Torture
CRC	Convention on the Rights of the Child
CRPD	International Convention on the Rights of Persons with Disabilities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
CCPR	Human Rights Committee
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
IHL	International Humanitarian Law

IMO	International Maritime Organization
OAS	Organization of American States
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
UDHR	Universal Declaration of Human Rights
UNODC	United Nations Office on Drugs and Crime



# Contents

	<i>Page</i>
Index of training tools . . . . .	xi
<b>INTRODUCTION . . . . .</b>	<b>1</b>
<b>1. HUMAN RIGHTS AND COUNTER-TERRORISM: CONTEXT AND OVERVIEW . . . . .</b>	<b>5</b>
1.1 Introduction: “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing” . . . . .	5
1.2 The international legal framework for the protection of human rights: overview . . . . .	7
1.3 International human rights treaties . . . . .	9
1.4 The United Nations human rights system . . . . .	10
1.4.1 The Human Rights Council and its mechanisms and procedures . . . . .	11
1.4.2 United Nations human rights treaty bodies . . . . .	12
1.4.3 The Office of the High Commissioner for Human Rights . . . . .	14
1.5 Regional systems: overview . . . . .	15
1.5.1 The Inter-American system for the protection of human rights . . . . .	15
1.5.2 The Council of Europe system and other regional human rights protection systems in Europe . . . . .	16
1.5.3 The African system for the protection of human rights . . . . .	19
1.5.4 The Arab Charter on Human Rights . . . . .	20
1.5.5 The ASEAN Human Rights Declaration . . . . .	20
1.6 The nature of States’ obligations under international human rights law . . . . .	21
1.6.1 Treaties, customary law and “soft law” . . . . .	21
1.6.2 The duty to respect, protect and fulfil human rights . . . . .	21
1.6.3 The relationship between international human rights law and national law . . . . .	22
1.6.4 Limitations permitted by human rights law . . . . .	23
1.6.5 Derogation in times of public emergency . . . . .	25
1.7 The relationship between human rights law and other international legal regimes . . . . .	29
<b>2. THE CRIMINALIZATION OF TERRORIST ACTIVITIES . . . . .</b>	<b>33</b>
2.1 Introduction . . . . .	33
2.2 No punishment without law . . . . .	33
2.2.1 Principle of legality and requirements of predictability and accessibility of criminal laws . . . . .	34
2.2.2 Prohibition on retroactive criminal laws . . . . .	37
2.3 The right to freedom of expression and terrorism-related offences, particularly incitement of terrorism . . . . .	38
2.4 Restricting freedom of association in countering terrorism . . . . .	45
<b>3. THE INVESTIGATION OF TERRORIST OFFENCES . . . . .</b>	<b>51</b>
3.1 Introduction . . . . .	51
3.2 The importance of the investigative stage for the effective protection of the right to a fair trial . . . . .	51

3.3	Overarching principles . . . . .	53
3.3.1	The presumption of innocence . . . . .	53
3.3.2	The principle of non-discrimination . . . . .	55
3.3.3	The treatment of children suspected of terrorist offences . . . . .	59
3.4	The principle of equality of arms . . . . .	62
3.4.1	Right of access to legal counsel of one's own choosing . . . . .	63
3.4.2	Right to be informed of the nature and cause of the charge(s) . . . . .	70
3.4.3	Right to adequate time and facilities in the preparation of a defence . . . . .	72
3.5	Treatment of suspects during an investigation . . . . .	73
3.5.1	Prohibition of torture, inhuman and degrading treatment . . . . .	74
3.5.2	Exclusion of evidence obtained through torture, inhuman or degrading treatment . . . . .	79
3.5.3	Right against self-incrimination/right to silence . . . . .	85
3.6	Search and seizure . . . . .	88
3.7	Special investigation techniques . . . . .	88
3.7.1	Undercover agents and informants . . . . .	89
3.7.2	Surveillance and interception of communications . . . . .	94
3.7.3	Protection of personal information gathered through surveillance, interception of communications and other investigative measures . . . . .	100
<b>4.</b>	<b>THE DETENTION OF TERRORIST SUSPECTS . . . . .</b>	<b>103</b>
4.1	Introduction . . . . .	103
4.2	Detention and human rights: overview . . . . .	103
4.3	Use of force to effect an arrest or in detention . . . . .	104
4.4	Arrest and detention: general requirements and safeguards . . . . .	105
4.4.1	Legality and non-arbitrariness . . . . .	105
4.4.2	The right to be informed of reasons for arrest . . . . .	108
4.4.3	Maintaining records about arrest and detention . . . . .	108
4.4.4	Informing detainees of their rights . . . . .	110
4.4.5	Right to consult with legal counsel . . . . .	111
4.4.6	Notification of the detainee's family . . . . .	111
4.4.7	Right to consular assistance . . . . .	112
4.4.8	Medical examination and access to medical care . . . . .	113
4.4.9.	Right to challenge the lawfulness of detention . . . . .	114
4.5	Arrest and detention in the criminal justice context . . . . .	117
4.5.1	The requirement of reasonable suspicion . . . . .	117
4.5.2	The right to be promptly informed of any charges . . . . .	117
4.5.3	The right to be brought promptly before a judge . . . . .	119
4.5.4	Remand detention . . . . .	120
4.6	Detention outside the criminal justice process . . . . .	124
4.6.1	Detention in view of extradition or deportation . . . . .	124
4.6.2	Detention on national security grounds . . . . .	125
4.6.3	Detention of terrorism suspects in situations of "armed conflict" . . . . .	128
4.7	Conditions of detention . . . . .	130
4.7.1	Basic requirements . . . . .	130
4.7.2	High-security detention regimes and solitary confinement . . . . .	131
4.7.3	Incommunicado and secret detention . . . . .	136
4.8	Detention of children suspected of involvement in terrorist offences . . . . .	138

<b>5. THE TRIAL OF TERRORISM OFFENCES</b> .....	<b>141</b>
5.1 Introduction. ....	141
5.2 Human rights of victims and witnesses in criminal proceedings in terrorism cases .....	141
5.3 The fairness of a trial: overview .....	143
5.4 Presumption of innocence at trial. ....	145
5.5 Trial by an independent and impartial tribunal. ....	146
5.5.1 The use of special or military courts in terrorism cases .....	147
5.6 Trial within a reasonable period of time. ....	150
5.7 Procedural guarantees at trial. ....	151
5.7.1 Public hearings and publicly accessible judgements .....	151
5.7.2 Trial in presence of accused/trial in absentia. ....	152
5.7.3 Rights in relation to witness attendance and examination. ....	154
5.7.4 Rights of defence and witness protection measures. ....	157
5.7.5 Exclusion of evidence on grounds of public interest .....	160
5.7.6 Exclusion of evidence obtained in violation of human rights law ...	164
5.7.7 Other procedural rights at trial. ....	168
5.8 The right to review by a Higher Tribunal .....	168
<b>6. THE PUNISHMENT OF TERRORIST OFFENCES</b> .....	<b>171</b>
6.1 Introduction. ....	171
6.2 The objectives of punishment. ....	171
6.3 The principle of “no punishment without law” .....	173
6.4 Capital punishment. ....	174
6.4.1 Sentence of death may only be imposed for the most serious crimes .....	176
6.4.2 Prohibition on the mandatory death penalty .....	177
6.4.3 Right to seek pardon or commutation of death sentence .....	178
6.5 Imprisonment for life .....	180
6.6 Conditions of imprisonment of convicted terrorist offenders. ....	184
<b>7. THE INTERNATIONAL TRANSFER OF PERSONS IN COUNTERING TERRORISM.</b> ..	<b>187</b>
7.1 Introduction. ....	187
7.2 Requirement of legality and right to seek review of decisions to deport or extradite .....	188
7.3 The prohibition on “refoulement” .....	190
7.3.1 The “non-refoulement” principle in international refugee law. ....	190
7.3.2 Protection against removal under international human rights law ...	192
7.3.3 The non-discrimination clause in the universal counter-terrorism instruments .....	197
7.4 Diplomatic assurances. ....	198
7.5 Obtaining custody of terrorism suspects abroad by lure or trickery. ....	201
7.6 “Extraordinary rendition” .....	203



# Index of training tools

As in other modules of the Curriculum, the present module makes use of a number of training tools. These tools aim to (a) allow users to actively engage with the subject matter discussed; (b) encourage users to explore the application of universal norms and concepts in their own legal system's reality; (c) ensure a practical, problem-solving-oriented approach to the issues; (d) allow users access to a wide range of additional material publicly available, which in the interest of brevity and for reasons of space could not be included in the module.



**Focus boxes:** Readers are introduced by a series of boxes to topics of specific interest, providing more in-depth information or examples, and allowing a comparative approach to the subject.



**Interviews/multimedia:** Internet links to filmed interviews with experts or other video material have been included as part of a multi-media training approach.



**Practical guidance:** Practical guidance has been included to encourage users to adopt a concrete and practical approach.



**Case studies:** Studies of real cases from numerous jurisdictions are provided to illustrate how legal concepts have been applied in practice by courts and other bodies.



**Activities:** These boxes offer ideas for exploring how the various topics covered in the module are handled or reflected in the legal system and practice of the participants' countries. Participants are encouraged to apply their skills and share their experience with reference to specific topics. During workshops, trainers may propose an activity to stimulate an initial discussion among participants. Persons studying independently will also be able to use the activity boxes to focus on the practical application of knowledge acquired.



**Assessment questions:** At the end of each chapter, assessment questions provide the possibility to test knowledge on the topics covered. Unlike the activities, the answers to assessment questions can generally be found in the text of the module. Assessment typically takes place at the end of a training session, but can also serve as a preliminary tool to identify training needs, delivery methods and the level of competence of participants.



**Tools:** This tool offers materials to assist criminal justice practitioners. It includes practical guides, manuals, treaties and model laws, databases and other sources. Website links have been added under each tool to enable practitioners to access them with just one click.



**Further reading:** This tool offers reference to additional material with a view to broadening knowledge or exploring application of the norms and concepts discussed in additional real cases.



**Reference:** There is inevitably a degree of overlap within the chapters of each module and between the modules of the CTLTC. In some cases, the same topic is examined from different angles in two or more chapters or modules. This should not be seen as a drawback,

but rather as an asset enabling trainers to arrange tailor-made activities depending on specific training needs. For example, in preparation for a training workshop, the need may arise to cover certain issues more in depth, to analyse them from multiple perspectives, or to examine their connection with others. The reference symbol is used to inform users of the location of information covering the same or connected topics.

# INTRODUCTION

## Background: Counter-Terrorism Legal Training Curriculum

The United Nations Office on Drugs and Crime is mandated to provide assistance to requesting countries in the legal and criminal justice aspects of countering terrorism. Its Terrorism Prevention Branch is leading this assistance delivery, primarily by assisting countries to ratify the international legal instruments against terrorism, incorporate their provisions in national legislation and build the capacity of the national criminal justice system to implement those provisions effectively, in accordance with the rule of law, including human rights.

The Counter-Terrorism Legal Training Curriculum is one of the tools developed by the Branch for transferring the knowledge and expertise needed to strengthen the capacity of national criminal justice officials to put the universal legal framework against terrorism into practice.

This knowledge transfer is pursued through:

- Direct training of criminal justice officials
- Train-the-trainers activities
- Supporting national training institutions of criminal justice officials (schools of judges and prosecutors, law enforcement academies and other relevant institutions) to develop/incorporate counter-terrorism elements in their curricula

The Curriculum consists of several modules, each dealing with specific thematic areas of the legal and criminal justice aspects of countering terrorism. Its first five modules are:

- *Module 1. Counter-Terrorism in the International Legal Context* (under preparation)
- *Module 2. The Universal Legal Framework Against Terrorism* (issued)
- *Module 3. International Cooperation in Criminal Matters: Counter-Terrorism* (issued)
- *Module 4. Human Rights and Criminal Justice Responses to Terrorism* (this issue)
- *Module 5. Transport related (civil aviation and maritime) Terrorism Offences* (being issued)

## Human Rights and Counter-Terrorism

In the Global Counter-Terrorism Strategy (A/RES/60/288) adopted by the General Assembly in 2006, United Nations Member States unanimously reiterated that “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing”. The Strategy also “recognize[d] that States may require assistance in developing and maintaining ... effective and rule of law-based criminal justice systems, and [encouraged] them to *resort to the technical assistance delivered, inter alia, by the*

*United Nations Office on Drugs and Crime*” (emphasis added). The present module is intended as a key tool for UNODC to live up to this mandate.

The Global Counter-Terrorism Strategy also illustrates that the protection of human rights in counter-terrorism is essential to all aspects of counter-terrorism, not only criminal justice, but also—to name just a few—national security, military operations, inclusive social and economic policies, treatment of national and ethnic minorities, and migration. It is important to stress that the present module of the Curriculum is limited (nearly exclusively) to human rights in the context of criminal justice.

## Target audience

Consistent with the mandates and focus of work of UNODC, the primary target audience of the Counter-Terrorism Legal Training Curriculum typically includes:

- Prosecutors and judges
- Investigators and other law enforcement officials
- Policymakers and government officials from concerned key departments—notably Foreign Affairs, Justice and Interior—who are involved in legislative drafting or mutual legal assistance in criminal matters or have responsibilities with regard to the ratification of international treaties

The modules are easily adaptable to suit the specific needs, expertise and expectations of specific groups.

The module on Human Rights and Criminal Justice Responses to Terrorism is particularly tailored for use in capacity-building initiatives addressing judges and prosecutors. Nevertheless, it may also be used successfully in capacity-building activities for the other broader target audiences indicated above.

A strong rule-of-law-based criminal justice system will rely not only on government officials. Defence lawyers, national human rights institutions and civil society organizations dealing with criminal justice have a key role to play in this regard. This is recognized in the Guidance Note of the Secretary-General on the *United Nations Approach to Rule of Law Assistance* of April 2008, which requires United Nations entities to involve these and other civil society actors in capacity-building in the field of the rule of law. In line with this approach, this module is also designed to be used in training for defence lawyers, national human rights institutions, and—where appropriate—civil society organizations.

## Planning training based on this module

The material in the module on *Human Rights and Criminal Justice Responses to Terrorism* is too voluminous to be covered in one workshop of a few days. Those planning a training course based on this module may wish to consider dividing the material over a series of training sessions or workshops. In some contexts, it may be sufficient to focus the training course on chapters 3 (investigation), 4 (detention) and 5 (trial), drawing on material from the remaining chapters only as needed.



It will be important to consider the relevance of each chapter of the module to the audience targeted by the training planned. For prosecutors, judges and defence lawyers, all chapters are highly relevant. For investigators and other law enforcement officials, a course based primarily on chapters 3 to 5 may be most useful. Legislators and other policymakers might find chapters 1, 2 and 6 particularly important. For diplomats and officials engaged in international cooperation, chapters 1 and 7 will be of special relevance.



# 1. HUMAN RIGHTS AND COUNTER-TERRORISM: CONTEXT AND OVERVIEW

## 1.1 Introduction: “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing”

Acts of terrorism “ai[m] at the destruction of human rights, fundamental freedoms and democracy [...] undermin[e] pluralistic civil society and hav[e] adverse consequences on the economic and social development of States” (General Assembly Resolution 48/122 (1993)). By “endanger[ing] innocent lives and the dignity and security of human beings everywhere, threaten[ing] the social and economic development of all States and undermin[ing] global stability and prosperity” (Security Council Resolution 1377 (2001)), acts of terrorism have a direct, destructive impact on the enjoyment of human rights.

Faced with the devastating threat and consequences of terrorism, States have a duty to protect individuals under their jurisdiction. They are under the obligation to prevent terrorist acts and to bring those responsible for them to justice. In doing so, however, they must not lose sight of the fact that, as stated by the United Nations General Assembly, “effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing” (A/RES/60/288). Indeed, respect for human rights and fundamental freedoms is an essential element of any effective counter-terrorism strategy.

In his landmark report *In Larger Freedom: Towards Development, Security and Human Rights for All*, the United Nations Secretary-General eloquently makes the same point when he writes that:

“Terrorists are accountable to no one. We, on the other hand, must never lose sight of our accountability to citizens all around the world. In our struggle against terrorism, we must never compromise human rights. When we do so we facilitate achievement of one of the terrorist’s objectives. By ceding the moral high ground we provoke tension, hatred and mistrust of Governments among precisely those parts of the population where terrorists find recruits.”<sup>1</sup>

On 8 September 2006, the General Assembly solemnly reaffirmed the centrality of respect for human rights to counter-terrorism measures as it voted resolution 60/288 adopting the Global Counter-Terrorism Strategy. This was a historical moment, as it is the first time that all Member States have agreed to a common strategic approach to fight terrorism.

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<sup>1</sup> A/59/2005, para. 94.



## The Global Counter-Terrorism Strategy

The Global Counter-Terrorism Strategy organizes the practical steps States have resolved to take individually and collectively to prevent and combat terrorism into four areas, the four Pillars of the Strategy. They include a wide array of measures, ranging from strengthening State capacity to counter terrorist threats to better coordinating the United Nations system's counter-terrorism activities. Respect for human rights is specifically enshrined as one of the "Pillars" of the Strategy (Pillar IV), but permeates all other parts of the Strategy, too.

The four Pillars are:

- I. Measures to address the conditions conducive to the spread of terrorism

In Pillar I States resolve to undertake measures aimed at addressing "the conditions conducive to the spread of terrorism, including but not limited to prolonged unresolved conflicts, dehumanization of victims of terrorism ..., lack of the rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance". In resolving to address these conditions, States "recogniz[e] that none of these conditions can excuse or justify acts of terrorism".

- II. Measures to prevent and combat terrorism
- III. Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard
- IV. Measures to ensure respect for human rights and rule of law as fundamental basis for fight against terrorism

The key commitments States made under Pillar IV of the Global Counter-Terrorism Strategy are:

- To ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.
- To consider becoming parties without delay to the core international instruments on human rights law, refugee law and international humanitarian law, and implementing them, as well as to consider accepting the competence of international and relevant regional human rights monitoring bodies.
- To make every effort to develop and maintain an effective and rule of law-based national criminal justice system that can ensure, in accordance with their obligations under international law, that any person who participates in the financing, planning, preparation or perpetration of terrorist acts is brought to justice, on the basis of the obligation to extradite or prosecute, with due respect for human rights and fundamental freedoms. In this regard, the Global Counter-Terrorism Strategy encourages States to resort to the technical assistance delivered, inter alia, by the United Nations Office on Drugs and Crime.
- To support and strengthen the capacity of multilateral institutions, in particular the United Nations, in promoting human rights and the rule of law while undertaking effective and targeted measures to combat terrorism.

The Security Council is the United Nations main organ with "primary responsibility for the maintenance of international peace and security" according to article 24 (1) of the United Nations Charter. The Council has repeatedly determined that "terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security

and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed”.<sup>2</sup>

The Security Council has also affirmed on a number of occasions that peace, security and respect for human rights in response to terrorism are mutually complementary objectives.



### Security Council Resolutions

- *Security Council Resolution 1904 (2009)*  
The Security Council reaffirmed the need to combat terrorism, “in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee and humanitarian law ...”
- *Security Council Resolution 1624 (2005)*  
The Security Council reaffirmed “the imperative to combat terrorism in all its forms and manifestations by all means, in accordance with the Charter of the United Nations, and also stress[ed] 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 law, refugee law, and humanitarian law”.



### Activities

In what ways may observance of human rights standards in counter-terrorism operations enhance the effectiveness of the fight against terrorism? In what ways may a failure to adhere to human rights requirements harm efforts to combat terrorism and those who support it?



### Tools

- Information on General Assembly action to counter terrorism is available here: <http://www.un.org/en/terrorism/ga.shtml>.
- Information on Security Council action to counter terrorism is available here: <https://www.un.org/en/terrorism/securitycouncil.shtml>.
- The Global Counter-Terrorism Strategy is available here: <http://www.un.org/en/terrorism/strategy-counter-terrorism.shtml>.

## 1.2 The international legal framework for the protection of human rights: overview

Respect for human rights and fundamental freedoms in combating terrorism is not only a strategic and policy imperative. It is also a specific legal obligation binding all United Nations

<sup>2</sup> Security Council Resolution 1963 (2010), preamble para. 1.

Member States. The remainder of chapter 1 will provide a very succinct and necessarily selective overview of the international legal framework for the protection of human rights. It will emerge that international law clearly dictates that the threat terrorism poses to international peace and security, to democracy and to human rights can and must be addressed within the framework of human rights law. This body of law provides the tools to take effective measures to prevent acts of terrorism and bring terrorists to justice.

The United Nations Charter enshrines the protection and promotion of human rights as one of the overarching goals of the United Nations and identifies human rights as a necessary condition for the promotion of peace and stability.



### The place of human rights in the United Nations Charter

Article 1 of the Charter sets forth the purposes of the United Nations, among them:

to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;

The Charter also specifically identifies respect for human rights as a necessary condition for the promotion of peace, stability and friendly relations among states. Article 55 of the Charter states:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations [...] the United Nations shall promote [...] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Moreover, States which are members of the United Nations pledge themselves to take action, individually and acting collectively, to protect and promote human rights. Under article 56 of the Charter, States commit “to take joint and separate action in cooperation with the [United Nations] for the achievement of the purposes set forth in article 55”, which includes promoting respect for human rights.

Alongside the Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights are fundamental to the international human rights framework. The Universal Declaration of Human Rights was adopted by the General Assembly in 1948. While it is not binding as a General Assembly resolution, many of its provisions are recognized as enshrining binding rules of international customary law. As will be set out below, in addition to the two Covenants, there are a range of other universal and regional treaties of particular significance in the context of criminal justice responses to terrorism. Some of them address specific human rights violations (e.g. torture), others safeguard the rights of particular groups including women, children and ethnic and racial groups.

In addition to the international treaties, there is also a range of declarations, guidelines and principles (so-called “soft-law instruments”) relevant to the protection of human rights in counter-terrorism investigations and prosecutions. Whereas human rights treaties impose binding obligations on those States which have ratified them, soft-law instruments (often adopted in the form of resolutions by international bodies like the General Assembly) do not impose binding legal obligations on States, but provide important guidance in the interpretation of treaty provisions.

## 1.3 International human rights treaties

A wide range of international human rights treaties exist at the universal and regional levels which are significant in relation to counter-terrorism.



### Universal and regional human rights treaties

#### *Universal human rights treaties*

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Convention on the Rights of the Child (CRC)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)
- International Convention for the Protection of All Persons from Enforced Disappearance (CPED)
- International Convention on the Rights of Persons with Disabilities (CRPD)

#### *Regional human rights treaties*

- American Convention on Human Rights (ACHR)
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
- Charter of Fundamental Rights of the European Union
- African Charter on Human and Peoples' Rights (ACHPR)
- Arab Charter on Human Rights

There are also a wide range of other universal and regional human rights treaties aimed at the protection of specific groups, such as ethnic and linguistic minorities, or providing human rights protection in respect of specific phenomena such as torture or disappearances. The list of tools below contains links to further information about the many different regional human rights treaties providing further specific forms of human rights protection.



### Tools

- A list of the main universal human rights treaties and information concerning their ratification status is available here: <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.
- The text and information about the European Convention on Human Rights is available here: <http://www.conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>.
- The text of the African Charter on Human and Peoples' Rights is available here: <http://www.african-court.org/en/index.php/documents-legal-instruments>.

- The text of the American Convention on Human Rights is available here: [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm).
- An unofficial English version of the Arab Charter on Human Rights is available here: <http://www1.umn.edu/humanrts/instree/loas2005.html>.
- Information on the Charter of Fundamental Rights of the European Union is available here: <http://ec.europa.eu/justice/fundamental-rights/charter/>.

Each of the main universal and regional human rights conventions has its own implementation, monitoring and enforcement mechanism, ranging from reporting procedures to quasi-judicial and judicial mechanisms for the consideration of complaints.

## 1.4 The United Nations human rights system

*Overview:* The United Nations human rights system is made up of a broad range of human rights bodies and procedures concerned with the promotion and protection of human rights. To obtain an overview of these bodies and procedures it is useful to distinguish between the “Charter-based system” and the “treaty-based system”.

The Charter-based system relates to those human rights bodies which ultimately derive their mandate from the Charter of the United Nations, including where they are established by resolution of the United Nations General Assembly. Charter-based procedures and obligations therefore apply to all United Nations Member States by virtue of their membership of the United Nations. The Human Rights Council (replacing the Commission on Human Rights), the Universal Periodic Review and the human rights Special Procedures (which are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective) are among the main Charter-based bodies and procedures in the field of human rights.

Treaty-based bodies derive their mandate from the United Nations human rights treaties (see the box in section 1.3 above). There are nine core international human rights treaties. All United Nations Member States have ratified at least one core international human rights treaty, and 80 per cent have ratified four or more. As explained below (section 1.4.2), each of the core treaties sets up a so-called “treaty body”, a committee of independent experts monitoring the implementation of the treaty. The treaty bodies monitor the implementation of the treaty only with regard to those States that are parties to the treaty concerned. For instance, while all United Nations Member States have to report to and are reviewed under the Universal Periodic Review process, whether they have ratified one, two or nine of the core universal treaties, a treaty body such as the Committee against Torture will only review the implementation of the Convention against Torture in those States that have ratified this treaty.

The Office for the High Commissioner for Human Rights as the lead entity within the United Nations Secretariat in the field of human rights supports the work of the Human Rights Council and Charter-based procedures, as well as of the treaty bodies.





### Practical guidance

There are two United Nations human rights bodies (and one former body) with very similar names which may easily be confused:

- The Human Rights Council is a sub-organ of the General Assembly. It is an inter-governmental body within the United Nations system made up of 47 States elected by the General Assembly. Human Rights Council membership is open to all United Nations Member States, whether or not they have ratified specific human rights treaties, and it is mandated to deal with the situation of all human rights in all United Nations Member States. The Human Rights Council conducts the Universal Periodic Review described below under 1.4.1.3. The Special Procedures discussed below under 1.4.1.2 report to the Human Rights Council. In 2006, the Human Rights Council replaced the Human Rights Commission (A/RES/60/251), which has accordingly ceased to exist.
- The Human Rights Committee is the independent expert body monitoring the implementation of the ICCPR. It accordingly only deals with the protection of the rights enshrined in the ICCPR in the countries that are Parties to the ICCPR (see section 1.4.2).

## 1.4.1 The Human Rights Council and its mechanisms and procedures

### 1.4.1.1 Human Rights Council

The Human Rights Council is an inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe, addressing situations of human rights violations and making recommendations on them. The Council was created by the United Nations General Assembly on 15 March 2006 by resolution 60/251 and replaced the former Commission on Human Rights. It is made up of 47 Member States which are elected by the General Assembly. The Human Rights Council has the power to consider all thematic human rights issues and situations that require its attention throughout the year.

The Human Rights Council has devoted considerable attention to the question of the protection of human rights while countering terrorism. It mandates, receives and debates reports on this question from the Special Rapporteur on the promotion and protection of human rights while countering terrorism (see 1.4.1.2 below) and from the High Commissioner for Human Rights and her Office (see 1.4.3 below), and adopts resolutions based on these reports.

The Human Rights Council Advisory Committee was established in 2008 to function as a think-tank for the Council and work at its direction. The Committee is composed of 18 independent experts from different professional backgrounds representing the various regions of the world. The Advisory Committee has occasionally been active in fields related to human rights and terrorism, e.g. it prepared a study on the issue of terrorist hostage-taking and human rights (A/HRC/24/47).

### 1.4.1.2 Special procedures of the United Nations Human Rights Council

Special Procedures is the general name given to the mechanisms established by the Human Rights Council to report and advise on human rights issues from a thematic or country-specific perspective. Special Procedures are either an individual (called “Special Rapporteur” or “Independent Expert”) or a working group usually composed of five members (one from

each region of the world). Mandate-holders of the Special Procedures serve in their personal capacity, and do not receive salaries or any other financial compensation for their work. The independent status of the mandate-holders is crucial in order to be able to fulfil their functions impartially.

There are a number of Special Procedures of particular relevance to human rights and the criminal justice response to terrorism, including the:

- Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (in the following “Special Rapporteur on human rights while countering terrorism”)
- Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (in the following “Special Rapporteur on torture”)
- Working Group on Arbitrary Detention
- Working Group on Enforced or Involuntary Disappearances
- Special Rapporteur on the independence of judges and lawyers
- Special Rapporteur on extrajudicial, summary or arbitrary executions
- Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression
- Special Rapporteur on freedom of religion or belief
- Special Rapporteur on freedom of peaceful assembly and of association
- Special Rapporteur on the situation of human rights defenders

The Special Rapporteurs and Working Groups carry out country visits to collect first-hand information on the human rights issues falling within their mandate, including measures adopted by Member States to counter terrorism. In addition to reports on country visits, they publish thematic reports which identify challenges arising in counter-terrorism and good practices adopted to deal with them. The Special Rapporteurs and Working Groups further intervene with governments on specific allegations of human rights violations that are brought to their attention. This module will refer to the Special Procedures reports as an authoritative source of analysis and recommendations.

#### *1.4.1.3 Universal Periodic Review*

The Universal Periodic Review is a reporting procedure put in place by General Assembly Resolution 60/251 (2006). Every four and a half years the overall human rights situation in each Member State of the United Nations is examined, by reference to the full range of human rights obligations by which they are bound. This process is conducted by the Universal Periodic Review Working Group of the Human Rights Council. It is therefore a peer review process (States reviewing the implementation of human rights obligations by other States), as opposed to the treaty bodies and Special Procedures which are composed of independent experts.

### **1.4.2 United Nations human rights treaty bodies**

Each of the core universal (United Nations) human rights treaties sets up a body of independent experts to monitor the implementation of the treaty (the “treaty bodies”). The treaty body that will most often be referred to in this module is the Human Rights Committee, the independent expert body monitoring the implementation of the ICCPR. Other treaty

bodies referred to in this module include the Committee against Torture, which monitors implementation of the Convention against Torture, the Subcommittee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment, which carries out visits to places of detention in countries that have ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), and the Committee on the Rights of the Child, the treaty-body established by the Convention on the Rights of the Child.

States parties to the universal human rights treaties are obliged to periodically submit to the respective treaty bodies reports on the implementation of the treaties. Some of the treaty bodies have specifically requested States to provide information on counter-terrorism measures in their periodic reports.<sup>3</sup> This process constitutes an opportunity for individual State parties to conduct a comprehensive review of the measures they have taken to bring their national law and policy into line with the provisions of the treaties. These reports are examined and discussed by the Committee in public meetings and in the presence of representatives of the State party. Alternative reports might be submitted by national human rights institutions or non-governmental organizations (NGOs). At the conclusion of its consideration of each State report the committee issues findings termed “Concluding Observations”. This reporting mechanism aims to create a dialogue between the relevant treaty body and the State party concerned for the purpose of assisting the latter in introducing the adjustments to domestic law and practice required by its international treaty obligations.

The human rights treaty bodies also play an important role in examining complaints from individuals, termed “communications”, alleging that they have been victim of a violation of one or more rights guaranteed by the treaty in question. The treaty bodies can only receive individual complaints if the State concerned by the communication has accepted this procedure, either by becoming Party to an optional protocol or by making a declaration to that effect. The aim of the communications procedure is to remedy human rights violations in individual cases. After considering a complaint and obtaining observations from the State party concerned in a quasi-judicial procedure, the treaty body will set out its “views” (the term used to refer to the decision) as to whether the State party has violated the complainant’s human rights. If a violation is indicated, the treaty body now commonly makes a recommendation as to the reparation that ought to be made. Strictly, these views are not binding. Nevertheless, State parties are required under international law to implement a treaty in good faith. Moreover, States will mostly want to be seen to be complying with these recommendations to maintain good standing as a Party to the treaty and member of the international community.

The “views” adopted by the human rights treaty bodies provide real life examples to see the human rights treaty norms applied to cases arising from the counter-terrorism and criminal justice practice of States. These cases decided by the treaty bodies will therefore be an important source for the analysis in this module.

The human rights treaty bodies also publish “general comments” or “general recommendations” in which they set forth their general interpretation of treaty provisions. One prominent example of this authoritative source of interpretation of human rights norms is the Human Rights Committee’s General Comment No. 32, which provides guidance on the implementation of the right to a fair trial under article 14 of ICCPR. You will find numerous references to the General Comments throughout this book.

<sup>3</sup> See, for example, Human Rights Committee, Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights (CCPR/C/2009/1).

### 1.4.3 The Office of the High Commissioner for Human Rights

The High Commissioner for Human Rights is the principal human rights official of the United Nations and spearheads the United Nations' human rights efforts. The Office of the High Commissioner for Human Rights (OHCHR) is mandated to promote and protect the enjoyment and full realization, by all people, of all rights established in international human rights law. Through its field offices and at headquarters, the Office promotes human rights and the rule of law as the fundamental basis of national, regional and international counter-terrorism policies and strategies through technical assistance and capacity-building initiatives, as well as monitoring, advocacy for and reporting on human rights-compliance in the counter-terrorism context. The Office also supports the various human rights bodies and procedures, including the human rights treaty bodies and special procedures mandates referred to in sections 1.4.1 and 1.4.2 above.

The Global Counter-Terrorism Strategy states that OHCHR should “play a lead role in examining the question of protecting human rights while countering terrorism, by making general recommendations on the human rights obligations of States and providing them with assistance and advice, in particular in the area of raising awareness of international human rights law among national law enforcement agencies, at the request of States” (A/RES/60/288, Pillar IV, No. 7). The General Assembly has further requested OHCHR to “rais[e] awareness ... about the need to respect human rights and the rule of law while countering terrorism and support the exchange of best practices to promote and protect human rights, fundamental freedoms and the rule of law in all aspects of counter-terrorism” (A/RES/68/178, OP 20, see also Human Rights Council resolutions 19/19 and 25/7). One important tool of OHCHR in the fulfillment of these mandates are annual reports of the Secretary-General, the High Commissioner and her Office on human rights and counter-terrorism-related issues to the General Assembly and the Human Rights Council, which will be referred to throughout this module. An active member of the United Nations Counter-Terrorism Implementation Task Force (CTITF), the OHCHR also Chairs the CTITF Working Group on Protecting Human Rights While Countering Terrorism.



#### Tools

The Universal Human Rights Index is an online database providing easy access to country-specific human rights information emanating from international human rights mechanisms in the United Nations system: the Treaty Bodies, the Special Procedures and the Universal Periodic Review (UPR): <http://uhri.ohchr.org/en>.



#### Further reading

- Information on the work of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: <http://www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx>.
- Information on other thematic Special Procedures mandates of the United Nations Human Rights Council particularly relevant to counter-terrorism can be accessed here: <http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx>.

- Fact Sheet No. 32 on Human Rights, Terrorism and Counter-terrorism, published by the Office of the High Commissioner for Human Rights, identifies critical human rights issues raised in the context of terrorism and highlights the relevant human rights principles and standards which must be respected at all times, and in particular in the context of counter-terrorism. It is available here: <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.

## 1.5 Regional systems: overview

There are three well-established regional systems for the protection of human rights, the Inter-American, European and the African system. The judgements, decisions, views, reports and other practice of the organs of these regional systems for the protection of human rights constitute a vast body of practice relating to human rights in the criminal justice responses to terrorism, other national security threats and organized crime. This body of practice constitutes a major source of guidance and case studies relied on to illustrate the problems discussed in this module. The more recent Arab League human rights system and the ASEAN Human Rights Declaration are also briefly mentioned at the end of this section.

### 1.5.1 The Inter-American system for the protection of human rights

In 1948, 21 States of the Americas signed the Charter of the Organization of American States (OAS), thereby transforming the Pan American Union (an organization that has existed since 1910) into a new regional organization. At the same conference, the then 21 OAS member States also signed the American Declaration of the Rights and Duties of Man. This Declaration was the world's first international human rights instrument of a general nature, predating the Universal Declaration of Human Rights. At present, all 35 independent States of the Americas are members of the OAS.

The central binding legal instrument for the protection of human rights within the Inter-American system is the American Convention on Human Rights (ACHR) which came into force in 1978.

In the Inter-American system, an important role is played by the Inter-American Commission of Human Rights (IACHR). It receives communications from individuals alleging violations of either the American Convention on Human Rights or the American Declaration of the Rights and Duties of Man. There is no individual right of petition to the Inter-American Court of Human Rights (IACtHR). The Commission can issue non-binding views in response to communications. It can also bring cases before the Court, which has the power to issue binding decisions and to award reparations.

The Commission may conduct investigations into the human rights situation prevailing in a particular country or investigate and prepare reports in particular areas of human rights concern, such as enforced disappearance. In addition, the Commission has the power to scrutinize the laws of State Parties to the ACHR and to recommend that a law be annulled or domestic legal procedures be changed.

A range of other treaties have been established within the context of the Inter-American system for the protection of human rights. These include the Inter-American Convention on the Enforced Disappearance of Persons and the Inter-American Convention to Prevent and Punish Torture.

The Inter-American Committee against Terrorism (CICTE) has as its main purpose to promote cooperation among member States to prevent, combat and eliminate terrorism, in accordance with the rule of law and international human rights.



### Tools

- Further information on the Inter-American Court of Human Rights (in Spanish) is available here: <http://www.corteidh.or.cr/>.
- Further information on the Inter-American Commission on Human Rights is available here: <http://www.oas.org/en/iachr/>.
- For an overview of jurisprudence within the Inter-American system regarding human rights and counter-terrorism, see the *Report on Terrorism and Human Rights*, Inter-American Commission on Human Rights, available at: <http://www1.umn.edu/humanrts/iachr/humanetreatment.html#D-3>.
- Details of the work of the OAS in the field of terrorism are available here: <http://www.oas.org/en/topics/terrorism.asp>, and on the Inter-American Committee Against Terrorism specifically here: <http://www.oas.org/en/sms/cicte/default.asp>.

## 1.5.2 The Council of Europe system and other regional human rights protection systems in Europe

### 1.5.2.1 The Council of Europe

The Council of Europe (CoE) was founded in 1949 as an international organization with the aim of creating a common democratic and legal area throughout the European continent, and ensuring respect for its fundamental values: human rights, democracy and the rule of law. It is not part of the European Union system (although all European Union member States are also members of the CoE) and it now numbers 47 member States. Many treaties in areas ranging from human rights to international cooperation in criminal matters, corruption, cybercrime and terrorism have been adopted within the framework of the Council of Europe. The most prominent of the CoE treaties concerned with the protection of human rights is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which came into force in 1953.

ECHR initially established two bodies to hear complaints alleging violations of the rights it protected: the European Commission on Human Rights and the European Court of Human Rights (ECtHR). Since 1998, persons in all 47 member States of the Council of Europe have a right of individual petition directly to ECtHR. This means that they can bring a complaint directly to ECtHR once they have exhausted domestic remedies, i.e. they have made use of the mechanisms available at the national level to remedy the alleged human rights violation. ECtHR has the power to issue binding judgements in respect of the complaints brought before it, deciding whether one or more rights enshrined in ECHR have been violated. ECtHR also has power to require the State in question to afford “just satisfaction” to the victims of a violation, most often in the form of financial compensation.



## Multimedia

For a 15-minute video presenting the European Court of Human Rights and its case law, including in terrorism related cases: <http://www.youtube.com/watch?v=Ildoe02cYOU&feature=plcp&context=C3494c3aUDOEgsToPDskLp5dEeCFO-YnqrILlvQAe>.

Various other bodies exist for the protection and promotion of human rights within the framework of the Council of Europe. The European Committee for the Prevention of Torture (CPT) is responsible for overseeing the implementation of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The CPT conducts visits to countries, in particular to places of detention, to ensure that the requirements of the Convention are being observed. As such it provides a non-judicial preventive mechanism to protect persons deprived of their liberty from torture and other forms of ill-treatment.

The Parliamentary Assembly of the Council of Europe, composed of delegations of representatives of member States' parliaments, has passed several resolutions of relevance to human rights and counter-terrorism. Through its system of Parliamentary Rapporteurs, it has produced a number of notable investigative reports in the field of counter-terrorism and human rights, including those dealing with allegations of unlawful international transfer of persons suspected of involvement in terrorism (see chapter 7).

The Committee of Ministers of the Council of Europe supervises the execution of the judgments of ECtHR by member States. It further adopted the *Council of Europe Guidelines on Human Rights and the Fight Against Terrorism* and the *Council of Europe Guidelines on the protection of victims of terrorist acts*, two important documents that are referred to in the course of the present manual.

The European Commission for Democracy through Law—better known as the Venice Commission—is the CoE's advisory body on constitutional matters. Its role is to provide legal advice to CoE member States. Some of its legal opinions, referred to in this manual, are highly relevant to human rights in the administration of justice in terrorism cases.

In 2005, the CoE adopted the Convention on the Prevention of Terrorism. The Group of Parties is a body mandated to carry out follow-up to the implementation of this Convention by the States parties. The Committee of Experts on Terrorism (CODEXTER) is an inter-governmental committee of experts which works to improve capacity and cooperation in the field of counter-terrorism.



## Tools

- The Committee of Ministers of the Council of Europe has adopted the *Council of Europe Guidelines on Human Rights and the Fight Against Terrorism*: [http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/coe/coe-rights\\_guidelines\\_en.pdf](http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/coe/coe-rights_guidelines_en.pdf) and *Guidelines on the protection of victims of terrorist acts*: [http://www.coe.int/t/dlapil/codexter/victims\\_en.asp](http://www.coe.int/t/dlapil/codexter/victims_en.asp).

- The Press Unit of ECtHR has compiled the case law of the Court on specific topics in “Factsheets”. The Factsheet with the Court’s case law on terrorism is available here: [http://www.echr.coe.int/Documents/FS\\_Terrorism\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf). All available Factsheets can be found here: <http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c>.
- The jurisprudence of ECtHR can be searched on the HUDOC database: <http://www.echr.coe.int/echr/en/hudoc>.
- General information on the work of the Council of Europe in the field of counter-terrorism is available here: <http://hub.coe.int/what-we-do/rule-of-law/terrorism>.
- Information on the CODEXTER is available here: [http://www.coe.int/t/dlapil/codexter/default\\_EN.asp](http://www.coe.int/t/dlapil/codexter/default_EN.asp).

It is important to distinguish the Council of Europe system for the protection of human rights from other systems for the protection and promotion of human rights in Europe. Two other significant systems in Europe with their own regimes for the protection of human rights are the European Union and the Organization for Security and Co-operation in Europe (OSCE).

### 1.5.2.2 *The European Union*

All European Union (EU) member States are members of the Council of Europe. The European Union has, however, also developed its own system for the protection of human rights. The centerpiece of this system is the EU Charter of Fundamental Rights, which is binding upon both EU institutions and EU member States when they implement EU law. This means that any EU law or any decision or action taken by an EU institution is only lawful if it meets the requirements of the Charter. Similarly, EU member States must, when acting within the scope of EU law, act in accordance with the requirements of the Charter. The Court of Justice of the European Union (CJEU) has, on many occasions, struck down laws or decisions or declared unlawful actions at the domestic level by EU member States on grounds of incompatibility with the Charter. In the case of *Kadi v. Commission* C 584/10 P, for instance, the CJEU found that EU regulations implementing the United Nations Security Council’s Al Qaida sanctions regime must comply with the requirements of the EU Fundamental Rights Charter.

### 1.5.2.3 *The Organization for Security and Co-operation in Europe (OSCE)*

The Organization for Security and Co-operation in Europe (OSCE) is the world’s largest regional security organization with 57 participating States in Europe, Central Asia and North America. In the Helsinki Final Act (the 1975 international agreement establishing the Conference on Security and Co-operation in Europe, the OSCE’s predecessor), the participating States recognized that lasting security can be achieved only through efforts in the three dimensions of security: the politico-military dimension, the economic and environmental dimension and the human dimension.

Throughout the years, the OSCE participating States have entered into political commitments to a comprehensive catalogue of human rights and democracy norms.<sup>4</sup> While recognizing that States have legitimate and urgent reasons to prevent and counter terrorism, the OSCE Bucharest Plan for Combating Terrorism (2001) and the OSCE Charter on Preventing and Combating Terrorism (2002) affirm that responses to the threat of terrorism must not unlawfully

<sup>4</sup> Relevant commitments are compiled in *OSCE Human Dimension Commitments, Volume 1—Thematic compilation*, 3rd edition 2011; available at: <http://www.osce.org/odihr/76894?download=true>.



infringe upon, damage or destroy the very standards, principles and values of human rights, rule of law and pluralistic democracy. In the OSCE Consolidated Framework for the Fight against Terrorism (2012) participating States have identified the protection and promotion of human rights and fundamental freedoms in the fight against terrorism as one of the strategic focus areas for OSCE counter-terrorism activities.

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) is tasked with assisting participating States in meeting their commitments in the field of human rights and democracy.

### 1.5.3 The African system for the protection of human rights

The African Charter on Human and Peoples' Rights (ACHPR, also known as the "Banjul Charter") was concluded under the aegis of the Organization of African Unity (OAU, now the African Union) and entered into force in 1986. Distinguishing features of the Banjul Charter are the prominent place it attributes, in addition to individual rights, to peoples' rights on the one hand (articles 19-24) and to individuals' duties on the other (articles 27-29).

The Banjul Charter establishes the African Commission on Human and Peoples' Rights. The Commission can receive individual communications alleging human rights violations. If a complaint is admissible, the Commission will issue its views as to whether a violation has occurred and, if so, recommend reparation. In addition, the Commission considers and reports on thematic human rights issues as well as on the human rights situation in particular countries.

In 2004, a Protocol to the Banjul Charter established the African Court of Human and Peoples' Rights. Cases may be brought before the Court by the Commission, by States or by individuals (but only in respect of States which have ratified the Protocol and thereby permitted individual petition). At the time of writing, around 25 African States accepted the jurisdiction of the Court to hear disputes brought before it by the Commission or by other States, and five States granted the right of individual petition to the Court, which had a small but growing number of cases.

Several innovative features set the African Court apart from its American and European counterparts: the Protocol to the Banjul Charter provides that the Court may apply not only ACHPR but also other international human rights treaties which have been ratified by the State party in question.<sup>5</sup> Moreover, NGOs recognized by the AU can apply to the Court for advisory opinions.



#### Tools

- Information on the African Commission on Human and Peoples' Rights is available here: <http://www.achpr.org/>.
- Further information about the African Court of Human and Peoples' Rights is available here: <http://www.african-court.org/en/>.

<sup>5</sup> The jurisdiction of the Inter-American Court of Human Rights also comprises certain other Inter-American human rights treaties (particularly the Inter-American Convention to Prevent and Punish Torture), but the jurisdiction of the African Court extends to "any other relevant Human Rights instrument ratified by the States concerned" (article 3 of the Banjul Charter Protocol), including thereby the United Nations human rights treaties, too.

### 1.5.4 The Arab Charter on Human Rights

The Arab Charter on Human Rights was adopted by the Council of the League of Arab States in 1994. A revised version was adopted in 2004 and entered into force (for the States that have ratified it) in 2008. The Charter also provides for the establishment of a seven-person Committee of Experts to prepare State Reports, but there is no individual right to petition the Committee of Experts.

### 1.5.5 The ASEAN Human Rights Declaration

In 2012, the Heads of State of the Association of Southeast Asian Nations (ASEAN) adopted the ASEAN Human Rights Declaration. It is the first regional human rights instrument in eastern Asia. In addition to civil and political rights as well as economic, social and cultural rights, it enshrines the right to development and the right to peace. As its name suggests, the Declaration is not a binding treaty. It does not provide for any enforcement mechanism.



#### Practical guidance

The international procedures and complaints mechanisms cannot be a substitute for national mechanisms for the protection of human rights. The primary responsibility for the protection and promotion of human rights lies with States. International law requires each State to give effect to human rights obligations within their own national legal system and national agencies. National officials and courts are much better placed than international courts and supervisory mechanisms to protect and remedy human rights violations (and, even more importantly, to prevent such violations occurring in the first instance).



#### Activities

- Which universal and regional human rights treaties is your country a party to? Have you used these treaties in your professional work? How?
- Find the most recent Concluding Observations of the Human Rights Committee and other United Nations human rights treaty bodies relating to your country. What are the recommendations regarding the administration of justice? What are the recommendations regarding human rights in countering terrorism?
- Has your country accepted the individual communications procedure under any human rights treaty it is a party to? Can you find the views of a treaty body on an individual communication in respect of your country?
- Which universal human rights treaties has your country not ratified? Discuss why your country might have decided not to ratify these treaties.

## 1.6 The nature of States' obligations under international human rights law

### 1.6.1 Treaties, customary law and "soft law"

A distinction must be drawn between human rights treaties or rules of customary international law, which impose binding obligations on States, and other international instruments containing principles which are not legally binding, but set standards and provide good practice guidance. To take one example, the International Covenant on Civil and Political Rights is a binding treaty which imposes obligations under international law, including in the context of counter-terrorism operations. By contrast, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems were adopted by General Assembly resolution. Other instruments, e.g. the United Nations Basic Principles on the Role of Lawyers, were adopted by a United Nations Congress on the Prevention of Crime and the Treatment of Offenders. These non-binding instruments (also referred to as "soft law") provide important guidance in the interpretation of treaty provisions.

### 1.6.2 The duty to respect, protect and fulfil human rights

By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The duty to respect human rights means that States must refrain from violating human rights through public officials and others acting on behalf of the State.

Human rights, however, do not only provide protection for individuals against action by State agents interfering with their rights and freedoms. Human rights law also requires the State to take positive action. The obligation to protect means that, in certain circumstances, the human rights obligations of a State "will be fully discharged if individuals are protected by the State, not just against violations of [human] rights by its agents, but also against acts committed by private persons or entities",<sup>6</sup> including terrorist groups.

The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights, e.g. by establishing or funding schools to ensure that the right to primary education does not remain an abstract notion.



#### The positive obligation to protect the right to life against terrorist threats

Fact Sheet No. 32 on Human Rights, Terrorism and Counter-terrorism, published by the Office of the High Commissioner for Human Rights, explains the implications of the "positive obligation" to ensure respect for human rights using the example of "the supreme right", the right to life (page 8):

"... there is an obligation on the part of the State to protect the right to life of every person within its territory and no derogation from this right is permitted, even in times of public emergency. The protection of the right to life includes an obligation on States to take all appropriate and necessary steps to safeguard the lives of those within their jurisdiction. As part of this obligation, States must put in place effective criminal justice and law enforcement

<sup>6</sup> Human Right Committee, General Comment No. 31 (CCPR/C/21/Rev.1/Add.13), 26 May 2004, para. 8.

systems, such as measures to deter the commission of offences and investigate violations where they occur; ensure that those suspected of criminal acts are prosecuted; provide victims with effective remedies; and take other necessary steps to prevent a recurrence of violations. In addition, international and regional human rights law has recognized that, in specific circumstances, States have a positive obligation to take preventive operational measures to protect an individual or individuals whose life is known or suspected to be at risk from the criminal acts of another individual, which certainly includes terrorists. Also important to highlight is the obligation on States to ensure the personal security of individuals under their jurisdiction where a threat is known or suspected to exist. This, of course, includes terrorist threats.”

### 1.6.3 The relationship between international human rights law and national law

As a matter of international law, a rule or provision of domestic law cannot justify failure to take a measure required by international law nor the taking of a measure prohibited by international law. This is so regardless of whether the provisions of domestic law in question are constitutional in character or have some other form of special status in domestic law.

In general terms, the manner in which international law is received into a domestic legal system (and the circumstances in which it may be directly enforced by national courts) depends on whether the State in question is a “monist” or “dualist” State.



#### Monist and dualist legal systems

National legal systems receive international law into their domestic legal systems in different ways. Some legal systems treat rules of international law (or certain rules of international law) as ipso facto forming part of national law. For instance, according to article 93 of the Constitution of the Kingdom of the Netherlands “[p]rovisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published”. Similar provisions are found in the constitutions of many other States.

Dualist systems treat international law as a separate legal field. The rules of international law will only acquire formal domestic legal effect when incorporated into domestic law, usually by legislative act.

Many legal systems adopt a mixed approach. In the legal systems in the common law tradition, for instance, often rules of customary international law are regarded, in principle, as forming part of the common law. Treaties on the other hand must be incorporated by act of parliament.



#### Activity

How are international human rights norms, stemming from treaties your country is a Party to and from customary international law, received into your national legal system? What is their value if they conflict with provisions of national law?

### 1.6.4 Limitations permitted by human rights law

Most counter-terrorism measures can be adopted and carried out without any interference with or restriction on human rights. In some circumstances, however, there will be a need—only perceived, or real—to limit the enjoyment of certain human rights for the purpose of protecting goods such as national security, or the life, physical integrity and fundamental freedoms of others. Indeed, as discussed above (1.6.2), the protection of the right to life and other rights against violence by terrorist groups is in itself a human rights obligation.

Some of the most fundamental human rights are “absolute”. Such rights include the prohibitions on torture, on slavery and on retroactive criminal laws. The absolute character of these rights means that it is not permitted to restrict these rights by balancing their enjoyment against the pursuit of a legitimate aim. In the words of article 2 of the United Nations Convention against Torture, “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.

Most rights, however, are not absolute in character. States can limit the exercise of these rights for valid reasons, including the needs of countering terrorism, as long as they respect a number of conditions.

In the case of some rights, the conditions for legitimate limitations are spelled out in the treaty provisions enshrining the right. Examples are the rights to freedom of expression, freedom of association, freedom of assembly and freedom of movement, and the requirement of publicity of court hearings. These rights are accompanied by various grounds, such as national security or public order, as well as conditions to be met in order for them to be legitimately limited.



#### Freedom of expression—a non-absolute right

Article 19 of ICCPR, protecting the right to freedom of expression, exemplifies the structure of non-absolute rights.

Paragraph 2 sets forth the substance of the right:

“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.”

Paragraph 3 provides the conditions under which the right can be legitimately limited:

“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.”



See chapter 2 for case studies regarding the proportionality of limitations on the rights to freedom of expression and association in countering terrorism.

In the case of some other rights, the human rights treaty provision limits itself to stating that the right may not be interfered with “arbitrarily”. This is, for instance, the case of article 9 of ICCPR, which requires that deprivation of liberty must not be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.



See chapter 4 for a case study regarding the notion of “arbitrary detention”.

Finally, some rights are subject to what could be termed “inherent” limitations. The right of an accused person in a criminal case to be tried without “undue delay” is an example. What is a reasonable delay has to be assessed in the circumstances of each case, taking into account the complexity of the case (which in terrorism cases may be considerable, particularly if evidence needs to be obtained abroad or extradition proceedings are pursued), the conduct of the accused, and the manner in which the matter was dealt with by the investigating and judicial authorities. A second example is the right of accused persons to examine, or have examined, witnesses against them. This right does not provide an unlimited right to obtain the attendance of any witness requested by the accused or his counsel, but only a right to have witnesses admitted that are relevant for the defence. Moreover, in exceptional cases it may be limited in order to protect the safety of the witness or on grounds of national security. These limitations are not spelled out in the human rights treaties, but have been developed by national and international courts and other treaty monitoring bodies applying human rights norms to specific cases before them.



See chapter 5 for more details and specific cases regarding procedural guarantees in terrorism trials and permissible limitations to them.



### The conditions for legitimate limitation of non-absolute rights

On the basis of provisions such as article 19 of ICCPR protecting the right to freedom of expression (see above, other examples in ICCPR are articles 12, 18, 21, and 22), human rights courts and treaty bodies have developed a test to establish whether a measure limiting a non-absolute right is legitimate. The following questions must be asked:

- Is there a legal basis for the measure limiting the right?
- Does the limitation on the right pursue a legitimate aim such as respect of the rights or reputations of others, the protection of national security, the maintenance of public order or public health or morals?
- If so, is the limitation necessary to achieve the legitimate aim, and is the extent of the limitation proportionate in pursuit of the identified legitimate aim? The existence and effectiveness of procedural safeguards will be a key aspect of the assessment whether the limitation of the right is proportionate.
- Does the restriction respect the principle of equality? Is it non-discriminatory? Measures that limit rights in a discriminatory way will fail the test of proportionality. Therefore, the question of discrimination is generally considered one aspect of the necessity and proportionality test.

Only if all of these questions can be answered in the affirmative in a specific case will a restriction on a non-absolute right be permissible under international human rights law.

Note that this test was developed to examine the permissibility of measures interfering with rights explicitly permitting restrictions and spelling out the legitimate aims justifying restrictions. However, very similar reasoning is in fact used to assess whether measures limiting other non-absolute rights are permissible. An example: as stated above, detention will be considered arbitrary not only if it is devoid of a legal basis, but also if it is discriminatory, or completely disproportionate to the legitimate aim to be achieved (this is illustrated by the *Mukong* case discussed in chapter 4).



### Activity

Does your country's constitution and legislation regulate the conditions for legitimate limitations of human rights (or constitutional rights and freedoms)? Are any rights established as absolute? Which rights can be limited? Is there case law of the highest courts in your country regarding the conditions for valid limitations of human rights?

## 1.6.5 Derogation in times of public emergency

In extreme circumstances, “in time of public emergency which threatens the life of the nation” (article 4 of ICCPR), States may take measures to derogate from ICCPR, i.e. to temporarily suspend or adjust their obligations under the treaty, provided a number of conditions are met. At regional level, article 15 of ECHR and article 27 of ACHR contain similar provisions.

A number of rights are “non-derogable”, meaning that they may not be suspended even in times of the most serious public emergency.



### Non-derogable rights in ICCPR

Article 4(2), ICCPR specifies those rights which are non-derogable.

- Article 6 (right to life)
- Article 7 (prohibition on torture, cruel, inhuman or degrading treatment)
- Article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude)
- Article 11 (prohibition on imprisonment on the basis of inability to pay a contractual obligation)
- Article 15 (principle of legality in the field of criminal law)
- Article 16 (right to recognition as a person before the law)
- Article 18 (freedom of thought, conscience and religion)

According to the Human Rights Committee (General Comment No. 29, paragraphs 13-16), there are elements in some of the rights not listed in article 4(2) of ICCPR which cannot be lawfully derogated from. Of particular relevance to human rights while countering terrorism, these include:

- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person (article 10 of ICCPR)
- Prohibition against taking of hostages, abductions and unacknowledged detention
- The fundamental requirements of a fair trial

The application of emergency measures derogating from human rights obligations is subject to strict requirements and principles.



## Requirements for permissible derogation under ICCPR

### *Substantive requirements and principles*

- *Existence of a public emergency:* there must be a “public emergency which threatens the life of the nation”, such as armed conflict, civil and violent unrest, a terrorist emergency, or a severe natural disaster, such as a major flood or earthquake.
- *Principle of conformity with international obligations:* Derogations should not be inconsistent with other obligations under international law. In no circumstances can the right to derogate from human rights obligations be invoked to justify a violation of international humanitarian law or of a peremptory norm of international law. For instance, while derogations from article 14 of ICCPR (right to a fair trial) may be permissible to the extent strictly required by the emergency situation created by an armed conflict, this can never justify a violation of the fair trial rights of prisoners of war under the Third Geneva Convention relative to the treatment of prisoners of war.
- *Principle of proportionality:* Permissible derogation measures must limit the derogated rights only to the extent strictly required by the exigencies of the situation (see article 4(1) of ICCPR). In determining whether a derogation is proportionate, the question to be asked is whether there are other means, less restrictive of the rights in question, which would provide a similarly effective means of responding to the exigencies of the situation.
- General Comment No. 29 of the Human Rights Committee makes clear that the requirement of strict necessity relates to the duration, geographical coverage and material scope of the derogation. In particular, in relation to the duration of a derogation, the Human Rights Committee states that “measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature”.
- Principle 54 of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (which have been endorsed by the United Nations Economic and Social Council) states that “[t]he principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger”.
- *Principle of non-discrimination:* Derogation must be applied in a non-discriminatory manner, without a distinction solely founded on grounds of race, colour, sex, language, religion or social origin.

Note the similarity between, on the one hand, the substantive requirements and principles for derogations to be permissible and, on the other hand, the conditions for the legitimacy of measures limiting non-absolute rights (1.6.4 above), particularly with regard to the principles of necessity, proportionality and non-discrimination. The two case studies below illustrate the application of this test.

### *Procedural requirements*

- *Official proclamation:* Derogation measures are only permissible in respect of public emergencies which are “officially proclaimed”. When proclaiming a public emergency, States must abide by their constitutional and other provisions of law which govern such a proclamation. As the Human Rights Committee stated in General Comment No. 29, this “requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed”.



- *International notification:* Article 4(3) ICCPR requires States seeking to declare a public emergency and to derogate from the requirements of ICCPR to inform the United Nations Secretary-General of this position.



## Two case studies on the validity of derogations

*The Landinelli Silva case:*<sup>a</sup> Mr. Landinelli Silva and others were members of certain political parties in Uruguay and ran for public office as candidates of those parties in elections. Following a change in the political regime, these parties were declared illegal by government decree, which also deprived the parties' candidates at previous elections of the right to vote for 15 years. Uruguay sought to justify these measures by reference to a purported state of emergency. In its note to the United Nations Secretary-General, which was designed to comply with the requirements laid down in article 4(3) of ICCPR, the Government of Uruguay made reference to an emergency situation in the country. No factual details were given. The note confined itself to stating that the existence of the emergency situation was "a matter of universal knowledge", without attempting to indicate the nature and the scope of the derogations actually implemented or the necessity of the measures in question.

The Human Rights Committee concluded that the conditions for a valid derogation were not satisfied. It observed that, "even on the assumption that there exists a situation of emergency in Uruguay, the Human Rights Committee does not see what ground could be adduced to support the contention that, in order to restore peace and order, it was necessary to deprive all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political right for a period as long as 15 years. [...] The Government of Uruguay has failed to show that the interdiction of any kind of political dissent is required in order to deal with the alleged emergency situation and pave the way back to political freedom".

*Case of A and others:*<sup>b</sup> Following the terrorist attacks on the United States of America of 11 September 2001, the United Kingdom adopted legislation allowing the arrest and administrative detention of foreign nationals suspected by a government minister to be "international terrorists". The detention decision was subject to review by a special immigration appeals court. Accepting that these detention powers might be inconsistent with article 5(1) of ECHR (which protects the right to liberty), the government sought to avail itself of the right of derogation under article 15(1) of ECHR. The government argued that foreign nationals present in the United Kingdom suspected of being involved in the commission, preparation or instigation of acts of terrorism constituted a threat to the national security of the United Kingdom and a public emergency.

A and others were foreign nationals living in the United Kingdom. The government suspected them of being international terrorists. However, the government considered that human rights law, specifically the principle of non-refoulement (see chapter 7 on this topic), prevented their deportation, as they would have been at risk of torture in their countries of origin. The government also considered that their prosecution in the United Kingdom would not be possible. The men were therefore placed in administrative detention under the new anti-terrorism legislation.

The validity of the United Kingdom's derogation was examined by both the House of Lords as the United Kingdom's highest court, and ECtHR. ECtHR observed that national authorities enjoyed a wide margin of appreciation in assessing whether the life of their nation was threatened by a public emergency. Weight had, therefore, to be attached to the judgement of the government, Parliament and national courts in this regard. With some hesitation, both the House of Lords and ECtHR accepted the government's view that there was a public emergency threatening the life of the nation which could justify derogations from ECHR.

However, the House of Lords and ECtHR also both took issue with the fact that the special administrative detention powers could be exercised only against foreign nationals and not against United Kingdom citizens suspected of being international terrorists. The two courts were not persuaded by the government's reasons for this difference in treatment. The House of Lords and ECtHR concluded that the derogating measures were disproportionate in that they discriminated unjustifiably against non-nationals, and therefore did not accept the validity of the derogation.

As a result of these judgements, the United Kingdom changed the law and abolished the specific administrative detention powers that had been successfully challenged.

<sup>a</sup>Human Rights Committee, *Landinelli Silva v. Uruguay*, Communication No. 8/34, United Nations Doc. Supp. No. 40 (A/36/40) art. 130, 8 April 1981.

<sup>b</sup>ECtHR, *A. and others v. the United Kingdom*, Application No. 3455/05, Judgement of 19 February 2009.



### Activities

- Has your country taken measures derogating from its obligations under a United Nations or regional human rights treaty?
- Does your country's constitution and legislation regulate the conditions for derogation from human rights norms (or constitutional rights and freedoms) in a state of emergency? Are any rights established as non-derogable? It might be useful to consider this activity jointly with the activity in section 1.6.4.
- A close reading of the judgements in the *A. and others* case summarized above shows that several of the judges dealing with the case, both in the House of Lords and ECtHR, had significant doubts as to whether the terrorist threat in the United Kingdom at the time really constituted an emergency justifying derogation from human rights obligations. Article 4(2) of ICCPR allows derogations in time of "public emergency threatening the life of the nation". How would you assess whether the threat to public security due to terrorism in your country at a given time meets that threshold?



### Further reading

- Human Rights Committee, General Comment 29: States of Emergency (article 4) is available here: <http://www.unhchr.ch/tbs/doc.nsf/0/71eba4be3974b4f7c1256ae200517361>.
- European Commission for Democracy through Law (Venice Commission), Opinion on Protection of Human Rights during States of Emergency: [http://www.venice.coe.int/WebForms/pages/?p=01\\_Presentation](http://www.venice.coe.int/WebForms/pages/?p=01_Presentation).
- Chapter 16 of *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, published by the Office of the High Commissioner for Human Rights, deals with the administration of justice during public emergencies: <http://www.ohchr.org/Documents/Publications/training9chapter16en.pdf>.

## 1.7 The relationship between human rights law and other international legal regimes

International human rights law, at the universal and regional levels, coexists alongside other international legal regimes which are also of relevance in the context of counter-terrorism. The most notable of these are international humanitarian law, international criminal law and international refugee law.

### International humanitarian law

Counter-terrorism measures may take place in the context of widespread armed violence. In such situations, questions of compliance with the body of international law which specifically regulates armed conflict, international humanitarian law (IHL), may arise. In general, IHL becomes applicable where violence, involving organized parties, has reached an intensity sufficient to amount to an “armed conflict”, whether international or non-international. IHL is also applicable in circumstances of military occupation. IHL sets out rules with regard to matters such as the treatment of civilians in armed conflicts, the conduct of hostilities, the treatment of prisoners of war, rules relating to the use of weapons and targeting, among other matters. IHL rules on detention, on torture and inhuman or degrading treatment and on the right to a fair trial may apply to persons detained in the context of an armed conflict and suspected of acts of terrorism.

It is now well established that international human rights law remains applicable (subject to valid derogations on grounds of public emergency) during armed conflict. The International Court of Justice, the United Nations’ principal judicial organ, observed “that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency” (1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, para. 25). This was re-affirmed by the International Court of Justice in its *Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territories*. The Human Rights Committee has equally stated that international human rights law applies “also in situations of armed conflict to which the rules of international humanitarian law are applicable.” It added that “[w]hile, in respect of certain [rights protected by ICCPR], more specific rules of international humanitarian law may be specially relevant for the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”<sup>7</sup>

### International refugee law

A further area of international law of relevance to human rights and counter-terrorism is international refugee law. International refugee law is the body of law which provides a specific legal framework for the protection of refugees setting out States’ obligations to them and establishing standards for their treatment. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees are the two universal instruments in international refugee law.

There are various aspects of international refugee law that are relevant to counter-terrorism. Individuals suspected of terrorism may have acquired refugee status or may be seeking asylum. Conflicts involving terrorist groups may cause individuals fearing persecution by those groups to flee their countries in search of asylum.

<sup>7</sup> Human Rights Committee, General Comment No. 31 (CCPR/C/21/Rev.1/Add.13), 26 May 2004, para. 11.



See chapter 7 for more detailed discussion of some issues arising in the context of counter-terrorism and international refugee law.

## International criminal law

The focus of international criminal law is on the responsibility of individuals rather than on the responsibility of States. Under certain circumstances, an act of terrorism may also constitute a war crime or a crime against humanity. This could for instance be the case where an armed group carries out a number of deadly explosives attacks against members of an ethnic or religious minority group with the aim of pushing them to leave their home and flee to a different part of the country or abroad. Counter-terrorism measures could also constitute an offence under international criminal law, for instance torture or summary execution of terrorism suspects apprehended in a situation of armed conflict.

The fact that certain conduct may amount to a crime under international law does not preclude the application of international human rights law in the investigation, prosecution and punishment of such acts. The statutes of the major international criminal tribunals indeed require the tribunals to conduct their proceedings in a manner compatible with international human rights guarantees.



## Activities

As stated in many General Assembly and Security Council resolutions, counter-terrorism measures must respect international law, “in particular international human rights law, refugee law, and humanitarian law”. List five examples of counter-terrorism measures that would not be in accordance with refugee law or international humanitarian law.



## Further reading

- The UNODC publication *Frequently Asked Questions on International Law Aspects of Countering Terrorism* explains the relationship between terrorism and international criminal law (chapter 2), international humanitarian law (chapter 3) and international refugee law (chapter 4): <http://www.unodc.org/documents/terrorism/Publications/FAQ/English.pdf>.
- The website of the International Committee of the Red Cross provides questions and answers on international humanitarian law and terrorism: <http://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm>.
- OHCHR has published a manual on *International Legal Protection of Human Rights in Armed Conflict* available here: [http://www.ohchr.org/Documents/Publications/HR\\_in\\_armed\\_conflict.pdf](http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf).
- The Report on the situation of detainees at Guantánamo Bay by five holders of human rights Special Procedures mandates (E/CN.4/2006/120) discusses the applicability of human rights and international humanitarian law to the situation of detainees at the United States Naval Base at Guantánamo Bay. It is available here: <http://www2.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm>.

- Key human rights guarantees are enshrined in articles 21-22 and 66-68 of the Rome Statute of the International Criminal Court (the Statute is available here: <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>). Also the Statute of the Special Tribunal for Lebanon, the first international criminal tribunal established to try terrorism cases, contains a section (articles 15-17) setting forth the rights of defendants and victims (<http://www.stl-tsl.org/en/documents/statute-of-the-tribunal>). This module will in several places make reference to how difficult human rights issues arising in terrorism trials are addressed under the Rules of Procedure and Evidence of the Special Tribunal for Lebanon.



### Assessment questions

- What is the position of the United Nations General Assembly and Security Council on respect for human rights in counter-terrorism?
- Explain the nature and role of the United Nations Human Rights Committee and of the Special Rapporteur on human rights while countering terrorism. How do they assist States in respecting human rights while countering terrorism?
- List commonalities and differences between the United Nations human rights treaty bodies, e.g. the Human Rights Committee, the Committee against Torture or the Committee on the Rights of the Child, on the one hand, and the regional human rights commissions and courts on the other.
- Explain the difference between human rights treaty obligations and “soft law” instruments. Find five examples of “soft law” instruments relevant to the criminal justice response to terrorism in chapters 2 to 7 of this module. How do these instruments assist in clarifying treaty obligations?
- Consider the situation of a country which, following a series of bomb attacks against civilians causing massive loss of life, decides to introduce restrictions on freedom of movement in the area affected by the terrorist attacks. Explain the difference between limiting freedom of movement under paragraph 3 of article 12 of ICCPR and derogating from article 12 of ICCPR.
- List five examples of situations in which the application of human rights law overlaps with the application of rules of international humanitarian law.



## 2. THE CRIMINALIZATION OF TERRORIST ACTIVITIES

### 2.1 Introduction

If terrorism is to be successfully combated through the criminal justice system, it is essential that terrorist activities are properly and adequately criminalized within national legal systems. Indeed, States are under an international obligation to criminalize terrorist activities. Sixteen out of the 18 universal counter-terrorism instruments define an offence (e.g. the hijacking of a plane or attacks against internationally protected persons) and oblige State parties to establish the offence as criminal offence under their domestic law. Moreover, in resolution 1373 (2001) the United Nations Security Council decided “that all States shall ... [e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice”. The resolution further clarifies that this requires that “such terrorist acts [be] established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts”.

The criminalization of terrorist offences, however, raises a number of important issues under human rights law which shall be considered in the present chapter. The first is the principle of “no punishment without law” (the principle of legality in criminal law), in particular the requirement of legal certainty. The second overarching issue to be addressed is the question of how to ensure that the fundamental freedoms of expression, assembly and association are not violated in the criminalization and prosecution of terrorism-related offences.

### 2.2 No punishment without law

The principle of “no punishment without law” is a fundamental principle of criminal justice and an essential safeguard against arbitrary prosecution, conviction and punishment. Its importance is such that no derogation from it is allowed even “in time of public emergency which threatens the life of the nation”. This is, for instance, stipulated in article 4(2) of ICCPR, article 15 of ECHR and article 27(2) of ACHR.

The first implication of the principle of “no punishment without law” is that only the law can define a crime and prescribe a penalty. No prosecution may be initiated and eventually punishment meted out for conduct that is not proscribed as an offence by law. The concept of “law” in this regard comprises statute law as well as case law. A second, equally important, aspect is the prohibition of retroactive criminal laws.

The General Assembly has urged all United Nations Member States “to ensure that their laws criminalizing acts of terrorism are accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international law, including human rights law”.<sup>8</sup>

<sup>8</sup> A/RES/64/168, OP 6(k).

## 2.2.1 Principle of legality and requirements of predictability and accessibility of criminal laws

The principle of “no punishment without law” is not confined to prohibiting the prosecution and punishment for conduct that is not proscribed as an offence. To provide an effective safeguard against arbitrary prosecution, conviction and punishment, laws imposing criminal punishment must be written in a way that gives “fair notice” of what conduct is prohibited. The practice of the Human Rights Committee and the case law of ECtHR, of the international criminal tribunals, and of other international jurisdictions, as well as of many countries’ domestic courts, highlight several requirements deriving from this principle. As ECtHR explained in a series of cases<sup>9</sup> interpreting article 7 of the ECHR, which is very close to article 15 of ICCPR:

- “Article 7 [no punishment without law] ... embodies, more generally, the principle that only the law can define a crime and prescribe a penalty.”
- “Criminal law must not be extensively construed to the detriment of an accused, for instance by analogy.” In other words, while in civil and administrative law it is generally permitted to apply a rule to situations that are analogous or similar to the one explicitly covered by a provision, this is not generally permissible in criminal law.
- The concept of “law” implies “qualitative requirements, including those of accessibility and foreseeability. It follows that the offences and the relevant penalties must be clearly defined in law. This requirement is satisfied when the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it or by way of appropriate legal advice, to a degree that is reasonable in the circumstances, what acts and omissions will make him criminally liable”.



### The “void for vagueness” doctrine

In many common law jurisdictions, the requirement of foreseeability of criminal laws is upheld through the “void for vagueness” doctrine. This doctrine and its importance to the protection against arbitrary prosecutions were explained by the United States Supreme Court in the following terms:

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”<sup>a</sup>

In the case *Uganda v. Sekabira*,<sup>b</sup> the High Court of Uganda held that the void for vagueness doctrine is encapsulated in article 27(8) of the Constitution of Uganda, which enshrines the principle of no punishment without law (“No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.”)

<sup>9</sup> See, for example, ECtHR, *Alimuçaj v. Albania*, Application No. 20134/05, Judgement of 7 February 2012, paras. 149–151.



The High Court agreed with defence counsel in this case that a subsection of the Ugandan Anti-Terrorism Act of 2002 was (as it stood at the time) “vague, obscure, ambiguous and when read in the context of the rest of the section, [...] capable of being understood in two or more ways”, and could therefore not be a proper base for the terrorism charges against the accused.

<sup>a</sup>United States Supreme Court, *Grayned v. City of Rockford*, 408 U.S. 104 (1972), at 108–09.

<sup>b</sup>High Court of Uganda, *Uganda v. Sekabira and 10 others*, Judgement of 14 May 2012.



### Foreseeability of criminal law and judicial interpretation

How can the requirement that criminal statutes must be of general and abstract nature and open to application in situations which the legislator may not be able to envisage be reconciled with the requirement that the law give “fair notice” of what conduct is prohibited? What is, in this respect, the role of interpretation of statutes by the courts? ECtHR recently made the following observations on these age-old questions, which are of the greatest importance to correctly understanding the “no punishment without law” principle:

“92. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (...). However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (...).

93. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (...). The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition ... . [The principle “no punishment without law”] cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen [...].”<sup>a</sup>

<sup>a</sup>ECtHR, *Del Río Prada v. Spain*, Application No. 42750/09, Judgement of 21 October 2013. This case is summarized in chapter 6, section 6.3.

The universal counter-terrorism legal instruments negotiated within the framework of the United Nations, the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO) and the International Atomic Energy Agency (IAEA) provide detailed definitions of terrorist offences that comply with the requirements of accessibility and foreseeability of criminal law. States parties to these instruments commit to incorporating those offences into their domestic criminal law, though not necessarily by taking over word by word the definition of the offence in the international treaty.



On the universal counter-terrorism instruments, see Training Module 2 of the Counter-terrorism Legal Training Curriculum on *The Universal Legal Framework Against Terrorism*, and Training Module 5 on *The Universal Legal Framework: Aviation-related and maritime terrorism*.

The universal counter-terrorism instruments take a so-called “sectoral approach”. Each treaty deals with offences against certain interests (such as the safety of international civil aviation, or international maritime navigation), against certain persons (diplomats, hostages) or committed with certain weapons (such as explosives or nuclear weapons). The instruments do not provide a universally agreed upon general, comprehensive definition of “terrorism” or “acts of terrorism”.

For the purposes of their domestic counter-terrorism legislation, however, many States see the need to provide in their law a definition of “terrorism” or “acts of terrorism”. They also perceive the need to create additional offences which are not required by the international instruments, or which though required by a Security Council resolution are not defined in the universal counter-terrorism instruments (for additional discussion of one such offence, “incitement to terrorism”, see section 2.3).

In recent years, the Human Rights Committee, the Special Rapporteur on human rights while countering terrorism and the High Commissioner for Human Rights have frequently expressed the concern that the counter-terrorism legislation of States does not meet the requirements of accessibility and foreseeability. In reviewing counter-terrorism legislation of Member States they have, for instance, expressed the following criticism:

- “Lack of precision in the particularly broad definitions of terrorism and terrorist activity; ... the State party should: Adopt a narrower definition of crimes of terrorism limited to offences that can justifiably be equated with terrorism and its serious consequences.”<sup>10</sup>
- “The vaguely defined crime of collaboration [with terrorist organizations] runs the risk of being extended to include behaviour that does not relate to any kind of violent activity” and “the vagueness of certain provisions on terrorist crimes in the ... Penal Code carries with it the risk of a ‘slippery slope’, i.e. the gradual broadening of the notion of terrorism to acts that do not amount to, and do not have sufficient connection to, acts of serious violence against members of the general population.”<sup>11</sup>
- “The Committee notes with concern that the offence of ‘encouragement of terrorism’ has been defined ... in broad and vague terms.”<sup>12</sup>



### Activities

- Does your legal system enshrine the principle “no punishment without law”?
- Do you know cases in which courts in your jurisdiction have referred to the requirements of foreseeability and accessibility, or the prohibition of application by analogy, in interpreting a criminal law provision?
- Does your legal system have a definition of “terrorism” or “acts of terrorism” as such? If so, is it sufficiently precise to give “fair notice” as to what conduct is punishable as terrorism?

<sup>10</sup> Concluding Observations of the Human Rights Committee, Russian Federation (CCPR/C/RUS/CO/6), 29 October 2009, para. 3.

<sup>11</sup> Report of the Special Rapporteur on Human Rights While Countering Terrorism, Spain (A/HRC/10/3/Add.2), 16 December 2008, paras. 9 and 52.

<sup>12</sup> Concluding Observations of the Human Rights Committee, United Kingdom (CCPR/C/GBR/CO/6), 21 July 2008.



### Tools

- The UNODC Model Legislative Provisions against Terrorism (article 15) provide drafting guidelines for States that choose to define and criminalize acts of terrorism as such, proposing various options reflecting descriptions to be found in different United Nations texts and regional legal instruments. The Model Legislative Provisions against Terrorism are available at: [https://www.unodc.org/tldb/pdf/Model\\_Law\\_against\\_Terrorism.doc](https://www.unodc.org/tldb/pdf/Model_Law_against_Terrorism.doc).
- The Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on *Ten areas of best practices in countering terrorism* (A/HRC/16/51) provides a “model definition of terrorism” (paras. 26-28). It is available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf>.

### 2.2.2 Prohibition on retroactive criminal laws

The prohibition of retroactive criminal laws is an essential corollary of the principle of no punishment without law. The prohibition concerns only changes in the law that are to the detriment of an accused person, either because they create new offences, or broaden existing ones, or provide for harsher penalties. In the words of article 15 of ICCPR:

- “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.”

These principles are reflected in the constitutions, constitutional principles, criminal codes and case law of most, if not all, legal systems in the world. The 1947 Constitution of Japan, for instance, provides in article 39: “No person shall be held criminally liable for an act which was lawful at the time it was committed”. The Penal Code adds in article 6 that “[w]hen a punishment is changed by law after the commission of a crime, the lesser punishment shall be applied.”

Violations of the principle of non-retroactivity of criminal law can result not only from changes in legislation, but also from changes in the courts’ interpretation of laws, when well-established case law changes to a defendant’s detriment. This situation is illustrated by the *Del Río Prada* case<sup>13</sup> discussed in chapter 6, section 6.3.



### Activities

Have you dealt with a criminal case in which retroactivity was an issue or are you aware of a case within your jurisdiction posing a problem of retroactivity in criminal law?

<sup>13</sup> ECtHR, *Del Río Prada v. Spain*, Application No. 42750/09, Judgement of 21 October 2013.

## 2.3 The right to freedom of expression and terrorism-related offences, particularly incitement of terrorism

Criminal law and criminal justice are, traditionally, primarily reactive. They respond to the commission of attacks against life, limb, property and other goods by providing for the identification and punishment of those responsible. The effective enforcement of criminal laws is expected to have a preventive effect by means of deterrence of potential offenders.

With regard to terrorism, however, there is agreement that a solely reactive criminal justice strategy is insufficient and that therefore international action to combat terrorism should focus heavily on prevention. This includes making it a criminal offence to collect funds with the aim that they be used for the perpetration of terrorist acts. To many, a preventive criminal justice strategy against terrorism also needs to include offences to counter the spreading of ideas that incite others to commit terrorist acts or that justify, encourage, or praise terrorist acts.

The preventive potential of offences criminalizing speech that might encourage, incite or otherwise cause the commission of acts of terrorism has to be carefully balanced against the impact such legislation has on freedom of expression. Speaking of the importance of freedom of expression for a democratic society in a case concerning alleged terrorist propaganda, the European Court of Human Rights has stated:

“Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to [the restrictions allowed under] paragraph 2 of article 10 [ECHR, which protects freedom of expression], it is applicable not only to “information” and ideas that are favourably received or regarded as inoffensive ..., but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. As set forth in article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.”<sup>14</sup>

In resolution 1624 (2005) the Security Council “[c]ondemn[s] ... in the strongest terms the incitement of terrorist acts and repudiate[s] attempts at the justification or glorification of terrorist acts that may incite further terrorist acts”. The Security Council therefore calls upon all States to adopt the necessary measures to “[p]rohibit by law incitement to commit a terrorist act or acts”, prevent such conduct and “[d]eny 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”. Resolution 1624 does not, however, define what conduct constitutes incitement.

At the regional level, the Council of Europe Convention on the Prevention of Terrorism of 2005 requires member States to criminalize “public provocation to commit a terrorist offence”, which is defined in article 5(1):

“For the purposes of this Convention, ‘provocation to commit a terrorist offence’ means the distribution, or otherwise making available, of a message to the public, with the intent

<sup>14</sup> ECtHR, *Sürek and Özdemir v. Turkey*, Merits, Application Nos. 23927/94 and 24277/94, Judgement of 8 July 1999.

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.”

In calling on all States to criminalize the incitement of terrorist acts in resolution 1624 (2005), the Security Council also recalls, however, the right to freedom of expression and stresses that any restrictions on the right to freedom of expression shall only be such as are provided by law and are necessary on the grounds set out in paragraph 3 of article 19 of ICCPR. Similarly, article 12 of the Council of Europe Convention on the Prevention of Terrorism stresses that the criminalization of public provocation to commit a terrorist offence and of recruitment must be “carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion”.



See chapter 1, section 1.6.4, on legitimate limitations to non-absolute rights, such as the rights to freedom of expression and association, in countering terrorism.



### Activities

- Compare the definition of the right to freedom of expression in the international human rights treaties to which your country is a party to any relevant provisions in your country's constitution and laws. Also compare the grounds on which freedom of expression can be restricted.
- Paragraph 3 of article 19 of ICCPR requires that any restrictions on the right to freedom of expression must be “provided by law”. Identify examples of legislation in your country which could be a legal basis for limiting freedom of expression on grounds related to countering terrorism.

It is not possible to state in the abstract whether a prosecution for “incitement” or “public provocation” to commit a terrorist offence, or for “praising”, justifying” or “encouraging” a terrorist offence will constitute a lawful, necessary and proportionate interference with freedom of expression, or whether it will have to be considered a violation of that freedom. This will depend on how the offence is defined in the national legislation, and on the specific circumstances of the situation to which it is applied.

Most, if not all, national criminal law systems punish incitement understood as one person inducing a specified other person to commit a specific serious offence by persuasion, remuneration, promises or threats. This does generally not raise any concerns with regard to freedom of expression.

Questions of safeguarding freedom of expression will arise when the inciter or instigator is not directing his persuasion to a specified other person, but to a crowd at a public gathering or to the public in general, for instance in an interview given to a newspaper or TV channel, or by posting his opinion on a website, and when there is no incitement to commit a specific offence, but rather a general expression of support for a terrorist group or terrorist leader.

As mentioned above, in resolution 1624 which requires all States to adopt the necessary measures to “[p]rohibit by law incitement to commit a terrorist act or acts”, the Security

Council did not define what conduct constitutes incitement. The context of the resolution suggests that the Security Council envisaged not only the instigation of a specified person to commit a terrorist offence, but also speech addressed at the public. The Special Rapporteur on human rights while countering terrorism has suggested to United Nations Member States a “model offence of incitement to terrorism” to assist them in carrying out their obligations under Security Council resolution 1624 in full respect of the right to freedom of expression. This “model offence” is nearly identical to the offence of “public provocation to commit a terrorist offence” in article 5 of the Council of Europe Convention on the Prevention of Terrorism.<sup>15</sup> It reads:

“It is an offence to intentionally and unlawfully distribute or otherwise make available a message to the public with the intent to incite the commission of a terrorist offence, where such conduct, whether or not expressly advocating terrorist offences, causes a danger that one or more such offences may be committed.”<sup>16</sup>

This model offence of incitement to terrorism and the offence of “public provocation to commit a terrorist offence” in article 5 of the Council of Europe Convention share the following elements:

- They require a personal and specific intent to incite the commission of a terrorist offence as an element of the offence. This intent can, however, be inferred from factual circumstances in which comments are made.
- The speech or conduct causes an actual risk that a terrorist offence may be committed.
- The speech or conduct is punishable whether or not it involves an explicit appeal to commit a specific attack on an identified target.
- The speech or conduct is punishable whether or not any terrorist offence is committed or attempted as a result of it, as long as it created an actual risk of commission of a terrorist offence.

Some States perceive the need to go further in the suppression of speech that might incite others to engage in terrorist activities. They criminalize conduct that has been described as “glorification”, “praise” or “justification” of terrorism or, in French, “apologie du terrorisme”. While the specific elements of such offences will vary from one legal system to another, the Council of Europe has proposed the following working definition of “apologie du terrorisme”: “the public expression of praise, support or justification of terrorists and/or terrorist acts”.<sup>17</sup> The main difference between such an offence and “provocation to commit a terrorist offence” in article 5 of the Council of Europe Convention would be that “apologie” offences do not require proof of the intent to incite the commission of a terrorist offence. Also the creation of an actual risk of the commission of a terrorist act as a result of the incriminated conduct may not be required.

<sup>15</sup> The only difference between the two definitions (in addition to the different name of the offence) is that the CoE Convention states that the conduct shall constitute an offence “whether or not directly advocating terrorist offences”, while the Special Rapporteur’s model offence substitutes “directly” with “expressly”.

<sup>16</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Ten areas of best practices in countering terrorism* (A/HRC/16/51), p. 29.

<sup>17</sup> Council of Europe publishing, “*Apologie du terrorisme*” and “incitement to terrorism” (2004), p. 12; much of the material contained in this publication is available online at: [http://www.coe.int/t/dlapil/codexter/3\\_codexter/Working\\_Documents/2004/CODEXTER%20\\_2004\\_%2004%20rev%20e%20Report%20on%20apologie%20and%20incitement.pdf](http://www.coe.int/t/dlapil/codexter/3_codexter/Working_Documents/2004/CODEXTER%20_2004_%2004%20rev%20e%20Report%20on%20apologie%20and%20incitement.pdf).

In its General Comment on the right to freedom of expression, the Human Rights Committee warns that “offences as ‘encouragement of terrorism’ and ‘extremist activity’ as well as offences of ‘praising’, ‘glorifying’, or ‘justifying’ terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression” (General Comment No. 34, paragraph 46).

The European Court of Human Rights has similarly subjected cases in which persons were prosecuted and convicted for “praising terrorism” to very intense scrutiny. In dealing with a series of cases in which people were found guilty of “praising terrorism” for having shouted during demonstrations slogans expressing support for a terrorist leader or a terrorist organization, or advocating the violent overthrow of the government, ECtHR has made very clear that the context in which the facts occurred is of the greatest importance: slogans shouted at an otherwise peaceful demonstration in which no violence is threatened or carried out are unlikely to justify prosecution for praising terrorism, even if the text of the slogan could be seen as inciting violence.<sup>18</sup> ECtHR has also clarified that a speaker at a demonstration cannot be held accountable for slogans shouted by the crowd allegedly praising a terrorist organization if he has done nothing to incite the crowd to shout those slogans.<sup>19</sup> Moreover, a fine or a very short prison term may be justified as punishment for the offence of “praising terrorism”, a longer prison term is most likely to be found disproportionate and therefore a violation of freedom of expression.<sup>20</sup>

Questions regarding the right balance to be struck between the need to suppress speech and publications that incite to commit acts of terrorism on the one hand, and the protection of freedom of expression on the other, arise in many different situations. The materials in the “Tools” box below and in the following case studies provide a wealth of examples from the practice of national and international courts in this regard.



### Tools

- The Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on *Ten areas of best practices in countering terrorism* (A/HRC/16/51) discusses best practices in the criminalization of incitement to terrorism (paras. 29–32). It is available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf>.
- The Council of Europe Convention on the Prevention of Terrorism of 2005 provides a definition of “public provocation to commit a terrorist offence” (article 5) and of “recruitment for terrorism” (article 6). It is available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/196.htm>. The Explanatory Report to this Convention (<http://conventions.coe.int/Treaty/EN/Reports/Html/196.htm>) provides additional guidance to its correct interpretation, including with regard to the question what conduct amounts to “public provocation to commit a terrorist offence” (paragraphs 86–105). Note that for the purpose of this Convention, “terrorist offences” are the offences contained in the United Nations counter-terrorism legal instruments.

<sup>18</sup> ECtHR, *Gül and others v. Turkey*, Application No. 4870/02, Judgement of 8 June 2010, paras. 40 and ff.

<sup>19</sup> ECtHR, *Bülent Kaya v. Turkey*, Application No. 52056/08, Judgement of 22 October 2013, para. 42.

<sup>20</sup> Compare ECtHR, *Taşdemir v. Turkey*, Application No. 38841/07, Decision of 23 February 2010, and ECtHR, *Gül and others v. Turkey*, Application No. 4870/02, Judgement of 8 June 2010, para. 43.

- The UNODC publication *Preventing terrorist acts: A criminal justice strategy integrating rule of law standards in implementation of the United Nations anti-terrorism instruments* provides useful discussion of incitement of terrorism and support for terrorism offences, as well as of rule-of-law and human rights considerations relevant to the criminalization of these offences. It is available here: [http://www.unodc.org/documents/terrorism/Publications/Preventing\\_Terrorist\\_Acts/English.pdf](http://www.unodc.org/documents/terrorism/Publications/Preventing_Terrorist_Acts/English.pdf).
- The Internet is a favourite tool for terrorists to disseminate propaganda, recruit new members and incite others to carry out terrorist acts. The UNODC publication *The Use of the Internet for Terrorist Purposes* provides examples of national legislative provisions criminalizing the use of the Internet for terrorist purposes and actual cases prosecuted under these provisions. It also discusses human rights and rule-of-law concerns related to the criminalization of incitement through the Internet. The publication is available at: [http://www.unodc.org/documents/terrorism/Publications/12-52159\\_Ebook\\_Internet\\_TPB.pdf](http://www.unodc.org/documents/terrorism/Publications/12-52159_Ebook_Internet_TPB.pdf).



### Activities

- Compare the offences criminalizing speech in support of terrorism under your domestic laws to the “Model offence of incitement to terrorism” proposed by the Special Rapporteur. In what respects do they differ?
- The Internet is a favourite tool for terrorists to disseminate propaganda, recruit new members and incite others to carry out terrorist acts. Are the offences in your country’s law allowing the prosecution of incitement and other support to terrorism suited to prosecuting the use of the Internet for terrorist purposes?
- Security Council resolution 1624, as well as article 20(2) of ICCPR, do not explicitly require that the prohibition of incitement to terrorism (in the case of resolution 1624), or of “discrimination, hostility or violence” (in the case of article 20(2)), must take the form of a criminal offence. Do you think that non-penal (civil or administrative) sanctions could be effective against those who engage in or disseminate speech that constitutes “incitement of terrorism”? What civil or administrative sanctions for incitement to terrorism, or justification/glorification of terrorism exist in your legal system, or can you think of? What are the advantages and disadvantages of non-penal sanctions?



### Activities. Freedom of expression case studies

In the following case studies, the challenges of upholding freedom of expression while countering speech that could incite terrorist violence or threaten national security are illustrated by three cases. As you read through the case studies, analyse them through the lens of the following questions.

- Did the national criminal law provisions applied by the national courts in these cases give a sufficiently “fair notice” of what conduct is prohibited? Or could it be argued in one case or the other that they were too vague?
- Do you think that the national courts struck the right balance between upholding freedom of expression on the one hand and combating terrorist acts, or national security more broadly, on the other?



- Imagine that your country's law is the domestic law applicable to the facts of each of these three cases. Consider not only offences relating specifically to speech that incites violence, but also those criminalizing support to terrorism, complicity in terrorism offences, or national security offences more broadly. Which offences could have been charged in your jurisdiction on the basis of the facts of the three cases? As a prosecutor in your country, which of the cases would you seek to prosecute? What arguments would an experienced defence counsel in your country raise in each of the cases?
- In the case of *Sürek and Özdemir*, the prosecution is against the newspaper owner and editor who published statements by a terrorist leader, not against the speaker himself. Should a different standard apply in such cases?
- Would the statements made by the PKK leader in the interview with the weekly published in the case of *Sürek and Özdemir* be punishable under your country's law (assuming the interviewed PKK leader was charged, and not the newspaper owner and editor)?
- Apply the model offence of incitement to terrorism proposed by the Special Rapporteur to the facts of each of the cases. Which of the cases would, in your view, fulfil the criteria of "incitement" under the Special Rapporteur's definition?
- In the preamble of resolution 1624, the Security Council "repudiat[es] attempts at the justification or glorification of terrorist acts". The call on Member States to "prohibit by law", however, is limited to "incitement to commit a terrorist act or acts". In reading through the case studies, consider whether the facts of any of the cases would constitute praising, justification or glorification of terrorist acts without amounting to incitement to or public provocation of terrorism.



### Case study. The *Park* case<sup>a</sup>

Mr. Park, a citizen of the Republic of Korea (South Korea), studied in the United States of America from 1983 to 1989. There he was a member of an organization named the Young Koreans Union (YKU) and took part in peaceful demonstrations and gatherings highly critical of the government of the Republic of Korea and of the military alliance between the Republic of Korea and the United States. Upon his return home he was charged and found guilty of having violated the Republic's National Security Law, and sentenced to one year's suspended imprisonment. In considering Mr. Park's appeal, the Supreme Court found that the YKU was an organization which had as its purpose the commission of the crimes of siding with and furthering the activities of the Democratic People's Republic of Korea (North Korean) Government and thus an "enemy-benefiting organization".

Article 7 of the National Security Law under which Mr. Park was convicted read:

- (1) Any person who has benefited an anti-State organization by way of praising, encouraging or siding with or through other means the activities of an anti-State organization, its members or a person who was under instructions from such organization, shall be punished by imprisonment for not more than seven years.
- (2) Any person who has formed or joined an organization which aims at committing actions as stipulated in paragraph 1 of this article shall be punished by imprisonment for not more than one year. ...

Mr. Park complained to the Human Rights Committee. In considering the application, the Human Rights Committee remarked that "the right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification." The Human Rights Committee noted that the Government stated that the

provisions of the National Security Law and their application in Mr. Park's case were justified to protect national security. However, "the Committee must still determine whether the measures taken were necessary for the purpose stated". The Committee found that the Government had not explained "the precise nature of the threat ... [Mr. Park's] exercise of freedom of expression posed." The Committee found that Mr. Park's conviction could not be said to be necessary for the protection of one of the legitimate purposes in article 19(3) of ICCPR. It therefore concluded that there was a violation of freedom of expression.

<sup>a</sup>Human Rights Committee, *Park v. Republic of Korea*, Communication No. 628/1995, 20 October 1998.



### Case study. The *Sürek and Özdemir* case<sup>a</sup>

The *Sürek and Özdemir* case took place against the background of serious disturbances in south-east Turkey, including deadly attacks against civilians by the PKK (Kurdistan Workers' Party). The PKK is banned as a terrorist organization by the Government of Turkey and listed as a terrorist organization by a number of States and some international organizations.

Mr. Sürek was a major shareholder of a weekly review, of which Mr. Özdemir was editor-in-chief. The review published an interview with a leader of the PKK, in which he set out their tactics and objectives. The thrust of the PKK leader's statements was that the PKK would have to continue and increase the severity of its armed struggle against the State as the State was unwilling to accede to the demands of the PKK if put peacefully. Messrs. Sürek and Özdemir were charged under the then Prevention of Terrorism Act. The court found the accused guilty of publishing declarations of terrorist organizations and disseminating separatist propaganda in violation of sections 6 and 8 of the Turkish Prevention of Terrorism Act 1991. Mr. Sürek was given a heavy fine, Mr. Özdemir a fine and a six-month prison sentence.

Sections 6 and 8 of the Turkish Prevention of Terrorism Act read as follows at the time of the offence and the trial (they have since been amended):

Section 6: "[...] It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to print or publish declarations or leaflets emanating from terrorist organizations. Where the offences contemplated in the above paragraphs are committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law No. 5680), the publisher shall also be liable to a fine [...]."

Section 8: "Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not more than five years' imprisonment and a fine of from fifty million to one hundred million Turkish liras. Where the crime of propaganda contemplated in the above paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law No. 5680), the publisher shall also be liable to a fine [...]."

Messrs. Sürek and Özdemir filed an application to ECtHR. ECtHR considered that the sentence imposed on the applicants was based on law and could be said to pursue the legitimate aims identified by the Government, namely the protection of national security, territorial integrity and the prevention of disorder and crime. In assessing whether the interference with freedom of speech was proportionate, ECtHR held [art. 58] "[w]hile the press must not overstep the bounds set,

*inter alia*, for the protection of the vital interests of the State, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones.” A majority of ECtHR judges considered [art. 61] that “the views expressed in the interviews could not be read as an incitement to violence; nor could they be construed as liable to incite violence.” ECtHR concluded that the conviction and sentencing of the applicants were disproportionate and therefore not “necessary in a democratic society”.

<sup>a</sup>ECtHR, *Sürek and Özdemir v. Turkey*, Application Nos. 23927/94 and 24277/94, Judgement of 8 July 1999.



### Case study. The Leroy case<sup>a</sup>

On 13 September 2011, the Basque weekly *Ekaizta*, published a cartoon representing the attack on the twin towers of the World Trade Center, with the caption: “We have all dreamt of it . . . Hamas did it” (the text is a parody on an advertisement slogan well known at the time). Mr. Leroy was the cartoonist who had drawn and submitted the cartoon. In its next issue, the magazine published excerpts from letters and e-mails reacting to it. It also published a statement by Leroy explaining that, when making the cartoon, he had intended to express his anti-American feelings, but had failed to consider the human grief and suffering caused by the attacks. The public prosecutor initiated criminal proceedings against the editor of *Ekaizta* on charges of condoning terrorism and against Mr. Leroy on charges of complicity in condoning terrorism under the French Press Act. Both were found guilty and sentenced to the payment of moderate fines.

Mr. Leroy applied to ECtHR alleging a violation of his freedom of expression. ECtHR found that the measures taken against Mr. Leroy were based on law and pursued a legitimate aim. As to the proportionality of the interference with his freedom of expression, ECtHR considered that through the drawing and the text accompanying it, Mr. Leroy had expressed his support and moral solidarity with the authors of an attack that killed thousands of civilians. He had offended the dignity of the victims. ECtHR accepted that Mr. Leroy’s cartoon could be considered satire, but it nonetheless insisted that there are “duties and responsibilities” coming with the exercise of freedom of expression. ECtHR decided that the penalty had not been disproportionate. There was no violation of the right to freedom of expression.

<sup>a</sup>ECtHR, *Leroy v. France*, Application No. 36109/03, Judgement of 2 October 2008.

## 2.4 Restricting freedom of association in countering terrorism

“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.”<sup>21</sup>

<sup>21</sup> Organization for Security and Co-operation in Europe (OSCE), *Countering Terrorism, Protecting Human Rights: A Manual*, p. 216, available at: <http://www.osce.org/odihr/29103>.

Freedom of association is protected in article 20 of UDHR, article 22 of ICCPR, article 10 of ECHR, article 16 of ACHR, article 10(1) of ACHPR and article 24(5) of the Arab Charter on Human Rights. It is a non-absolute right that can be restricted “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 19, paragraph 2 of ICCPR), as long as the restrictions have a legal basis and are proportional.

Of particular relevance in the context of counter-terrorism measures, the right to raise funds and to use them to carry out the activities of the association is an essential element of the right to freedom of association. “[F]unding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with [the right to freedom of association]”.<sup>22</sup>



### Case study. The *Herri Batasuna* case<sup>a</sup>

In June 2002, the Spanish Parliament enacted a new law on political parties, which in chapter III regulates the dissolution by court of political parties which do not respect democratic principles and human rights. In March 2003, the Supreme Court of Spain declared Herri Batasuna and Batasuna (two separatist parties from the Basque region) illegal, pronounced their dissolution and the liquidation of their assets. The Supreme Court considered that Herri Batasuna and Batasuna had the same ideology as the terrorist organization ETA (*Euskadi Ta Askatasuna*, meaning “Basque Homeland and Freedom”), were in fact tightly controlled by ETA and were instruments of its terrorist strategy. As evidence of this, the Supreme Court referred to incidents in which representatives of Batasuna had refused to condemn terrorist acts; had expressed support for detained ETA terrorists, including making them honorary citizens of municipalities governed by Batasuna; and had issued statements such as “ETA [does] not support armed struggle for the fun of it, but [it is] an organization conscious of the need to use every means possible to confront the State”.

Herri Batasuna and Batasuna appealed to the European Court of Human Rights. ECtHR stressed the linkage between freedom of expression and freedoms of association and assembly and recalled [art. 78] that “it is well-established in its case law that drastic measures, such as the dissolution of a political party, may only be taken in the most serious cases”. ECtHR agreed with the Spanish courts that “the refusal to condemn violence against a backdrop of terrorism that had been in place for more than thirty years and condemned by all the other political parties amounted to tacit support for terrorism.” (art. 88) It further recalled the universal condemnation of justification for terrorism and the international instruments obliging States to criminalize public provocation to commit a terrorist offence. ECtHR concluded that the dissolution of the two parties could reasonably be considered as meeting a “pressing social need” and as proportionate to the legitimate aim pursued. The measure could accordingly be considered “necessary in a democratic society”.

<sup>a</sup>ECtHR, *Herri Batasuna and Batasuna v. Spain*, Application Nos. 25803/04 and 25817/04, Judgement of 6 November 2009.

The sanctions imposed against Herri Batasuna and Batasuna were not criminal sanctions, but rather concerned the right to participate in elections and run for public office. Many countries have lists proscribing certain organizations or groups as terrorist groups (so-called “blacklists”) for purposes of sanctions. These sanctions can include:

<sup>22</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (A/HRC/23/39), para. 16.

- Freezing assets and prohibiting the collection of funds for the group
- Travel bans for members of the group
- Prohibition on displaying support in public for the organization
- Prohibition on participation in elections and the conduct of public affairs

Such measures might interfere with the freedoms of movement, of expression and of association of the members and sympathizers of the group, as well as with the right to property and the right respect for privacy and family life, the right to respect for one's honour and reputation,<sup>23</sup> and the right to take part in the conduct of public affairs. Therefore, sanctions need to meet, in the specific case, the tests of provision by law, legitimate aim, non-discrimination, necessity and proportionality. Respect for due process safeguards, including the availability of judicial review of any measure, is an essential condition for respecting human rights in imposing sanctions against organizations alleged to be involved in terrorist activities.<sup>24</sup>



### Combating the abuse of non-profit organizations for terrorism while protecting the legitimate activities of charities

All States are under the obligation to criminalize and prosecute the collection of funds to be used to carry out terrorist acts, and to freeze and seize all funds used for or allocated to terrorism financing. The Financial Action Task Force (FATF)<sup>25</sup> states in its Recommendation 8 that non-profit organizations are particularly vulnerable to being misused for the financing of terrorism. FATF identifies three main ways in which non-profit organizations are misused by terrorists:

- “ (a) By terrorist organizations posing as legitimate [non-profit] entities;
- (b) To exploit legitimate [non-profit] entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and
- (c) To conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organizations.”

The FATF Interpretive Note to Recommendation 8 on non-profit organizations (NPOs) stresses that “[m]easures adopted by countries to protect the NPO sector from terrorist abuse should not disrupt or discourage legitimate charitable activities. ... Actions taken for this purpose should, to the extent reasonably possible, avoid any negative impact on innocent and legitimate beneficiaries of charitable activity. However, this interest cannot excuse the need to undertake immediate and effective actions to advance the immediate interest of halting terrorist financing or other forms of terrorist support provided by NPOs”. (FATF Best Practice, Combating the Abuse of Non-Profit Organizations (Recommendation 8), paragraph 3(c)).

FATF has developed a set of best practices to assist States in protecting legitimate activities of charitable organizations in their efforts to stop the misuse of non-profit organizations for terrorist financing.

<sup>25</sup>The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF Recommendations are recognized as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard.

<sup>23</sup> Human Rights Committee, *Sayadi and Vinck v. Belgium*, Communication No. 1472/2006 (CCPR/C/94/D/1472/2006), 29 December 2008.

<sup>24</sup> European Court of Justice, *Kadi and Yusuf v. The Council of the European Union*, 2008.



### Criminal sanctions for association with a proscribed organization

In addition to the non-penal sanctions mentioned above (e.g. freezing of assets), some legal systems also connect penal sanctions to the mere fact of belonging to a terrorist group or organization, i.e. without the need for the prosecution to show participation of the accused in a terrorist act. In a report on the protection of the freedoms of assembly and association (A/61/267, paragraph 26), the Special Rapporteur on human rights while countering terrorism recommends that where belonging to a terrorist organization is made a criminal offence, the following safeguards should apply:

- The determination that the organization is “terrorist” is made based on factual evidence of its activities.
- The determination that the organization is “terrorist” is made by an independent judicial body.
- The term “terrorist” or “terrorism” is clearly defined.



### Activities

- Does your legal system criminalize membership in a terrorist group (as a separate offence in addition to various forms of complicity in terrorist acts)?
- If so, will the prosecution have to prove at trial that the group engaged in terrorist activities, or is the previous designation of the entity as terrorist group sufficient proof at trial? Discuss the advantages and disadvantages of the two approaches.
- How is membership in a terrorist group defined and/or proved in your legal system?
- What rights are affected by a decision to close a non-profit organization, or to freeze its assets? Think of the persons working for the organization, of the donors, and of those benefitted by the activities of the organization. What are the procedural safeguards in place your legal system when measures against a NPO suspected of involvement in terrorism financing are considered?



### Further reading

- The Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on freedom of assembly and association (A/61/267) is available here: [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=12600](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=12600).
- The FATF Best Practices for Combating the Abuse of Non-Profit Organizations (Recommendation 8) are available here: [http://www.fatf-gafi.org/media/fatf/documents/reports/Combating\\_the\\_abuse\\_of\\_NPOs\\_Rec8.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/Combating_the_abuse_of_NPOs_Rec8.pdf).
- Part III of the Organization for Security and Co-operation in Europe’s manual *Countering Terrorism, Protecting Human Rights: A Manual*, is dedicated to “Human Rights and the guarantee of democratic pluralism”. It provides more in-depth analysis of many of the issues discussed here and is available at: <http://www.osce.org/odihr/29103>.



### Assessment questions

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- The principle of legality in criminal law (“no punishment without law”) is not confined to prohibiting retroactive criminal laws to the disadvantage of an accused. Name at least three other requirements deriving from this principle.
- Explain the relationship between the clarification and development of criminal law through judicial decision making and the principle of legality in criminal law (“no punishment without law”).
- Security Council resolution 1624 (2005) requires Member States to prohibit “incitement to terrorism”. But what conduct constitutes “incitement to terrorism” under international law?
- The right to freedom of expression is not absolute rights. Measures limiting this right for purposes of countering terrorism can be legitimate if they satisfy certain conditions. What are these conditions? (In addition to chapter 2, you will find assistance in answering this question also in chapter 1, section 1.6.4.) Name three examples of counter-terrorism legislation that violates the rights to freedom of expression, and explain why the limitation of freedom of expression in these cases is not justified although it pursues the legitimate aim of protecting human lives and public security.
- Describe the conditions that have to be met for the banning of a political organization on grounds of counter-terrorism or related grounds to be legitimate under international human rights law.
- Discuss the human rights implications of measures to freeze, seize or confiscate assets alleged to be used to support terrorist activities.





## 3. THE INVESTIGATION OF TERRORIST OFFENCES

### 3.1 Introduction

The investigation of terrorist offences raises many complex challenges for investigators, prosecutors, judges and defence lawyers. Investigations which comply with human rights standards are much more likely to be effective than those which do not. For example, where an investigation procures evidence through the torture or ill-treatment of a suspect, the trial of the suspect may collapse. Similarly, evidence which is obtained in violation of other human rights standards, such as those limiting the investigators' powers to carry out surveillance of suspects' phone calls or e-mails, may be excluded at trial. Human rights compliant investigations also improve the relationship between the investigative authorities and the communities affected by terrorism, greatly increasing the chances of useful information coming from persons in those communities. Finally, respect for human rights helps address the conditions conducive to the spread of terrorism, by avoiding grievances of which terrorist groups may take advantage.

### 3.2 The importance of the investigative stage for the effective protection of the right to a fair trial

The right to a fair trial is of crucial importance in the investigation, trial and punishment of terrorist offences. Safeguarding a fair trial is not a process which starts at the door of the court house, when the trial commences. A criminal justice system is a complex system comprised of a number of mutually interdependent actors: the police or other investigators, the prosecution, the defence, the judiciary and also the public. In order to reach a "fair trial" all actors have to fulfill their role and responsibilities in a proper and professional way from the start of the investigation.

Fundamental problems of fairness which develop prior to court proceedings risk harming (and can even render impossible) a fair trial before the trial itself has even begun. For instance, failure to provide an individual with prompt access to a lawyer puts at risk the fundamental fairness of the eventual proceedings against the individual. Similarly, prejudicial comments by, for example, members of the judiciary or other public officials implying that a suspect is guilty before that suspect has faced trial may call into question the fairness of any proceedings eventually brought. Thus fair trial guarantees are all of crucial importance both before court proceedings as well as in the course of such proceedings, if the guarantee of a fair trial is to be respected in practice.

The present chapter will first explore a number of overarching principles of international human rights law which must guide the investigation of any criminal offence, including terrorist offences. These principles include the presumption of innocence and equality before the law. They also include rules governing the treatment of juvenile suspects. Respect for these principles is crucial

both during the investigative and trial phases of proceedings, and the material in the present chapter will serve as an overall introduction to these principles. The chapter then thematically addresses a range of specific areas concerning the investigation of terrorist offences and examines the application of human rights law in each of these different contexts.

Key rights and principles commonly engaged in the investigation of terrorist offences include the following:

- Presumption of innocence
- Equality of arms
- Prohibition on discrimination
- Right to be informed of charges in a language one understands
- Right of access to a lawyer
- Right to adequate time and facilities to prepare defence, including access to concrete information about charges and concrete factual and evidentiary material supporting the charges
- Prohibition on torture, inhuman and degrading treatment and on the use of confessions and material extracted by torture, including material received from other States
- Right against self-incrimination
- Right to private and family life



### Activities

- Are the rights listed above protected within your own legal system in the context of criminal investigations, particularly investigations regarding terrorist offences? How are these rights protected in law?
- In your own work, have you experienced significant challenges or problems in ensuring that these rights are effectively protected in practice during the investigative stage of the criminal process? What do these problems involve?
- Consider and discuss the causes of these problems. Is the legal framework inadequate or are there practical issues which prevent rights from being safeguarded? If so, what are they?



### Further reading

- One of the documents most often referred to in this chapter is the Human Rights Committee's General Comment No. 32 on the right to a fair trial. It is available here: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en).
- The Organization for Security and Co-operation in Europe (OSCE) has published *Human Rights in Counter-Terrorism Investigations: A Practical Manual for Law Enforcement Officers*. This manual provides further detail and case studies regarding many of the matters discussed in this chapter, with a focus on the role of law enforcement officers: <http://www.osce.org/odihr/108930>.

In addition to the human rights of the terrorist suspect, States are also under an obligation to protect the human rights of victims and witnesses during the investigation of terrorism cases. Their rights to life, security, physical and mental integrity, respect for private and family life, and protection of dignity and reputation can be put at risk not only by threats from those under investigation and their accomplices. Police interviews and other investigative activities can force victims and witnesses to relive traumatic experiences or otherwise expose them to psychological harm. To protect the investigation, authorities often can only disclose to victims limited information regarding progress of the investigation. However, an unjustified refusal to provide information that could be disclosed can seriously affect the psychological well-being of victims and will affect their right of access to the courts. Finally, invasive media coverage can not only affect the right of the suspect to be presumed innocent (as discussed below). It can also have a grave impact on the mental integrity, family life and privacy of victims and witnesses.



Chapter 5, section 5.2, summarizes guidance on the role and treatment of victims of acts of terrorism and provides reference to tools and further reading on this matter.



### Activities

What measures are adopted in your legal system to protect the rights and interests of victims of crime, in particular victims of terrorist offences, during the investigation?

## 3.3 Overarching principles

A number of general human rights principles provide the framework within which the investigation of all suspected criminal offences, including terrorist offences, must be conducted. These principles include the presumption of innocence, equality before the courts and non-discrimination, and the principles of juvenile justice in case of suspects under the age of 18. The present section will explain these overarching principles and their application in the specific context of the investigation of terrorism.

### 3.3.1 The presumption of innocence

The presumption of innocence is fundamental to fair criminal proceedings. It must be respected not only during the trial but throughout the entirety of the investigation of a criminal offence. The presumption of innocence is enshrined, either expressly or implicitly in the major universal and regional human rights treaties as an aspect of the right to a fair trial. Article 14(2) of ICCPR provides that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”.

Addressing the presumption of innocence in General Comment No. 32, the Human Rights Committee states that the presumption of innocence

- Is fundamental to the protection of human rights
- Imposes on the prosecution the burden of proving the charge

- Guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt
- Ensures that the accused has the benefit of doubt
- Requires that persons accused of a criminal act must be treated in accordance with this principle

The Inter-American Commission on Human Rights warns that the presumption of innocence “can be considered violated where a person is held in connection with criminal charges for a prolonged period of time in preventative detention without proper justification, for the reason that such detention becomes a punitive rather than precautionary measure that is tantamount to anticipating a sentence”.<sup>25</sup>

*Adverse comment by public officials:* An important obligation deriving from the presumption of innocence is a restriction on adverse public comment by State officials in respect of a person suspected or charged with a terrorist offence.



### Case study. The *Krause* case<sup>a</sup>

In the *Krause* case, the European Commission on Human Rights addressed the situation of public officials making statements with regard to terrorist suspects under investigation.

Ms. Krause was detained on remand in Switzerland pending trial for terrorist offences. A terrorist commando composed of German and Palestinian terrorists had hijacked a plane. The commando demanded the release of various prisoners, including Ms. Krause, a woman connected to a German terrorist group.

The Swiss Federal Minister of Justice was asked on television how his Government intended to react. In a first interview, he stated that “Petra Krause cannot be considered a simple Palestinian freedom fighter. She has committed common law offences relating to the use of explosives. She will stand trial in autumn as a remand detainee. The fight against terrorism cannot be conducted by releasing terrorists.” In a second television interview he declared that Ms. Krause was linked to several explosives incidents, “she has to stand trial—I do not know the judgement. Terrorism cannot be fought by renouncing the rule of law”.

Ms. Krause complained to the European Commission on Human Rights that these statements violated the presumption of innocence. The Commission stressed that the presumption of innocence would be violated where a public official declared that a suspect is guilty of an offence before a court has established guilt. At the same time, authorities will not violate the presumption by informing the public about ongoing investigations, about arrests, about confessions made by suspects.

The Commission noted that the Swiss Federal Minister of Justice could have chosen his words more carefully. However, he had made clear that Ms. Krause still had to stand trial. In the second interview, he had specifically stated that he did not know what the outcome of the court proceedings would be. The Commission therefore concluded that the presumption of innocence had not been violated.

<sup>a</sup>ECtHR, *Krause v. Switzerland*, Merits, Application No. 7986/77, Judgement of 3 October 1978.

<sup>25</sup> Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, para. 223.

*Presumption of innocence and media coverage:* A difficult issue arises with regard to media coverage portraying a suspect or accused as guilty before the matter has been decided by a court. On the one hand, media campaigns prejudging the outcome of criminal proceedings may create a climate in which the objective, detached collection and examination of the evidence in favour and against a suspect's guilt becomes very difficult. This is particularly so where a case is to be tried before lay judges or a jury. On the other hand, media coverage of criminal justice, and particularly of an issue as important to the life of a nation as terrorism investigations and trials, is protected by the right to freedom of expression.

As highlighted by the *Krause* case, public officials must be very careful in speaking to the media regarding an ongoing terrorism case to avoid statements that could be seen as violating the presumption of innocence. To some extent, there is also a positive obligation on the authorities to ensure that, even in the absence of prejudicial statements from public officials, media coverage does not become as inflammatory as to prejudice the possibility of a fair trial taking place. Where a court is trying an accused in relation to whom there has been sustained highly damaging media coverage, the court must consider first whether it is possible to ensure a fair trial, notwithstanding such publicity. The authorities may consider measures including imposing appropriately tailored and proportionate reporting restrictions on the trial, ensuring that witnesses, lay judges or jurors have not seen, or been unduly influenced by, adverse media coverage and considering a change of venue for the trial. If, despite such measures, a fair trial is not possible it will be necessary, as a last resort, to stay proceedings.



Chapter 5 will deal with additional aspects of the presumption of innocence, in particular the question of the burden of proof at trial.



### Activities

- Are there guidelines in your criminal justice system regarding statements about ongoing investigations or trials by investigators, prosecutors or politicians? Do you recall cases in which such statements raised concerns from the point of view of the presumption of innocence?
- Do you see any problems from the perspective of the presumption of innocence concerning how media in your country report about ongoing terrorism investigations or trials? If so, what measures could be taken?

### 3.3.2 The principle of non-discrimination

The concept of non-discrimination is important in many aspects of counter-terrorism operations. The powers of criminal justice officials, such as search and seizure, surveillance or arrest, must be exercised in a non-discriminatory manner. Not every distinction in treatment will inevitably be discriminatory. Without objective justification, however, the differential treatment of different groups of people in the use of investigative powers is likely to be incompatible with the principle of non-discrimination.



### The adverse impact of discrimination in the use of law enforcement powers

The discriminatory use of law enforcement powers in counter-terrorism efforts, particularly where persons are considered “suspect” for the sole reason of belonging to certain ethnic or religious communities, not only violates human rights. It also risks having a severe negative impact on the prevention and investigation of terrorist offences. In a report on “profiling” practices<sup>a</sup>, the Special Rapporteur on human rights and counter-terrorism describes how terrorist-profiling practices which single out persons for enhanced law enforcement attention simply because of their belonging to a certain group take a profound emotional toll and stigmatize the entire group as a suspect community. He writes:

“This stigmatization may, in turn, result in a feeling of alienation among the targeted groups. The Special Rapporteur takes the view that the victimization and alienation of certain ethnic and religious groups may have significant negative implications for law enforcement efforts, as it involves a deep mistrust of the police ... The lack of trust between the police and communities may be especially disastrous in the counter-terrorism context. The gathering of intelligence is the key to success in largely preventive law enforcement operations. ... To be successful, counter-terrorism law enforcement policies would have to strengthen the trust between the police and communities.”<sup>b</sup>

Similarly, reflecting on the experience of several decades of counter-terrorism in Northern Ireland, the Northern Ireland Human Rights Commission writes that the discriminatory use of counter-terrorism powers by law enforcement agencies has a long-term negative impact on the effectiveness of crime prevention:

“The perception that the police force, which throughout the conflict had a significant under-representation of the Catholic community, and the armed forces, operated their emergency powers more frequently and aggressively in Catholic areas led to a persistent feeling of resentment towards law enforcement agencies. Overcoming this resentment and ensuring broader acceptance of the police service will take many years, and the impaired effectiveness of policing due to inadequate community support leaves those very communities vulnerable to crime and anti-social behaviour.”<sup>c</sup>

<sup>a</sup>Profiling has been defined as “the systematic association of sets of physical, behavioral or psychological characteristics with particular offences and their use as a basis for making law-enforcement decisions” (A/HRC/4/26, para. 33). On profiling in counter-terrorism investigations, see also the judgement of the Federal Constitutional Court of Germany summarized in section 3.7.3 below.

<sup>b</sup>A/HRC/4/26, para. 58.

<sup>c</sup>Northern Ireland Human Rights Commission, *Terrorism, Counter-terrorism and Human Rights: the experience of emergency powers in Northern Ireland*, Submission by the Northern Ireland Human Rights Commission to the International Commission of Jurists Eminent Jurists Panel, April 2006, para. 22.

Under article 2 of ICCPR, “[e]ach 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, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. Article 26 of ICCPR adds that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”. The prohibition of discrimination is also enshrined in all regional human rights treaties.

The prohibition of discrimination is so fundamental to human rights that, even in “time of public emergency which threatens the life of the nation”, measures taken to derogate from human rights may not be discriminatory (ICCPR article 4). In its *Statement on Racial Discrimination and Measures to Combat Terrorism*<sup>26</sup>, the United Nations Committee on the Elimination of All Forms of Racial Discrimination maintains the view that “the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted”.

Not every differentiation of treatment in law enforcement measures will constitute discrimination. If the criteria for a differentiation in treatment are reasonable and objective and if the aim is to achieve a purpose which is legitimate, there will be no discrimination.

A court or other authority considering whether a difference in treatment amounts to discrimination must ask a number of key questions:

- Does the measure give rise to differential treatment on a prohibited ground (such as those listed in article 2.2 of ICCPR)?
- If so, does the measure pursue a legitimate aim, such as the prevention of disorder and crime?
- Is there a reasonable and objective justification for the difference in treatment?
- Is the relationship between the aim and effects of the measure in question proportionate? Is the differential treatment necessary to achieve the aim pursued?

*Proportionality:* In answering the latter question, it is often helpful to consider whether the aim achieved through the difference in treatment could be achieved by means other than a measure which gives rise to a difference in treatment on a prohibited ground. In other words, asking whether the means employed are the least restrictive or whether the purpose could be achieved with a less significant (or no) difference in treatment. It is also helpful to consider whether safeguards are in place, such as independent scrutiny or review by courts, to protect the interests of those who may be differentially treated and to consider independently whether the justification is indeed reasonable and objective and proportionate.

*Burden of proof:* If there is a difference in treatment, the burden of proof shifts onto the State to show that the differential treatment has a reasonable and objective justification. Where the aim of differential treatment is vaguely identified by a public authority, it will be much harder for it to show that the differential treatment is reasonable and objectively justified and/or proportionate since there are likely to be many alternative means by which a vaguely identified aim could be pursued.



The prohibition of discrimination played a central role in the case of *A and others* discussed in chapter 1, section 1.6.5.

<sup>26</sup> Statement on Racial Discrimination and Measures to Combat Terrorism (A/57/18), 11 January 2002.



### The prohibition of discrimination in the universal counter-terrorism legal instruments

Most of the 18 universal counter-terrorism legal instruments enshrine the principle of non-discrimination in the context of extradition and mutual legal assistance. They provide that where a State receiving an extradition or mutual legal assistance request has “substantial grounds” to believe that this request is made for discriminatory reasons, it shall not be obliged to comply with the request. Article 14 of the 2010 Beijing Convention provides an example of such a provision:

“Nothing in this convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested State party has substantial grounds for believing that the request for extradition ... or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person’s position for any of these reasons.”

Other examples of non-discrimination clauses can be found, for example, in article 12 of the 1997 Convention for the Suppression of Terrorist Bombings and article 15 of the 1999 Convention for the Suppression of the Financing of Terrorism.



### Tools

- Committee on the Elimination of Racial Discrimination, General Recommendation 31 on the Prevention of Racial Discrimination in the Administration of the Criminal Justice is available here: [http://www2.ohchr.org/english/bodies/cerd/docs/GC31Rev\\_En.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/GC31Rev_En.pdf).
- The Statement on Racial Discrimination and Measures to Combat Terrorism by the Committee on the Elimination of All Forms of Racial Discrimination is available here: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/44f56d5419002875c1256c6b0059e53a?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/44f56d5419002875c1256c6b0059e53a?Opendocument).
- The Human Rights Committee deals with the prohibition of discrimination in its General Comment No. 18: <http://www1.umn.edu/humanrts/gencomm/hrcom18.htm>.
- The stopping and searching of persons is a law enforcement tool to prevent terrorism and apprehend those suspected of involvement in terrorist activities that frequently gives rise to claims of discrimination. The United Nations Counter-Terrorism Implementation Task Force (CTITF) has published a Basic Human Rights Reference Guide on *The Stopping and Searching of Persons*: [http://www.un.org/en/terrorism/pdfs/bhrrg\\_stopping\\_searching.pdf](http://www.un.org/en/terrorism/pdfs/bhrrg_stopping_searching.pdf). See particularly paragraphs 34 ff on “profiling” practices.
- The report of the Special Rapporteur on human rights and counter-terrorism examining the human rights implications of profiling practices (A/HRC/4/26, paras. 32-62) is available here: <http://unispal.un.org/UNISPAL.NSF/0/813E9AF0B820E2E58525730800513BEB>. This report also identifies good practices as alternatives to discriminatory profiling practices.
- For a general overview of the right to equality and non-discrimination in human rights law, see the OHCHR manual *Human Rights in the Administration of Justice*, chapter 13, available at: <http://www.ohchr.org/Documents/Publications/training9chapter13en.pdf>.





### Activities

- How is discrimination defined and prohibited in your legal system?
- Are there any laws, codes of practice or other instruments dealing with the prevention of discrimination in law enforcement?
- Do you have personal experience of “profiling” based on national, ethnic or religious characteristics in law enforcement?

### 3.3.3 The treatment of children suspected of terrorist offences

The recruitment and training of children by terrorist groups is a reality confronting many countries. International law establishes a very clear obligation to treat children and juveniles suspected of involvement in any criminal offence, including terrorist activities, differently from adult suspects and offenders because of their age-specific vulnerability. This obligation is set forth primarily in articles 37 and 40 of the Convention on the Rights of the Child (CRC), which is nearly universally ratified (as of 1 January 2014, 190 out of 193 United Nations Member States were parties to the CRC). The so-called “Beijing Rules” (United Nations Standard Minimum Rules for the Administration of Juvenile Justice, General Assembly resolution 40/33 of 29 November 1985) and “Havana Rules” (United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, resolution 45/113 of 14 December 1990), and General Comment No. 10 of the United Nations Committee on the Rights of the Child, which deals with children’s rights in juvenile justice, add very important soft law standards and guidance on juvenile justice.

Article 1 of CRC provides that, for the purposes of CRC, “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. CRC (article 40(3)) requires States to set a minimum age of criminal responsibility (MACR) below which children shall be presumed not to have the capacity to infringe the law. As explained by the Committee on the Rights of the Child,<sup>27</sup> this means that

- With regard to a child below the MACR committing an act that would constitute an offence, including an act of terrorism, “the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interest”.
- “Children at or above the MACR at the time of the commission of an offence ... but younger than 18 years ... can be formally charged and subject to penal law procedures. But these procedures ... must be in full compliance with the principles and provisions of CRC.” In other words, persons under 18 years of age but above the age of criminal responsibility, are entitled to the safeguards enshrined in CRC.
- CRC and the Beijing Rules do not establish an international standard for the MACR, but the Committee on the Rights of the Child considers that a MACR below the age of 12 years is not internationally acceptable and encourages States to continue to increase the MACR to a higher age level.

<sup>27</sup> CRC/C/GC/10, para. 31.



### Age assessment procedures

Particularly in States with low birth registration, the determination of the correct age of an alleged child offender may pose a challenge to the investigators, the prosecution and the court. There may be doubts whether the alleged child offender is over 18 years of age and can therefore be treated as an adult, or whether the alleged child offender has reached the minimum age of criminal responsibility.

When assessing the age of the child, the court must take into consideration all the information available. Medical and physical age assessment methods, such as bone x-rays, height, or signs of the onset of puberty, should be used only as a measure of last resort where there is reason to doubt the age of the child and where other approaches, such as interviews and attempts to gather documentary evidence, have failed to establish his or her age. A written record of the age assessment procedure must be kept, a copy of which must be made available to the alleged child offender.

The dignity of the child must be respected at all times. Therefore, the least invasive method of age assessment must be used in order to comply with international human rights standards. Any age-assessment procedure should be gender-appropriate, multidisciplinary and carried out by independent professionals with appropriate expertise in and familiarity with the child's ethnic and cultural background. Physical, developmental, psychological, environmental and cultural factors must also be considered. "It is important to recognize that the assessment of age is not an exact science. It is a process within which there will always be an inherent margin of error and a child's exact age cannot be established through medical or other physical examinations."<sup>a</sup>

Pending a conclusive determination of age by a judge or competent authority, law enforcement officers and prosecutors must treat the alleged terrorist as a child if he or she claims to or appears to be younger than 18. Where an age assessment fails to give certainty beyond reasonable doubt on the age of the alleged child offender, he or she must be regarded as a child. This means that in cases where there is doubt whether the alleged offender is a child or an adult—i.e., below or above the age of 18—he or she must be considered a child and fall within the scope of the juvenile justice law.

*Source:* this focus box is based primarily on article 11 of the UNODC Model Law on *Justice in Matters Involving Children in Conflict with the Law* and the commentary thereto.

<sup>a</sup>Smith, Terry and Brownlees, Laura, *United Nations Children's Fund discussion paper, Age assessment: a literature review & annotated bibliography*, UNICEF: New York 2011, p. 12.

Norms of international law affecting the treatment of children suspected of, charged with or convicted of involvement in terrorist offences are relevant at all stages of criminal proceedings. In dealing with access to legal counsel, compulsion to make self-incriminating statements, detention, trial, and punishment, this manual will highlight norms specific to the treatment of children. However, as with fair trial guarantees in general, it is essential that specific safeguards regarding children are respected from the start of an investigation into terrorist offences. The following paragraphs will therefore briefly summarize some core principles regarding the treatment of children suspected of involvement in terrorist offences.

The overarching principle is that every child (i.e. every person below the age of eighteen years) "alleged as, accused of, or recognized as having infringed the penal law [must] be treated in a manner consistent with the promotion of the child's sense of dignity and worth, ... which takes into account the child's age and the desirability of promoting the child's

reintegration and the child's assuming a constructive role in society" (article 40(1) of CRC). To that end, States parties to CRC commit to make use, "whenever appropriate and desirable, [of] measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected".

Where criminal proceedings are pursued against persons aged below 18, they are entitled to all the fair trial guarantees applicable to persons charged with a criminal offence. However, the implementation of these guarantees for children does have some specific aspects:

*Promptness:* The requirement of trial within reasonable time is particularly important in the case of children. The time between the commission of an offence and the final response to this act should be as short as possible. Time limits provided in criminal procedure law should be much shorter for children accused of an offence than for adults. (CRC General Comment No. 10, paras. 51–52).

*Legal and other assistance:* legal assistance from the first steps of criminal proceedings is particularly important in the case of children suspected of having committed an offence (see the *Salduz* case discussed in section 3.4.1. below). In addition to the assistance of a lawyer, parents or legal guardians should also be present at the proceedings because they can provide general psychological and emotional assistance to the child.

*Respect for privacy:* According to the Beijing Rules (8.2), "[i]n principle, no information that may lead to the identification of a juvenile offender shall be published". In the case of children alleged as, accused of, or recognized as having committed an offence (as well as those of children involved in judicial proceedings as victims or witnesses), the right to privacy of the child generally takes precedence over the principle of publicity of judicial proceedings.

*Training and specialization of criminal justice officials dealing with children:* "a key condition for a proper and effective implementation of these rights or guarantees is the quality of the persons involved in the administration of juvenile justice. The training of professionals, such as police officers, prosecutors, legal and other representatives of the child, judges, probation officers, social workers and others is crucial and should take place in a systematic and ongoing manner. These professionals should be well informed about the child's, and particularly about the adolescent's physical, psychological, mental and social development, as well as about the special needs of the most vulnerable children, such as children with disabilities, displaced children, street children, refugee and asylum-seeking children, and children belonging to racial, ethnic, religious, linguistic or other minorities" (CRC General Comment No. 10, para. 40, Beijing Rules 12 and 22).



## Tools

- Committee on the Rights of the Child, General Comment No. 10 on Children's rights in juvenile justice is available here: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f10&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f10&Lang=en).
- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, are available here: [http://www.unodc.org/pdf/criminal\\_justice/UN\\_Standard\\_Minimum\\_Rules\\_for\\_the\\_Admin\\_of\\_Juvenile\\_Justice\\_Beijing\\_Rules.pdf](http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Admin_of_Juvenile_Justice_Beijing_Rules.pdf).

- The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (“the Havana Rules”), A/RES/45/113, are available here: [http://www.unodc.org/pdf/compendium/compendium\\_2006\\_part\\_01\\_02.pdf](http://www.unodc.org/pdf/compendium/compendium_2006_part_01_02.pdf).
- UNODC has developed a model law on *Justice in Matters Involving Children in Conflict with the Law*. The Model Law and related commentary are available here: [http://www.unodc.org/documents/justice-and-prison-reform/Justice\\_Matters\\_Involving-Web\\_version.pdf](http://www.unodc.org/documents/justice-and-prison-reform/Justice_Matters_Involving-Web_version.pdf).
- In addition to the rights of children suspected of terrorist offences, criminal justice officials need to be aware of international law and best practices regarding the treatment of children who are victims or witnesses of acts of terrorism. UNODC has developed a *Handbook for Professionals and Policymakers on Justice in matters involving child victims and witnesses of crime*: [http://www.unodc.org/documents/justice-and-prison-reform/hb\\_justice\\_in\\_matters\\_professionals.pdf](http://www.unodc.org/documents/justice-and-prison-reform/hb_justice_in_matters_professionals.pdf) and a Model Law. *Justice in Matters Involving Child Victims and Witnesses of Crime: Model Law and Related Commentary* is available here: [http://www.unodc.org/documents/justice-and-prison-reform/Justice\\_in\\_matters...pdf](http://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf).
- Accusations against children of involvement with terrorist groups and their activities will often arise in the context of situations of armed conflict. The Office of the Special Representative of the Secretary-General for Children and Armed Conflict has published a Working Paper on *Children and Justice During and in the Aftermath of Armed Conflict*, which is available here: [http://childrenandarmedconflict.un.org/publications/WorkingPaper-3\\_Children-and-Justice.pdf](http://childrenandarmedconflict.un.org/publications/WorkingPaper-3_Children-and-Justice.pdf). In the context of armed conflicts, it is important to be aware that children suspected of involvement with terrorist groups may themselves be victims of the war crime of recruitment as a child soldier. Documents on this issue can be accessed through the web site of the Office of the Special Representative of the Secretary-General for Children and Armed Conflict: <http://childrenandarmedconflict.un.org/effects-of-conflict/six-grave-violations/child-soldiers/>.
- The United Nations Children’s Fund (UNICEF) has published *Age Assessment: A Technical Note*: [http://www.unicef.org/protection/files/Age\\_Assessment\\_Note\\_final\\_version\\_\(English\).pdf](http://www.unicef.org/protection/files/Age_Assessment_Note_final_version_(English).pdf).



### Activities

- Identify and compile the references to the treatment of children suspected or convicted of terrorist offences in other parts of this module.
- Have there been cases of persons aged below 18 suspected of involvement in terrorist offences in your jurisdiction? Were they dealt with in the ordinary (adult) criminal justice system or in the juvenile justice system?
- What special rules, if any, govern the treatment of persons aged below 18 charged with serious offences, including offences related to terrorism, in your jurisdiction? Compare the practice of your jurisdiction in this regard with the norms and standards set forth in this section and other parts of the module regarding children suspected or convicted of terrorist offences.
- In your experience, are special arrangements made and precautions taken for the questioning of child victims or witnesses in your jurisdiction?

## 3.4 The principle of equality of arms

There are a number of procedural guarantees designed to ensure that a suspect, and later an accused, has a fair opportunity to prepare his or her defence and to ensure that the

defence can be presented properly at trial. A fundamental principle guiding the pretrial (and trial) stage of criminal proceedings is that of equality of arms. This principle requires that an accused person be placed in a position to defend himself on an equal footing to that of the prosecution. It implies a number of further specific rights which seek to ensure that equality of arms between prosecution and defence is established in practice.



### Essential elements of equality of arms

In particular equality of arms necessitates the following protections in the course of pretrial proceedings:

- An accused person must be adequately informed of the charge(s) he or she faces in a language he or she understands.
- An accused person must, if desired, be able to obtain practical and effective legal assistance, if necessary free of charge.
- An accused person and his or her lawyer must be able to communicate freely and in confidence.
- An accused person must be afforded adequate time and facilities in the preparation of the defence.

#### 3.4.1 Right of access to legal counsel of one's own choosing

The right of access to legal counsel is protected by all major universal and regional human rights treaties: article 14(3)(d) of ICCPR, article 7(1)(c) of the African Charter of Human and People's Rights, article 6(3)(c) of the European Convention on Human Rights and article 8(2)(d) of the American Convention on Human Rights. Article 14(3)(d) of ICCPR dictates that every person charged with an offence is entitled to:

- Defend himself in person or through legal assistance of his own choosing.
- To be informed, if he does not have legal assistance, of this 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.

The right of access to legal counsel is often triggered by the arrest of a terrorism suspect. It applies, however, also where a terrorism suspect is not apprehended or released from detention while awaiting trial. Moreover, it is an essential guarantee for equality of arms and the right to a fair trial. It is in this last context that the right is enshrined in the international human rights treaties.

Individuals suspected or accused of terrorism related offences have the right to:

- Consult with a lawyer from the very first moment they are deprived of liberty.
- Have a lawyer present during any interviews.
- Be assisted by a lawyer in the preparation of their defence and at trial, as well as in any appeals proceedings.

- Be provided with a lawyer free of charge if they do not have the means to retain a lawyer.

In addition to serving their clients' interest, lawyers also serve in the public interest as a "watchdog of procedural regularity".<sup>28</sup> Full respect for the role of lawyers is among the most effective safeguards against human rights violations in criminal proceedings. "The right of access to a lawyer as from the outset of custody is a fundamental safeguard against ill-treatment. The possibility for persons to have rapid access to a lawyer will have a dissuasive effect upon those minded to ill-treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs."<sup>29</sup>

In terrorism cases it is particularly important to keep in mind that, in the words of the United Nations Basic Principles on the Role of Lawyers, "[l]awyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".<sup>30</sup> Governments are under the obligation to ensure that, also in very sensitive cases (such as many terrorism cases), lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and that lawyers do not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.<sup>31</sup>

In the following, four aspects of the right to legal assistance are examined in more detail:

- Prompt access to a lawyer
- Right to a lawyer of one's own choosing
- Confidential communications with the lawyer
- Legal assistance free of charge

### *Prompt access to a lawyer*

The first important requirement is that an arrested person must be afforded access to legal assistance promptly upon his arrest. An arrested person must therefore be informed of his right to legal assistance of his own choosing immediately upon arrest. The United Nations Basic Principles on the Role of Lawyers state that "[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them at all stages of criminal proceedings". The Principles also state that States "shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence".<sup>32</sup> This principle applies also in terrorism cases.

<sup>28</sup> ECtHR, *Ensslin, Baader and Raspe v. Germany*, Merits, Application No. 7572/76, 7586/76 and 7587/76, Judgement of 8 July 1978, p. 114.

<sup>29</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report to the Spanish Government on the visit to Spain carried out by the Committee from 19 September to 1 October 2007, para. 28.

<sup>30</sup> United Nations Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990, p. 18.

<sup>31</sup> United Nations Basic Principles on the Role of Lawyers, p. 16.

<sup>32</sup> See United Nations Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990, pp. 1 and 5.



### Case study. The *Salduz* case<sup>a</sup>

Mr. Salduz, who was aged 17 at the time of the facts, was arrested by anti-terrorism police on suspicion of having participated in an unlawful demonstration in support of the PKK, which is proscribed as a terrorist organization in Turkey and several other countries. He was interrogated at the anti-terrorism branch police station and admitted to having had a lead role in the organization of a demonstration in favour of the imprisoned PKK and its leader. Before and after the police interrogation he was visited by a doctor, who stated that there were no traces of ill-treatment on his body. Moreover, before the police interrogation, he signed a form in which he acknowledged that he had been informed of his right to remain silent. On the following day, Mr. Salduz repeated his confession first before a public prosecutor and then before an investigating judge. At the time, under Turkish law in terrorism cases the police interrogation and the initial appearances before the prosecutor and the judge all took place without the assistance of a lawyer.

Mr. Salduz was charged under the counter-terrorism law with aiding and abetting the PKK. The trial before the State Security Court started approximately three months after his arrest. He was assisted by defence counsel. Mr. Salduz retracted the statements made previously and denied that he had been involved in the demonstration. Also his co-accused who had described him as one of the organizers of the demonstration all retracted their statements previously made. The court, however, found Mr. Salduz and some of his co-accused guilty on the basis of the statements made to the police, the public prosecutor and the investigating judge, and sentenced him to four-and-a-half years' imprisonment. The judgement was upheld on appeal and by the Supreme Court.

Mr. Salduz filed an application to ECtHR complaining of a violation of his right to a fair trial. In its judgement [art. 54], ECtHR underlined the importance of the investigation stage for the preparation of the criminal proceedings and the vulnerability of an accused at this stage. It recalled that the right to a fair trial normally requires that the accused be allowed assistance of a lawyer already at the initial stages of police interrogation [art. 52]. However, this right was considered capable of being subject to restriction for good cause.

In applying these principles to the case of Mr. Salduz, ECtHR considered that apart from his and his co-defendants' statements (all given without the assistance of a lawyer), the evidence against Mr. Salduz was rather weak. ECtHR found [art. 58] that Mr. Salduz "was undoubtedly affected by the restrictions on his access to a lawyer in that his statement to the police was used for his conviction. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody." ECtHR also highlighted Mr. Salduz' young age (17) as a specific element of the case. It concluded that the trial had been unfair: "In sum,..., the absence of a lawyer while he was in police custody irretrievably affected his defence rights." [art. 62].

In the *Salduz* case, ECtHR stressed the importance of the right to prompt access to legal counsel specifically in the light of Mr. Salduz' young age. In a subsequent case concerning an adult man accused of being a member of a terrorist group, however, ECtHR clarified that the right to be assisted by a lawyer as soon as a person is taken into custody applies in all cases. ECtHR said:

*"In accordance with the generally recognized international norms ... an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned ... Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organization of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention."*<sup>b</sup> (emphasis added).

<sup>a</sup>ECtHR, *Salduz v. Turkey*, Application No. 36391/02, Judgement of 27 November 2008.

<sup>b</sup>ECtHR, *Dayanan v. Turkey*, Application No. 7377/03, Judgement of 13 October 2009, para. 32.

Some legal systems limit the right to prompt access to a lawyer in one way or the other: for example, the lawyer may only be present at the first formal interrogation of a detained suspect, but not at prior informal interviews with the police; or the lawyer can be present but not intervene in interviews in police custody; or the detained suspect can only consult in private with the lawyer after the first interview, and not before. International human rights bodies have, however, insisted that:

“The right to the presence of a lawyer when making a statement to the police is an important safeguard. However, the core of the notion of access to legal assistance for persons in police custody is the possibility for a detainee to consult in private with a lawyer, and in particular during the period immediately following his loss of liberty.

A right of access to legal assistance loses much of its effectiveness if it consists only of the presence of a lawyer when a statement is made and recorded, together with the possibility of a private consultation between the detainee and his lawyer after the completion of those proceedings. It provides little protection against the possible intimidation or physical ill-treatment of the detainee during the period prior to the interview at which his statement is given.”<sup>33</sup>

### *Right to a lawyer of one's choice*

A further important aspect is the right of every person charged with a crime “to defend himself in person or through *legal assistance of his own choosing*” (ICCPR, article 14(3)(d), emphasis added).



#### **Case study. The Law Office of Ghazi Suleiman case<sup>a</sup>**

Three men were arrested on accusations of involvement in terrorist activities and endangering the peace and security of Sudan. They were refused contact with their lawyers and families. The lawyers chosen by their families, Ghazi Suleiman and others, requested in vain from the competent authorities, including the Supreme Court, authorization to visit their clients and, subsequently, to represent them at trial. The military court which tried the three men assigned other defence counsel to them.

In its decision on the complaint brought by the Law Office of Ghazi Suleiman, the African Commission held (art. 59) that “the right to choose freely one's counsel is fundamental for the guarantee of a fair trial. To recognize that the court has the right of veto on the choice of a counsel of one's choice amounts to an unacceptable violation of this right.” The African Commission concluded (art. 60) that refusing the victims the right to be represented by the lawyer of their choice amounted to a violation of article 7(1)(c) of ACHPR (“Every individual shall have the right to have his cause heard. This comprises: ... the right to defense, including the right to be defended by counsel of his choice”).

<sup>a</sup>ACHPR, *Law Office of Ghazi Suleiman v. Sudan*, Communication Nos. 222/98 and 229/99, 29 May 2003.

Some governments argue that in terrorism and organized crime cases it is necessary, in the interests of the police investigation, to delay an arrested person's access to a lawyer of his own choice. This may be acceptable from an international human rights law perspective, provided the following safeguards are fulfilled:

<sup>33</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report to the Spanish Government on the visit to Spain carried out by the Committee from 1 to 12 April 1991, para. 50.



- The limitation of the right to consult with a lawyer of one's own choice is not automatic, but ordered by a judge on grounds relating to the specific circumstances of the arrested suspect and the terrorist group he is alleged to belong to.
- A government-appointed lawyer is promptly assigned and made available to the detained suspect (within a few hours of arrest).
- The other aspects of the right to prompt access to a lawyer (particularly the right to consult in private with the lawyer before any interview by the police), as set forth above, are fully respected.
- Access to a lawyer of the accused person's choosing is not delayed for more than the time reasonably necessary to achieve the objectives of this measure, for example, to protect the investigation.

### *Confidential communication with lawyer*

An important element of the right of access to a lawyer is that a suspect is able to communicate with the lawyer in confidence. Article 8(2)(d) of the American Convention on Human Rights expressly provides for the right of every person accused of a criminal offence to "communicate freely and privately with his counsel". While this is not spelled out in ICCPR, the Human Rights Committee makes clear that "[c]ounsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications" (General Comment 32, paragraph 34). This has been reiterated within the African system. In its Resolution on the Right to Recourse and Fair Trial, the African Commission on Human and Peoples' Rights stated that, as part of the right to a fair trial, individuals are entitled to "communicate in confidence with counsel of their choice". ECtHR has stated that "an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society ... . 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".<sup>34</sup>

In the case of persons suspected or accused of terrorism offences, some governments argue that there is a significant risk that lawyers may collude with detainees to convey messages to other members of the terrorist group, to intimidate witnesses, or for other purposes that create a risk to the integrity of the criminal justice process or to national security. They therefore see a need to exercise surveillance or censorship over communications between a detained terrorism suspect and his or her defence counsel. The Council of Europe Guidelines on Human Rights and the Fight Against Terrorism (Guideline XI) acknowledge that "[t]he imperatives of the fight against terrorism may ... require that a person deprived of his/her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners, in particular with regard to (i) the regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client".

Visual observation of contact between the suspect or accused and the lawyer is permissible. The consultation between the suspect and his lawyer must, however, be out of hearing of other persons, and also written communications between client and lawyer must be protected by confidentiality. Exceptionally, for compelling reasons, on the basis of precisely worded provisions and with robust safeguards, it may be permissible to restrict the confidentiality of these communications. The following case illustrates good practice in this regard.

<sup>34</sup> ECtHR, *S. v. Switzerland*, Application No. 12629/87, Judgement of 28 November 1991, para. 48.



### Restrictions on confidentiality of communication between a terrorism suspect and his lawyer

In the *Erdem* case,<sup>a</sup> ECtHR was called to examine a provision of the German code of criminal procedure which makes an exception to the general rule that communications between a prisoner detained on remand and his counsel are confidential. Article 148(2) of the code of criminal procedure provides that if the accused is in custody and the investigation concerns the offence of membership in a terrorist organization, written documents can be exchanged between the detainee and his lawyer only if the sender agrees to the correspondence first being monitored by a judge.

ECtHR recalled the general principle in its case law that

“the privilege that attaches to correspondence between a prisoner and their lawyers constitutes a fundamental right of the individual and directly affects the rights of defence”(paragraph 65), and that

“reading of a prisoner’s mail to and from a lawyer ... should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature” (paragraph 61).

ECtHR then found that the German provision did not violate Mr. Erdem’s rights because the following very stringent safeguards were prescribed by law:

- The provision is very precisely tailored to cover only prisoners suspected of belonging to a terrorist organization, as defined in the German criminal code.
- The correspondence is opened by a judge (and not the prison authorities, an investigator or a prosecutor). The law dictates that the judge must not be connected to the investigation in any way and is under an obligation to keep the information obtained confidential. The law thereby ensures that any information from the correspondence between terrorism suspect and his lawyer is not disclosed to the investigators, prosecutors and judges working on the case.

The law does not affect the confidential oral communications between the prisoner and his lawyer.

<sup>a</sup>ECtHR, *Erdem v. Germany*, Application No. 38321/97, Judgement of 5 July 2001.

### *Right to legal assistance free of charge*

Those suspected of having committed criminal offences may not be able to afford a lawyer. This is all the more likely in the case of potentially complex and lengthy criminal proceedings, which are frequent where charges connected with terrorism are brought. In order to ensure that the right of access to legal assistance is practical and effective and not merely illusory, it will often be necessary for individuals to be provided with legal aid to obtain assistance from a competent and experienced lawyer. This is required by article 14(3)(d) of ICCPR and further clarified in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.



## United Nations principles and guidelines on access to legal aid in criminal justice systems<sup>a</sup>

### Key principles

- States should ensure that anyone who is arrested, detained, suspected of or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process.
- Legal aid should also be provided, regardless of the person's means, if the interests of justice so require, for example, given the urgency or complexity of the case or the severity of the potential penalty. Considering the gravity of the charges, in terrorism cases the interests of justice will as a rule require that legal aid is provided.
- Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, information about charges, access to case files and adequate time and facilities to prepare their defence.

States should ensure that, prior to any questioning and at the time of deprivation of liberty, persons are informed of their right to legal aid and other procedural safeguards as well as of the potential consequences of voluntarily waiving those rights.

<sup>a</sup>General Assembly Resolution 67/187 (2012).



## Assistance for juveniles upon arrest

Like adults, children suspected of terrorist offences have a right to have the right to be represented by a lawyer (see the *Salduz* case discussed above).

In addition to the assistance of a lawyer, “[p]arents or legal guardians should also be present at the proceedings because they can provide general psychological and emotional assistance to the child. ... However, the judge or competent authority may decide, at the request of the child or of his/her legal or other appropriate assistance or because it is not in the best interests of the child (art. 3 of CRC), to limit, restrict or exclude the presence of the parents from the proceedings” (CRC General Comment No. 10, paras. 53–54). Upon the apprehension of a child, his or her parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter. (Beijing Rules, Rule 10.1).



## Tools

- The Basic Principles on the Role of Lawyers are available at: <http://www.refworld.org/docid/3ddb9f034.html>. Information concerning the activities of the United Nations Special Rapporteur on the Independence of Judges and Lawyers is available at: <http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx>.
- The Body of Principles for the Protection of Persons under Any Form of Detention, adopted by the United Nations General Assembly in 1988, is available here: <http://www.un.org/documents/ga/res/43/a43r173.htm>.

- The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems are available at: [http://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf).
- An overview of ECtHR's jurisprudence on the right to assistance from a lawyer is available in *European Court of Human Rights Factsheet: Police/Legal Assistance* available at: [http://www.echr.coe.int/Documents/FS\\_Police\\_arrest\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Police_arrest_ENG.pdf) <http://www.echr.coe.int/ECHR/EN/Header/Press/Information+sheets/Factsheets/>.
- The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and People's Rights in Resolution 41 (1999) are available here: <http://www.achpr.org/instruments/fair-trial/>.



### Practical guidance

It is a fundamental principle of human rights law that rights must be practical and effective, and not merely exist on paper and remain illusory. This principle is highly relevant to the right to defend oneself with the assistance of a lawyer. Some practical obstacles that risk making the effective exercise of the right to a lawyer, and therefore equality of arms, illusory are:

- An accused person is detained at a remote location for most of his pretrial detention period, making meetings with legal counsel and effective preparation of the defence case difficult;
- The legal aid system is insufficiently funded to function effectively to ensure adequate legal assistance in a legally and factually complex case;
- Language barriers prevent the accused person from communicating effectively with the lawyer, and no means are available to ensure free assistance of an interpreter.



### Activities

- What are the rules regarding to legal assistance by a person taken into custody on suspicion of involvement in terrorist offences within your own legal system?
- Do you have experience of problems that have arisen as a result of a failure to provide prompt access to a lawyer? If so, how could the legal system be reformed to address these problems? What changes—practical, procedural or to the law itself—would help?
- Does your legal system provide effective access to a lawyer to persons accused of terrorist offences who do not have the means to retain legal counsel? Is a lawyer provided from the moment of arrest to appeals proceedings following conviction? How is the quality of legal assistance provided by legal aid lawyers ensured? Consider both the legal standards and practical aspects in discussing these questions.

### 3.4.2 Right to be informed of the nature and cause of the charge(s)

The right to be informed of the charge one is facing is absolutely crucial for fair pretrial and trial procedure. It is a requirement imposed, expressly or implicitly, by all the major universal and regional human rights mechanisms providing for the right to a fair trial. Article 14(3)(a) of ICCPR provides that in the determination of any criminal charge against him,

everyone shall be entitled “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”.

*The nature and extent of the obligation:* The purpose of the obligation to inform accused persons promptly as to the nature and cause of the charge laid against them is to ensure that they have the information they need to prepare and put forward their defence. The obligation—and the nature and extent of the information with which the accused must be provided—must be understood in light of this purpose.



The obligation to inform the accused of the charges they face applies to any instance in which criminal charges are brought, and not merely to those persons who are detained. There is a separate right (as part of the right to liberty) to be informed of reasons for the arrest and of the charges brought which is triggered as soon as someone is deprived of liberty. That right is discussed in chapter 4 dealing with detention.

*Promptly:* The requirement of promptness is addressed in the Human Rights Committee’s General Comment No. 32 (paragraph 31) which states: the right to be informed of the charge “promptly” requires that “information be given as soon as the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such”.

*Cause of the accusation:* The cause of the accusation consists of the acts the accused is alleged to have committed and on which the accusation is based. ECtHR has stated that the accused must be told of “the material facts that form the basis of the accusation against him” and that he “must at any rate be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence”.<sup>35</sup>

*Nature of the charge:* The “nature” of the charge is the offence on which the charge is based. “[I]n criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.”<sup>36</sup> The nature of the charges may change as the criminal process develops, perhaps in light of new evidence or in light of the information provided by the accused. For instance, a person may initially be charge with having committed a terrorist act, but in the course of the investigation it may become clear that charges of aiding and abetting more aptly describe his conduct. Any such re-characterization of the facts must be notified to the accused in good time so that, with the assistance of defence counsel, he can prepare a defence case that will respond to the charges actually brought. The later in the criminal process or trial at which a charge is sought to be amended, the more likely it is that the ability of the accused fairly to conduct his defence will be compromised.

*In a language which the accused understands:* Language barriers must, if necessary, be overcome, by means of an interpreter to ensure that the accused understands the information he or she has been given. Article 14(3)(f) enshrines the right of every accused person to “have the free assistance of an interpreter if he cannot understand or speak the language used in court”.

<sup>35</sup> ECtHR, *Mattoccia v. Italy*, Merits, Application No. 23969/94, Judgement of 25 July 2000.

<sup>36</sup> ECtHR, *Pélissier and Sassi v. France*, Application No. 25444/94, Judgement of 25 March 1999, para. 52.



### Activities

What are the rules regarding a suspect's right to be informed of the charges against him or her in your legal system? Compare them to the international norms outlined above. Are these rules fully applied in practice in terrorism cases? What are, in your legal system, the consequences of a failure to inform a suspect of the charges against him or her?

### 3.4.3 Right to adequate time and facilities in the preparation of a defence

A further key human rights guarantee during the investigation of crime is the right to adequate time and facilities in the preparation of a defence. This is indispensable to the overall right to a fair trial, which would prove illusory in the event that a defendant is not granted sufficient time and facilities to prepare. It is an essential aspect of the requirement of equality of arms between prosecution and defence.

This right is guaranteed in the major universal and regional human rights treaties dealing with the right to a fair hearing. Article 14(3)(b) of the International Covenant on Civil and Political Rights provides that in the determination of any criminal charge, each accused shall be entitled “to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”. It is also guaranteed in the regional human rights treaties.

*Adequate time:* What counts as “adequate time” depends on the circumstances of each case. If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial. There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed. Generally, the adequacy of time depends on factors including:

- The complexity of the case, including the volume of evidence and other material to be considered
- Logistical constraints, such as the need to locate defence witnesses
- The workload of the accused's lawyer
- Whether there has been a change of lawyer, resulting in the need for the new lawyer to familiarize himself with the case

*Adequate facilities:* “Adequate facilities” must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary or going to the credibility of prosecution witnesses). There are a number of factors common to many counter-terrorism cases which tend to create difficulties with regard to respecting the requirement of “adequate facilities” for the preparation of the defence:

- The volume of evidence and other material to be considered.
- Terrorism cases often involve expert forensic or other scientific evidence. In such cases, the defence must be placed in a position to scrutinize the results of forensic evidence,

including through the provision of funding to instruct their own experts or to have evidence assessed using appropriate forensic procedures.

- Terrorism cases often involve information (e.g., coming from intelligence sources) the disclosure of which may, according to the prosecution, affect the security interests of a State and that therefore cannot be disclosed to the accused, or not in its entirety, or only without indicating the source of the information.
- Additionally, the practical obstacles to effective assistance by defence counsel can undermine the right to adequate facilities for the preparation of the defence.



The challenges typical of terrorism cases are again examined from the perspective of the trial stage in chapter 5, particularly sections 5.7.3 to 5.7.5.

### 3.5 Treatment of suspects during an investigation

In the aftermath of a terrorist attack the authorities, particularly the police and other investigating agencies, often are under enormous pressure—from the public and from political leaders—to identify those responsible and bring them to justice without delay. The plot will often have been carried out by a highly sophisticated and secretive organization, making the identification and arrest of those responsible particularly challenging. Quickly identifying those responsible and gathering evidence against them can be exceedingly difficult.

Under these circumstances, the use of coercion against suspects or persons suspected of being otherwise in possession of valuable information might appear the most effective way to ensure quick success to the investigation. It is, however, of crucial importance that human rights guarantees, including the prohibition on torture or ill-treatment, are adhered to in the course of a criminal investigation, including in terrorism cases. Not only are torture and other ill-treatment in violation of a universally established rule of law. Such conduct can also fundamentally undermine the investigation since, as will be seen, evidence obtained by torture must not be relied upon during a criminal trial and may render trial proceedings as a whole unfair, resulting in a conviction being overturned.



#### Case study. *The Birmingham Six case*<sup>a</sup>

In 1974 bombs placed in two pubs in Birmingham, England, caused 21 deaths and injured more than one hundred persons. Six men suspected by the police of being supporters of the terrorist organization Irish Republican Army (IRA) were arrested the same evening as they were about to board a ferry that would have taken them to Northern Ireland. In police custody some of the men made statements amounting to confessions. At trial, they retracted these statements, claiming that while in detention they had been subjected to various forms of coercion, including beatings, sleep and food deprivation, threats of being shot and threats to harm their families if they did not make a confession. Evidence of their confessions was admitted at trial. The jury found the six men guilty relying on the expert forensic evidence provided by the prosecution witness (controverted by the defence expert witness) and the evidence of police interviews which included the confessions provided by the defendants. Appeals courts upheld the convictions.

In the following years, investigative reporters and lawyers convinced of the Birmingham Six's innocence brought to light evidence suggesting police fabrication and suppression of evidence which cast significant doubts on the police's version of how the interviews and confessions occurred. Also the forensic evidence relied on at trial was shown to have been significantly inaccurate.

In 1990, the Birmingham Six applied to have their cases reopened and the convictions overturned. The prosecution did not oppose this application. The appellate court hearing the case found that the evidence regarding the confessions to the police interviews and the forensic evidence were both so unreliable that the convictions were unsafe and unsatisfactory. The six men were released and each awarded compensation in the range of £840,000 to £1.2 million. As of today, the real perpetrators of this terrorist act, one of the worse to take place in the United Kingdom, have not been identified.

<sup>a</sup>*R. v. McKenny and others*, 93 Cr. App. R. 287, Judgement of 27 March 1991.

### 3.5.1 Prohibition of torture, inhuman and degrading treatment

All of the major international and regional human rights systems enshrine the prohibition on torture, inhuman and degrading treatment. This prohibition is absolute and may not be derogated from in any circumstances. This is made clear in article 2(2) of the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which is, in turn, reflective of customary international law. It states:

“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

The Code of Conduct for Law Enforcement Officials adopted by United Nations General Assembly<sup>37</sup> in Resolution 34/169 (1979) equally states that “[n]o law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”

For its part, the Committee Against Torture has also stated that, just as the prohibition against torture, the prohibition on inhuman and degrading treatment “must be observed in all circumstances”. ECtHR has equally held that not only torture, but also inhuman or degrading treatment are prohibited in absolute terms, and that no derogation from this prohibition is possible even in the event of a public emergency threatening the life of the nation.<sup>38</sup>

In the context of armed conflict, torture of a prisoner of war or of a civilian in times of war constitutes a grave breach of Geneva Conventions III<sup>39</sup> and IV<sup>40</sup> and a war crime. Also in situations of non-international armed conflict, torture and “outrages upon personal dignity, in particular humiliating and degrading treatment”, are prohibited at all times according to common article 3 of the Geneva Conventions of 1949.

<sup>37</sup> General Assembly in Resolution 34/169 of 17 December 1979, para. 5.

<sup>38</sup> ECtHR, *Selmouni v. France*, Application No. 25803/94, Judgement of 28 July 1999, para. 95.

<sup>39</sup> Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, art. 129–130.

<sup>40</sup> Convention (III) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, art. 147.





### Key obligations in respect of torture, inhuman and degrading treatment or punishment

All states are under obligations to (a) prevent torture, inhuman and degrading treatment; (b) investigate allegations of torture, inhuman and degrading treatment (c) prosecute or extradite persons suspected of such conduct; (d) ensure that a victim of an act of torture, inhuman or degrading treatment obtains redress. These obligations are explicitly enshrined in the United Nations Convention against Torture (CAT), but—according to the case law of the international human rights courts and bodies—they equally arise under the other major international human rights treaties. Other very important obligations also exist, notably the obligation of non-refoulement further examined in chapter VII.

*Prevention:* Article 2(1) of CAT states that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”. This obligation requires a range of measures including the training of public officials (including law enforcement and prison officers, judges and prosecutors), safeguards with regard to places of detention (such as providing prompt access to a lawyer and to medical professionals, as well as keeping records of places of detention in accordance with international standards, see chapter 4, section 4.4 below), the criminalization of torture and the prompt investigation of allegations of torture or inhuman and degrading treatment. It also requires appropriate punishment for those found to have been involved in ill-treatment.

*Criminalization:* All States are required to ensure that all acts of torture and of complicity or participation in torture are offences under their criminal law (article 4, CAT).

*Obligation to investigate:* Article 12 of CAT provides that “[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction”. Article 13 adds: “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.”

*Prosecution (or extradition):* There is a clear obligation under international law to prosecute those responsible for torture. This obligation is inherent in all of the major international human rights treaties and is given clear expression in article 7 of CAT. Where a person alleged to have committed or been complicit in torture is found in the territory of a State, that State is obliged to either initiate an investigation with a view to prosecution, or to extradite the suspect to a requesting State.

*Reparations:* Victims of torture must also be assured an effective remedy, including compensation. Article 14(1) of CAT states that “[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation”.



The prevention of torture and inhuman or degrading treatment is very closely related to human rights norms and standards regarding persons deprived of their liberty, such as those relating to access to lawyers and to medical care, notification of family members, and maintaining records in places of detention. These are discussed primarily in chapter 4, particularly sections 4.4.3 to 4.4.8 and 4.7 (and, as far as access to legal counsel is concerned, in section 3.4.1 above).

Elements of torture: Article 1(1) of the Convention Against Torture defines torture as

- 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.

As the Convention Against Torture is very widely ratified, with 153 States parties, the definition of torture contained in article 1 has been widely accepted as reflective of customary international law. The second paragraph of article 1, however, stresses that the definition is for the purposes of the Convention and does not prejudice broader concepts of torture in domestic law or under other international instruments. Developments in international law since the Convention Against Torture was adopted suggest that torture can be committed also without the instigation, consent or acquiescence of a public official or other person acting in an official capacity, e.g. for instance by perpetrators affiliated with a rebel militia or a private security company. The Statute of the International Criminal Court (articles 7 and 8) and the Elements of Crimes adopted by the Assembly of States Parties to assist the Court in the interpretation and application of the Statute (Elements of Crimes articles 7(1)(f), 8(2)(a)(ii)-1 and 8(2)(c)(i)-4)), e.g., do not mention the perpetrator's acting in an official capacity as an element of torture.



### Impermissible interrogation techniques

Certain techniques that have been used against terrorism suspects to extract information or to humiliate them might not, in isolation, appear to cause the "severe pain or suffering" which is an element of torture under the definition in article 1 of the Convention Against Torture and under the ICC Statute and Elements of Crime. They include:

- (a) Wall-standing: forcing suspects to remain for periods of several hours in stress positions prior to interview;
- (b) Hooding: disorienting a suspect by placing a bag over their head;
- (c) Noise: subjecting a suspect prior to interrogation to loud or disorienting noise, including "white noise" of scrambled sound;
- (d) Sleep deprivation;
- (e) Deprivation of food and drink;
- (f) Using detainees' individual phobias (such as fear of dogs) to induce stress;
- (g) Deprivation of light and auditory stimuli;
- (h) Isolating the detainee from other detainees for prolonged periods of time (see section 4.7.2 below on solitary confinement) while still complying with basic standards of treatment.

These and similar techniques have, however, all been found to amount to inhuman and degrading treatment, if not to torture, particularly when used cumulatively.<sup>a</sup> They are therefore absolutely prohibited under international law.

<sup>a</sup>See Report on the situation of detainees at Guantánamo Bay by five holders of human rights Special Procedures mandates (E/CN.4/2006/120), paras. 49-53; ECtHR, *Ireland v. the United Kingdom*, Application No. 5310/71, Judgement of 18 January 1978; CAT, *Conclusions and Recommendations of the Committee Against Torture CAT/C/USA/CO/2*, 25 July 2006, para. 24. With regard to the first five techniques listed above, for example, the Committee against Torture (*Concluding observations of the Committee Against Torture: Israel*, A/52/44, 9 May 1997, para. 257) found that they “constitute torture as defined in article 1 of the Convention [against Torture]. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case”.

None of the international human rights instruments contains definitions of cruel, inhuman and degrading treatment. While both torture and inhuman and degrading treatment are prohibited at all times and under all circumstances, the distinction is relevant as the Convention Against Torture attaches certain specific obligations to torture, and because of the special stigma attached to torture.<sup>41</sup>

The Special Rapporteur against torture and the International Criminal Court Elements of Crimes (article 7(1)(f)) highlight that torture requires that the victim was in the custody or under the control of the perpetrator. Inhuman or degrading treatment can also be inflicted by excessive use of force in quelling a demonstration.<sup>42</sup>

With regard to custodial settings, inhuman and degrading treatment need not be inflicted intentionally or deliberately. The Inter-American Court of Human Rights has found that “incommunicado detention, being exhibited through the media wearing a degrading garment, solitary confinement in a tiny cell with no natural light, blows and maltreatment, including total immersion in water, intimidation with threats of further violence, a restrictive visiting schedule (...), all constitute forms of cruel, inhuman or degrading treatment”.<sup>43</sup> ECtHR has held that whether treatment amounts to inhuman and degrading treatment “depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some cases, the sex, age and state of health of the victim”.<sup>44</sup>



### Impact of inadequate conditions of detention on fair trial

The United Nations Working Group on Arbitrary Detention (E/CN.4/2005/6, paras. 69-70) has highlighted that inadequate conditions of detention may not only constitute inhuman treatment, but also adversely affect the right to a fair trial.

Conditions of detention have an impact on equality between the prosecution and the defence. “Where conditions of detention are so inadequate as to seriously weaken the pre-trial detainee and thereby impair equality, a fair trial is no longer ensured, even if procedural fair-trial guarantees

<sup>41</sup> ECtHR, *Ireland v. the United Kingdom*, Application No. 5310/71, Judgement of 18 January 1978, para. 167; ECtHR, *Selmouni v. France*, Application No. 25803/94, Judgement of 28 July 1999, para. 96.

<sup>42</sup> Report of the Special Rapporteur on the question of torture, E/CN.4/2006/6, paras. 34–41.

<sup>43</sup> Inter-American Court of Human Rights, *Loayza-Tamayo v. Peru*, Judgement of 17 September 1997 (Merits), para. 58.

<sup>44</sup> ECtHR, *Kudla v. Poland*, Merits, Application No. 30210/96, Judgement of 26 October 2000, para. 92.

are otherwise scrupulously observed.” The Working Group adds that it “is fully aware that the inadequate infrastructure, nourishment, hygiene and medical assistance in detention centres in many countries are in part due to the economic difficulties of these countries’ Governments. Nonetheless, Governments are responsible to ensure that conditions of detention do not result in violations of human rights”.

“Similarly, where the authority ruling on the conditions of pre-trial detention, including solitary confinement, contacts with family, phone calls and other activities, is the same authority conducting the criminal proceedings against the detained suspect, the equality between the two parties to the proceedings is severely impaired.” In other words, the authorities in charge of the place of detention should be sufficiently separate from the investigating authorities.

“Moreover, pre-trial detention becomes arbitrary where the conditions are such as to create an incentive for self-incrimination, or—even worse—to make pre-trial detention a form of advance punishment in violation of the presumption of innocence.”



## Tools

Alongside the treaty obligations and other legal obligations in respect of torture, inhuman and degrading treatment, there is also a wealth of soft law principles and guidelines which offer further support and guidance to States, public officials, lawyers, medical professionals and others in relation to torture and other forms of proscribed ill-treatment.

- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by United Nations General Assembly in Resolution 43/173 (1988) available at: <http://www.un.org/documents/ga/res/43/a43r173.htm>.
- Basic Principles on the Treatment of Prisoners adopted by United Nations General Assembly in Resolution 45/111 (1990), available at: <http://www.un.org/documents/ga/res/45/a45r111.htm>.
- Code of Conduct for Law Enforcement Officials adopted by United Nations General Assembly in Resolution 34/169 (1979) available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>.
- 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 adopted by the United Nations General Assembly in Resolution 37/194, 18 December 1982 available at: <http://www.un.org/documents/ga/res/37/a37r194.htm>.
- Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations Commission on Human Rights in Resolution 2000/43 available at: <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>.
- The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has gathered its analysis and recommendations based on visits to places of detention in Council of Europe States in the *CPT Standards*, available at: [CPT/Inf/E \(2000\)](http://www.cpt.coe.int/en/documents/eng-standards.pdf), available at: <http://www.cpt.coe.int/en/documents/eng-standards.pdf>.
- In its 23rd General Report (the 2013 annual report), paras. 71–84, the European Committee for the Prevention of Torture sets out the standards which it has developed as regards the documenting and reporting of medical evidence of ill-treatment: <http://www.cpt.coe.int/en/annual/rep-23.pdf>.

- *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (“the Robben Island Guidelines”), adopted in Resolution 61 (2002) of the African Commission on Human Rights is available at: <http://www.achpr.org/sessions/32nd/resolutions/61/>.
- Torture is punishable under the Rome Statute of the International Criminal Court as a war crime and as a crime against humanity. The Elements of Crimes define the specific elements of the crime of torture for the purposes of articles 7(1)(f) and 8(2)(a)(ii), 8(2)(c)(i) of the Statute: <http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>.

### 3.5.2 Exclusion of evidence obtained through torture, inhuman or degrading treatment

Article 15 of the Convention Against Torture states that “each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings”. In General Comment No. 2 (paragraph 6) the Committee Against Torture clarifies that this prohibition also applies in relation to inhuman and degrading treatment and that no limitation may be placed on this prohibition in any circumstances.

Responsibility of law enforcement officials, prosecutors, judges, prosecutors and other criminal justice professionals: judges, prosecutors and, indeed, law enforcement officials have an important role to play in safeguarding the prohibition on torture, inhuman and degrading treatment. One important principle for law enforcement officers to keep in mind is that “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture” (article 2(3), CAT).

The United Nations Guidelines on the Role of Prosecutors (Guideline 16) state that “[w]hen prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute 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”.

As regards judges, the Basic Principles on the Independence of the Judiciary, state that it is the duty of judges to be particularly alert to any sign of maltreatment or duress of any kind that might have taken place in the course of criminal investigations or in detention and to take the necessary measures whenever faced with a suspicion of maltreatment. Such measures may include requiring acts to be investigated or reporting evidence of torture to law enforcement or prosecutorial authorities.



#### Activities

In the next pages six cases are presented, all relating to the use of statements alleged to have been obtained by torture or inhuman or degrading treatment as evidence in criminal proceedings. The cases illustrate several difficult issues that arise in this regard. As you read through them, consider the following issues and examine how the courts in these cases dealt with them:

- What is the relationship between the violation of safeguards regarding detention (such as access to a lawyer without delay) and the likelihood of torture occurring? (*Taba, Singarasa and Ghailani* cases)
- Who bears the burden of proof regarding the question whether torture occurred? How does a violation of safeguards regarding detention (access to a lawyer, prohibition of incommunicado detention) affect the ability of the investigators to prove that self-incriminating statements were made voluntarily? (*Taba, Singarasa, Ghailani* and *El Haski* cases)
- In the *Haratyunyan* case, statements made under torture were subsequently confirmed before other investigators, prosecutors and judges. ECtHR considered that there were considerable doubts regarding the reliability of the witness statements confirming earlier statements under torture. On what grounds?
- In some cases, statements made under torture or other ill-treatment will lead the investigators to other evidence. This “derivative evidence” can consist of objects (as in the *Mthembu* case) or of the voluntary statements of a witness identified on the basis of the coerced statements (as in the *Ghailani* case). How did the courts deal with this situation?



### Case studies regarding the exclusion of evidence in violation of human rights law

#### The *Taba* case<sup>a</sup>

On 6 October 2004, bomb attacks in the Taba and Nouweiba tourist resorts on the Sinai Peninsula led to the death of 34 and injury of more than one hundred Egyptians and foreigners. The Egyptian security forces arrested a large number of persons in the aftermath of the attacks, among them Mohamed Gayez Sabbah, Osama Mohamed Abdel-Ghani Al-Nakhlawi and Younis Mohamed Abu-Gareer. They were detained incommunicado (including without access to a lawyer) for about half a year, then tried by the Supreme State Security Court of Egypt, found guilty primarily based on confessions they made while in detention, and sentenced to death.

Two human rights organizations brought applications on their behalf before the African Commission on Human and Peoples’ Rights. The African Commission established that the three men made their confessions after having been subjected repeatedly to torture (paragraph 189). The three men were detained without access to the outside world for six to nine months. They complained about the ill-treatment a first time when they were brought before a prosecutor. The public prosecution had them medically examined and determined that they were free from external injuries. The defendants then complained to the trial court, which ordered a medical examination. In spite of the long time elapsed, the medical examination showed unexplained injuries compatible with the torture complained of by the three men, but the court did not investigate the matter further. Instead it sentenced the defendants to death relying on their confessions made to the security forces.

In its decision, the African Commission reiterated several very important principles also contained in the jurisprudence of the other international human rights bodies:

- When a person is injured in detention or while under the control of the security forces, there is a presumption that the person was subjected to torture or ill-treatment (art. 168).
- If the prosecution wishes to rely on evidence which an individual claims was obtained through torture or ill-treatment, the burden falls on the prosecution to establish that evidence has not been obtained through torture or inhuman and degrading treatment. The African Commission stated that “once a victim raises doubt as to whether particular evidence has been procured by torture or other ill-treatment, the evidence in question should not be admissible, unless the State is able to show that there is no risk of torture or other ill-treatment”. Moreover, where a confession is obtained during incommunicado detention, it should be considered to have been obtained by coercion and not be admitted as evidence (art. 212).

- Access to a lawyer is one of the necessary safeguards against abuse during the pretrial process (art. 179).
- Prompt recourse to a judicial authority, independent of the authorities detaining, interrogating and ultimately prosecuting, constitutes a vital aspect of the prevention and deterrence of torture and other ill-treatment (art. 183). Appearance of the detainees before a prosecutor is not sufficient to satisfy this requirement.

Among other remedies, the Commission recommended to Egypt not to carry out the death sentences, to release the three men and to adequately compensate them. In February 2012 the Egyptian Government repealed the death sentences.

The *Harutyunyan case*<sup>b</sup>

Mr. Harutyunyan and other young men (A, H and T) were on a guard shift during military service. H was found dead in a trench, having been killed by a machine-gun shot. Military police took Mr. Harutyunyan, A and T to their post and subjected them to prolonged severe ill-treatment to coerce them into revealing what had happened. On the second day of detention T, and then also A, stated Mr. Harutyunyan had killed H. Mr. Harutyunyan was subjected to torture for over a month, until he confessed to an investigator (not the military police officers who had ill-treated him) that he had accidentally shot H. He was then charged with murder. On the following day, Mr. Harutyunyan was taken to the site of the incident, where he re-enacted what had happened according to his confession, which was video-recorded. Five months after the killing, a confrontation was held between Mr. Harutyunyan and T (who was still in military service), during which T confirmed his earlier testimony. T and A again confirmed their statements at a court hearing two months later.

The torture was subsequently reported to the military prosecutor. Medical examination confirmed that the three men had injuries compatible with the treatment they alleged the military police had subjected them to, and criminal proceedings were initiated against the alleged torturers in which they were eventually sentenced to three years imprisonment.

The case against Mr. Harutyunyan proceeded to trial. At trial, the accused revoked his confession, and A and T (who had in the meantime both been demobilized) revoked their statements incriminating him, explaining that those statements had been coerced. The court, however, found the testimony of Mr. Harutyunyan, T and A at trial unconvincing. The court noted that the accused had confessed to an investigator, not the military police officers who had ill-treated him, and that T and A had confirmed the statements initially made under coercion from the military police several months later. The court also adduced other, rather weak, circumstantial evidence and found the accused guilty of murder. This judgement was upheld on appeal. All the courts involved accepted as a fact that Mr. Harutyunyan, T and A had been tortured.

ECtHR found that the domestic courts had not adequately taken into account the impact of the torture on the fairness of the trial. It took the view [paragraph 65] that “where there is compelling evidence that a person has been subjected to ill-treatment, including physical violence and threats, the fact that this person confessed—or confirmed a coerced confession in his later statements—to an authority other than the one responsible for this ill-treatment should not automatically lead to the conclusion that such confession or later statements were not made as a consequence of the ill-treatment and the fear that a person may experience thereafter ... Finally, there was ample evidence before the domestic courts that witnesses T. and A. were being subjected to continued threats of further torture and retaliation ... Furthermore, the fact that they were still performing military service could undoubtedly have added to their fear and affected their statements, which is confirmed by the fact that the nature of those statements essentially changed after demobilization. Hence, the credibility of the statements made by them during that period should have been seriously questioned, and these statements should certainly not have been relied upon to justify the credibility of those made under torture.”

In the light of these considerations, ECtHR concluded “that, regardless of the impact the statements obtained under torture had on the outcome of the applicant’s criminal proceedings, the use of such evidence rendered his trial as a whole unfair”. There had accordingly been a violation of the right to a fair trial.

The case of *Nallaratnam Singarasa*<sup>c</sup>

Mr. Singarasa was arrested on suspicion of involvement in activities of the Liberation Tigers of Tamil Eelam, including attacks against camps of the Sri Lankan army. He was held in police custody for many months without access to a lawyer and allegedly beaten. About six months after his arrest, he was brought before a senior police officer and asked to sign a statement, which later on became the basis for his conviction at trial and sentenced to 35 years imprisonment. According to Mr. Singarasa, he was unable to understand the statement (as it was written in Sinhalese and he only spoke and read Tamil) and he had refused to sign it, but the police officer forcibly put his thumbprint on the typed statement.

At the time of the facts, under the Sri Lankan law of evidence a statement made to a police officer was inadmissible. The Prevention of Terrorism Act (PTA), however, made an exception to this rule, providing that a confession made to a senior police officer was admissible. The voluntariness of such a statement or confession could be challenged, but the burden of proving that a confession was not made voluntarily lay with the person claiming it. At trial, Mr. Singarasa claimed that his “confession” had been coerced. The court, however, applied the PTA provision and admitted the statement (basing the guilty finding and sentence on it), as Mr. Singarasa was unable to prove that the statement was not voluntary.

The Human Rights Committee, in its consideration of the case, maintained “that it is implicit in the principle [that an individual should not be compelled to self-incriminate] that the prosecution must prove that the confession was made without duress” (art. 7.4). If a court (whether at the pretrial or trial stage) finds that the prosecution have failed to show that an incriminating statement was not extracted through compulsion, where this issue is raised by the defence, then the evidence must be excluded in order that the trial is fair.

The *Mthembu* case<sup>d</sup>

Mr. Mthembu, a former police officer, was charged with the theft of two vehicles and a robbery at a post office, at which he obtained a steel box with a substantial amount in cash. The prosecution case relied in large part on the statements of an accomplice, Mr. Ramseroop, and on the fact that one of the vehicles and the steel box had been found at Ramseroop’s home, where he had been concealing them on behalf of the accused. The second stolen vehicle had been found independently.

The case went to trial four years later. Mr. Ramseroop testified that the accused Mr. Mthembu had handed him the car and the steel box for hiding. It also emerged, however, that the investigators had tortured Mr. Ramseroop (including through the use of electric shocks) at the police station before he showed them where the vehicle and the steel box were hidden. The court found Mr. Mthembu guilty on all counts and sentenced him to 23 years’ imprisonment. It reasoned that the vehicle and the steel box existed independently of the accomplice’s coerced statements, and that they therefore constituted relevant and reliable evidence.

On appeal, the Supreme Court of Appeals distinguished between a confession extorted by improper means, which was not admissible as evidence, and the so-called “real evidence”, objects which were found as a result of information obtained improperly. The Supreme Court noted that traditionally real evidence was not excluded, as its reliability was not influenced by the means used to find it.

The Supreme Court went on to note, however, that this had changed with the entry into force of the Bill of Rights in the Constitution of the Republic of South Africa in 1996, which provides in article 35(5):



“Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.”

The Supreme Court reasoned that “to admit Ramseroop’s testimony regarding the [car] and the metal box would require us to shut our eyes to the manner in which the police obtained this information from him. More seriously, it is tantamount to involving the judicial process in ‘moral defilement’. This ‘would compromise the integrity of the judicial process (and) dishonour the administration of justice’. In the long term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system. The public interest, ... , demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial”.

The Supreme Court quashed the convictions for the theft of the vehicle found at Ramseroop’s home and for the post office robbery. It upheld the conviction for the theft of the other vehicle and reduced the sentence to four years.

In conclusion, the Supreme Court noted that Mr. Mthembu, “who ought to have been convicted and appropriately punished for having committed serious crimes, will escape the full consequences of his criminal acts. The police officers who carried the responsibility of investigating these crimes have ... , by torturing Ramseroop ... themselves committed crimes of a most egregious kind. They have treated the law with contempt and must be held accountable for their actions.” The Supreme Court therefore transmitted its judgement to the minister competent for the police, to the national police commissioner, to the South African Human Rights Commission and to the National Director of Public Prosecutions for follow-up action.

The *Ghailani* case<sup>e</sup>

Ahmed Khalfan Ghailani was on trial in the United States Federal Court in New York City charged with murder, conspiracy to commit terrorist offences, and other offences for his suspected involvement (he was accused of playing a key logistical role) in the terrorist bombings in 1998 of the United States Embassies in Kenya and the Republic of Tanzania, which killed 224 people.

Mr. Ghailani had been captured in Pakistan in 2004 and had been detained at a secret detention facility of the United States Central Intelligence Agency (a so-called “black site”) and at the Naval Base in Guantánamo for five years before being put on trial in civilian court. Under interrogation during his detention at the CIA “black site”, Mr. Ghailani made statements which reportedly amounted to confessions of his role in the bombings. The prosecution made no attempt to introduce these statements as evidence at trial. Mr. Ghilani also made statements to the CIA investigators that led them to a man called Husein Abebe. Mr. Abebe subsequently told the investigators that he had sold Mr. Ghailani the explosives used in the attacks.

The prosecution considered Mr. Abebe a key witness, but Mr. Ghailani’s defence objected to his being called to testify at trial on the ground that the information leading to the identification of Mr. Abebe as a witness had, allegedly, been extorted from Mr. Ghailani under torture. The United States Government declined to provide information to the judge on the circumstances under which Mr. Ghailani had been interrogated and accepted that the judge would, as a consequence, assume that Mr. Ghailani’s statements had been coerced.

To decide on the question of the admissibility of Mr. Abebe’s testimony, the judge held closed hearings at which he heard as witnesses persons who were present when Mr. Abebe was persuaded to confess his role, to implicate the accused, and to cooperate with the authorities. He then ruled that the United States Constitution did not allow Mr. Abebe to take the stand as a witness because “the government has failed to prove that Abebe’s testimony is sufficiently attenuated from Ghailani’s coerced statements to permit its receipt in evidence”. The judge added:

“The Court has not reached this conclusion lightly. It is acutely aware of the perilous nature of the world in which we live. But the Constitution is the rock upon which our nation rests. We

must follow it not only when it is convenient, but when fear and danger beckon in a different direction. To do less would diminish us and undermine the foundation upon which we stand.”

The jury subsequently acquitted Mr. Ghailani on all but one of the more than 280 charges against him, including on charges of murder and conspiracy to use weapons of mass destruction. He was, however, found guilty on one count of conspiracy to destroy government buildings and property. The judge imposed a life sentence.

The *El Haski* case<sup>f</sup>

Mr. El Haski was a citizen of Morocco. Following periods in Syria, Saudi Arabia and Afghanistan (where he took part in military training with a militia leader), he entered Belgium illegally in 2004. After five months in Belgium he applied for asylum. Two weeks after his application, however, he was arrested and charged with participating, as a leader, in the activity of a terrorist group (the Moroccan Islamic Fighting Group or “GICM” after its French name *Groupe Islamique Combattant Marocain*) and other offences.

Evidence transmitted by the Moroccan authorities, obtained in the course of proceedings opened following the Casablanca bombings in 2003, was added to the criminal case file in Belgium. That evidence included witness statements describing the Mr. El Haski’s involvement and activities in the GICM.

Mr. El Haski was tried, found guilty of participating in the activities of a terrorist group, and sentenced to seven years imprisonment. He appealed the judgement asking the appellate court to exclude the statements taken in Morocco, which he alleged had been obtained through torture or inhuman treatment. The Court of Appeal, however, considered that Mr. El Haski had provided no evidence capable of shedding “reasonable doubt” on the way in which the statements had been obtained. It therefore rejected the argument and upheld the judgement based, among other things, on the statements transmitted by the Moroccan authorities.

Mr. El Haski complained to ECtHR. ECtHR recalled the principle whereby the use of evidence obtained in violation of the prohibition against torture and inhuman or degrading treatment automatically renders the proceedings as a whole unfair.

ECtHR noted that the statements at issue had been made by suspects questioned in Morocco in investigations and proceedings following the Casablanca bombings of 16 May 2003. On the basis of several reports issued by the United Nations and non-governmental organizations, ECtHR found that there existed a “real risk” at the time that statements had been obtained using treatment contrary to the prohibition of torture or inhuman or degrading treatment, and that, in the aftermath of the Casablanca bombings, the Moroccan judicial system did not offer real guarantees of independent, impartial and serious examination of allegations of torture.

ECtHR held that in the circumstances it was sufficient for Mr. El Haski to have demonstrated to the domestic court that there existed a “real risk” that the statements had been obtained by torture or inhuman or degrading treatment. The Belgian courts should have assured themselves that this was not the case or otherwise have excluded the statements from the case file. Requiring Mr. El Haski to provide “concrete proof” capable of shedding “reasonable doubt” on the way the statements had been obtained was not an adequate response of the Belgian courts to Mr. El Haski’s objections. ECtHR concluded that there had been a violation of the right to a fair trial.

<sup>a</sup>*Egyptian Initiative for Personal Rights and Interights v. Egypt*, Merits, Communication No. 334/06, art. 185, 1 March 2011.

<sup>b</sup>ECtHR, *Harutyunyan v. Armenia*, Application No. 36549/03, Judgement of 28 June 2007, art. 63.

<sup>c</sup>Human Rights Committee, *Nallaratnam Singarasa v. Sri Lanka*, Communication No. 1033/01 (CCPR/C/81/D/1033/2001), 21 July 2004, para. 7.4.

<sup>d</sup>Supreme Court of Appeals of South Africa, *Mthembu v The State*, Case No. 379/07, Judgement of 10 April 2008.

<sup>e</sup>United States District Court Southern District of New York, *United States of America v. Ahmed Khalfan Ghailani*, Case No. S10 98 Crim. 1023(LAK), 12 July 2010.

<sup>f</sup>ECtHR, *El Haski v. Belgium*, Application No. 649/08/03, Judgement of 25 September 2012.



### Tools

- The United Nations Guidelines on the Role of Prosecutors, in particular Principle 16, set out the professional responsibilities of prosecutors who come into possession of unlawfully obtained evidence. They are available here: <http://www.unrol.org/files/Guidelines%20on%20the%20Role%20of%20Prosecutors%20.pdf>.
- The *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* is intended to serve as international guidelines for the assessment of persons who allege torture and ill-treatment, for investigating cases of alleged torture and for reporting findings to the judiciary or any other investigative body. It is available here: <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>.



### Further reading

- The Special Rapporteur on torture has produced a report on the exclusionary rule (the absolute prohibition on the use of statements made as a result of torture or other ill-treatment), *A/HRC/25/60*: <http://www.refworld.org/docid/53185c254.html> .
- In the case of *A (FC) and others v Secretary of State for the Home Department* (decision of 8 December 2005) the United Kingdom's House of Lords examines the question of the admissibility of evidence possibly obtained under torture from the point of view of the common law: <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-2.htm>.

### 3.5.3 Right against self-incrimination/right to silence

Article 14(3)(g) of the International Covenant enshrines the right of each individual “not to be compelled to testify against himself or to confess guilt”. Article 8(2)(g) of the American Convention provides for the right of everyone “not to be compelled to be a witness against himself or to plead guilty”, a provision that is reinforced by article 8(3), which states that “a confession of guilt by the accused shall be valid only if it is made without coercion of any kind”. No similar provision is included expressly in either ECHR or ACHPR. However, the right to a fair trial has been interpreted in these instruments as including the right against self-incrimination.

In many national legal systems this principle is known as the “right to remain silent”. The 1987 Constitution of the Philippines, for example, provides that “[a]ny person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent” (article III, section 12(1)).

The right not to be compelled to testify against oneself or to confess guilt is of course a protection against the use of evidence obtained in violation of the prohibition against torture and inhuman or degrading treatment. The Human Rights Committee has, however, explained that the safeguard must be understood more broadly “in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt” (General Comment No. 32, paragraph 41). The following two cases illustrate situations in which this right was found to have been violated without a finding that a confession was extorted through physical ill-treatment.



## Case studies regarding the right against self-incrimination

### The *Brusco* case<sup>a</sup>

Mr. Brusco was suspected of having instigated the assault and battery of another man. He was taken into police custody and questioned as a witness (instead of as a suspect, which is what he actually was to the investigators). French law allowed the police to require a witness to solemnly swear to tell the truth, which was not allowed in the case of a suspect. During questioning under oath, Mr. Brusco admitted his role in instigating the intimidation attempt, but denied having instigated physical violence. The French courts found that, as the police did not have evidence against Mr. Brusco before the interview, the prohibition in French law against forcing a suspect to make statements under oath had not been violated.

ECtHR, however, concluded that Mr. Brusco was not a mere witness and should have had the right to remain silent and not to incriminate himself. The situation was aggravated by the fact that Mr. Brusco was not assisted by a lawyer until his twentieth hour in police custody. Had a lawyer been present, he would have been able to inform Mr. Brusco of his right to remain silent.

### The case of *Heaney and McGuinness*<sup>b</sup>

A large explosion at an army barracks killed five soldiers and a civilian. As part of the investigation in the immediate aftermath of the explosion, the police raided a house suspected of being used by the Irish Republican Army (IRA, an unlawful paramilitary organization), which was suspected to have carried out the attack. Items including balaclavas and latex gloves were found in the house. Heaney, McGuinness and others, suspected of being members of the IRA, were found at the house and arrested. Heaney and McGuinness were questioned about their movements that day, in particular their movements around the time at which the explosion occurred. The police also read out to them section 52 of Ireland's counter-terrorism legislation, which makes it a separate offence not to provide an account of one's movements. They refused to answer.

After tests, the items found in the house proved not to be forensically linked to the bombing. Heaney and McGuinness were charged with membership of an unlawful organization (the IRA) and, under section 52, with failing to provide an account of their movements during a specified period. Also at trial, Heaney and McGuinness remained silent. They were acquitted on the membership charges, but found guilty with regard to the failure to provide an account of their movements and sentenced to six months imprisonment.

Heaney and McGuinness brought their case before ECtHR. The Government argued that section 52 was a proportionate response to the threat posed by terrorism in Ireland at the time. ECtHR found, however, that the degree of compulsion imposed on Heaney and McGuinness by section 52 of the counter-terrorism law with a view to compelling them to provide information relating to the charges against them was such as to in effect destroy the very essence of the privilege against self-incrimination and the right to remain silent (art. 55). ECtHR therefore found a violation of the right to a fair trial. Moreover, ECtHR noted the close link between the right not to incriminate oneself and the presumption of innocence and found a violation of the latter, too.

<sup>a</sup>ECtHR, *Brusco v. France*, Application No. 1466/07, Judgement of 14 October 2010.

<sup>b</sup>ECtHR, *Heaney and McGuinness v. Ireland*, Application No. 34720/97, Judgement of 21 December 2000.

***Inference from silence:*** As highlighted by the *Heaney and McGuinness* case, the right against self-incrimination does not merely prevent the extraction of incriminating statements through coercion. It also restricts the extraction of such statements through the use of other forms of compulsion, direct or indirect. Thus, the imposition of fines or the drawing of adverse inferences later to be relied upon at trial where a suspect refuses to answer questions also

represents an interference with the right against self-incrimination. Such interferences are not necessarily impermissible in all circumstances, but proper safeguards must be in place, such as (a) access to independent legal advice at all times; (b) a full and clear warning as to the possible legal effect of failing to answer questions from the outset; (c) a requirement that a conviction not be based solely or mainly on an accused's silence; and (d) the existence of a *prima facie* case against an accused which could lead to a conviction if unanswered.



### Protection against self-incrimination and the questioning of children

Depending on their age and development, children can be led to make involuntary self-incriminating statements by means that would not have the same effect on an adult.

The Committee on the Rights of the Child (General Comment No. 10, para. 57) therefore states that

- In applying the prohibition against compulsory self-incrimination to the questioning of children, the “term ‘compelled’ should be interpreted in a broad manner and not be limited to physical force or other clear violations of human rights”.
- “The child being questioned must have access to a legal or other appropriate representative, and must be able to request the presence of his/her parent(s) during questioning.
- There must be independent scrutiny of the methods of interrogation to ensure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable.
- The court or other judicial body, when considering the voluntary nature and reliability of an admission or confession by a child, must take into account the age of the child, the length of custody and interrogation, and the presence of legal or other counsel, parent(s), or independent representatives of the child.
- Police officers and other investigating authorities should be well trained to avoid interrogation techniques and practices that result in coerced or unreliable confessions or testimonies.”



### Activities

- Does your country's criminal law have the offence of “torture”? If so, how is it defined? If not, what offences can a law enforcement official who subjects a suspect or other person being questioned to treatment that would amount to torture or inhuman or degrading treatment under international law be charged with?
- Are there (in your legal system) any norms or guidelines for prosecutors on how to deal with statements collected by law enforcement agents that can reasonably be suspected to have been obtained by torture or other forms of illegal coercion?
- Is there (in your legal system) a clear prohibition on the use of statements obtained by torture or inhuman or degrading treatment?
- The United Nations Working Group on Arbitrary Detention has highlighted that controlling conditions of detention can give investigators a means to exercise impermissible pressure on suspects (see section 3.5.1 above). In your country, do the investigators influence the conditions of detention of persons detained on suspicion of involvement in terrorism, or is the detaining authority completely separate from the investigating authority?
- How is the right not to be compelled to testify against oneself or to confess guilt protected in your legal system?

### 3.6 Search and seizure

The search of persons and property and the seizure of property may engage several rights, including the right to a private and family life where law enforcement officials conduct a search of personal premises owned or used by a suspect and, where property is seized, the right to the peaceful enjoyment of possessions. It may also interfere with the right to a fair trial, where the premises of lawyers are searched, or the fundamental freedoms of expression and association. Both the right to respect for private and family life and the right to peaceful enjoyment of possessions are not absolute and can be limited in certain circumstances. As in the case of other non-absolute rights, there are three essential requirements which any interference with these rights must satisfy (see section 1.6.4 above): being prescribed by law, having a legitimate aim and proportionality between the aim pursued and the interference with the right.



#### Case study. The *Rojas García* case<sup>a</sup>

Following the murder of the mayor of Bochalema, Colombia, a group of armed men wearing civilian clothes, from the public prosecutor's office, forcibly entered the Rojas García family home through the roof. The group carried out a room-by-room search of the premises, terrifying and verbally abusing the members of the family, including small children. In the course of the search, one of the officials fired a weapon. Two more persons then entered the house through the front door; one typed up a statement and forced the only adult male in the family to sign it; he did not allow him to read it, or to keep a copy. (para. 2.1).

In proceedings before the Human Rights Committee, the government argued that the raid had been carried out in accordance with the criminal procedure law; that there had been a good faith mistake in the identification of the house to be raided; and that the law enforcement forces had reason to expect armed resistance at the house. The Human Rights Committee noted that, even if the raid was in accordance with Colombian law, under article 17 of ICCPR, it is necessary for any interference in the home not only to be lawful, but also not to be arbitrary. The Committee considered "that the concept of arbitrariness in article 17 is intended to guarantee that even interference provided for by law ... should be, in any event, reasonable in the particular circumstances. It further considers that the State party's arguments fail to justify the conduct described". (para. 10.3) The Committee concluded that there had been arbitrary interference in the home of the Rojas García family. The Committee also noted, without ruling on the matter, that the raid could also constitute an attack on the family's honour and reputation.

<sup>a</sup>Human Rights Committee, *Rojas García v. Colombia*, Communication No. 687/1996 (CCPR/C/71/D/687/1996), 3 April 2001.

### 3.7 Special investigation techniques

The clandestine nature of terrorist conspiracies and activities and the mode of operation of terrorist organizations require specialized investigation methods. With developments in modern technology a wide array of investigative techniques lies at the disposal of law enforcement agencies when combating terrorism. Many different forms of covert surveillance are possible covering all of the modern forms of communication, as well as visual surveillance of suspects or the audio surveillance of premises in which they live or meet. The use of covert human

intelligence, whether undercover agents or informants, is also a common method used in preventing, detecting and prosecuting acts of terrorism.<sup>45</sup>

The covert investigation techniques mentioned above are often referred to as “special investigation techniques” (“SITs”). There is no universally accepted definition or list of SITs, and indeed their constantly evolving nature as the technologies used evolve, makes a comprehensive list elusive. In 2005, the Council of Europe adopted recommendations to member States on SITs, and in that context defined them as follows: ““Special investigation techniques’ means techniques applied by the competent authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons.”

While these and other investigative techniques are useful and, indeed, often necessary in combating terrorism, their very aim, i.e. to gather information about persons in such a way as not to alert the target, means that the use of SITs will nearly always involve an interference with the right to private life of the target and other persons. Moreover, the investigative agencies making use of SITs will often feel the need to prevent disclosure at the pretrial and trial stages of how SITs were used. This can raise difficult questions from the point of view of the right to a fair trial, which are examined in sections 5.7.4 and 5.7.5 below. Additional human rights concerns surrounding the use of SITs include the risk of a discriminatory use in racial, political or religious profiling practices, and the impact of covert surveillance on the fundamental freedoms of religion, thought, expression, assembly and association. For all these reasons, the use of SITs must be regulated and carefully supervised, including judicially, in order to ensure that human rights are respected.

### 3.7.1 Undercover agents and informants

The use of informants and undercover agents can be a key tool in the investigation of terrorist offences and, before an offence is committed, in gathering information about the activities of terrorist groups, disrupting their plans, and therefore saving innocent lives through the prevention of acts of terrorism.



#### Small glossary regarding undercover agents and informants

This glossary intends to clarify the meaning with which some terms are used in the following pages, not to provide official definitions.

- *Informant*: a person who provides information to the authorities. Informants can be former criminals or suspected to be part of or otherwise associated with a terrorist group, as well as members of the public. Here the term is used primarily to refer to informants who are part of a terrorist group (“participating informants”).
- *Undercover agent*: a law enforcement officer or other person tasked by handlers with gathering information and evidence covertly, for instance by infiltrating an organization suspected of terrorism-related offences.

<sup>45</sup> Council of Europe, Recommendation Rec(2005)10 of the Committee of Ministers to member States on “special investigation techniques” in relation to serious crimes including acts of terrorism, Adopted by the Committee of Ministers on 20 April 2005.

- *Informant/Undercover agent's handler*: a law enforcement officer who is the point of contact for an informant or undercover agent.
- *Entrapment*: the act of government agents or officials that induces a person to commit a crime he or she is not previously disposed to commit.
- *Agent provocateur*: an undercover agent who entices another person to commit an illegal act.

In some circumstances it will be possible for law enforcement agencies to infiltrate an undercover agent into the midst of a terrorist group or conspiracy. More often law enforcement agencies, whether by inducement or threat, such as that of prosecution, may be able to persuade an individual already involved in a terrorist grouping or conspiracy to provide information on the activities of the organization. This may involve the informant in becoming enmeshed in a particular conspiracy so as to provide information on its development or to participate in certain of the activities of the organization more generally. In return for this it will usually be necessary for the informer to be promised some form of immunity from prosecution under domestic law. The United Nations Convention against Transnational Organized Crime (UNTOC) encourages States parties to make use of undercover agents and participating informants in the investigation of organized crime groups.



### **The United Nations Convention against Transnational Organized Crime (UNTOC) provisions on undercover operations and the use of participating informants**

Under UNTOC article 20, paragraph 1, States are required, if permitted by the basic principles of their national legal systems, to allow for the use, where appropriate, of undercover operations or infiltration of criminal operations in their territory, for the purpose of combating organized crime.

Article 26 of UNTOC deals with the use of participating informants. It reads:

#### *Measures to enhance cooperation with law enforcement authorities*

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in organized criminal groups:
  - (a) To supply information useful to competent authorities for investigative and evidentiary purposes on such matters as:
    - (i) The identity, nature, composition, structure, location or activities of organized criminal groups;
    - (ii) Links, including international links, with other organized criminal groups;
    - (iii) Offences that organized criminal groups have committed or may commit;
  - (b) To provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime.
2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.
3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.



As with other SITs, the use of an informant, and particularly the use of an undercover agent, will generally involve a covert intrusion into the private life of the persons targeted by the investigation, as well as potentially other persons. There are also human rights concerns that are specific to the use of informants and undercover agents, including:

- Considering that undercover agents and, to a lesser extent, informants, are acting on behalf of the State, to what extent should they be allowed to take part in committing crimes?
- Where is the line between the use of an agent or informer as a legitimate means of gathering information or evidence, and the point at which such activities amount to impermissible inducement to commit crime (also known as “entrapment” or use of an “agent provocateur”)?
- Acting as an undercover agent infiltrated into a terrorist group, or an organized crime group more generally, or as an informant on such a group will often be dangerous. To what extent does the State have an obligation to protect the life and security of the undercover agent or informant?

Regarding the first question, to be able to gain or maintain a role in the terrorist group that provides access to the information sought by the investigating agency, the undercover agent or informant will most often need to be involved in the criminal activities of the group. The UNODC Model Legislative Provisions against Organized Crime, which are intended to assist States in implementing UNTOC, therefore provide that an officer infiltrated into a criminal group may “make available legal and financial means, transport, storage, housing and communications needed for the perpetration of those offences” without becoming criminally responsible (article 15, paragraph 3).

In addition to the need for domestic law to provide a legal framework for such activities, there are important limitations imposed by international human rights law on the activities in which an undercover agent or participating informant, as an agent of the State, can become involved. Where an informant is acting under the control of a State or its law enforcement agencies, it is clearly impermissible for a State to permit the informant to participate in the abuse of fundamental human rights, such as acts involving killing, enforced disappearance or torture and ill-treatment. The prohibition on torture and the arbitrary deprivation of life are absolute and cannot be justified, even by reference to important law enforcement goals such as the investigation of terrorism.

Regarding the second question, “sting” operations, whereby those suspected of serious crime are allowed by law enforcement agencies to commit crime within a controlled environment monitored by police for purposes of detection, arrest and prosecution, can provide an invaluable tool in preventing and suppressing serious crime. Indeed, UNTOC calls on each State Party to “take the necessary measures to allow for the appropriate use of controlled delivery ... by its competent authorities in its territory for the purpose of effectively combating organized crime” (article 20(1)).

It is important, however, that such efforts do not transgress impermissibly into the territory of encouraging and inducing the commission of crime which otherwise would not have occurred. “Undercover agents must not provide an opportunity to commit an offence to a person they do not reasonably suspect to be engaged in criminal activities. Where they have such reasonable suspicion, they should not induce the commission of an offence where the

person had no pre-existing intent of committing it.”<sup>46</sup> Whether that line was crossed will often be a question requiring a detailed examination of the facts of the specific case, as illustrated by the following case.



### Case study. The *Ramanauskas* case<sup>3</sup>

Mr. Ramanauskas was a prosecutor working in Lithuania. He was approached by AZ, a person unknown to him, who, on a number of occasions, offered him a substantial sum of money as a bribe, purportedly in order to secure the acquittal of a person charged with a serious criminal offence. AZ was in fact an officer of the police anti-corruption team. Initially Mr. Ramanauskas refused the bribe, but accepted after AZ had reiterated the offer a number of times.

ECtHR held [art. 51 and 55] that impermissible “police incitement occurs where the officers involved—whether members of the security forces or persons acting on their instructions—do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed ...” Applying this test to the facts of the case, ECtHR noted [art. 67–68] that it must consider a number of factors. First, there was no evidence that Mr. Ramanauskas had committed any offences beforehand, in particular corruption-related offences. Secondly, all the meetings between Mr. Ramanauskas and the undercover officer took place at the undercover officer’s initiative. Third, the suspect seemed to have been subjected to blatant prompting and encouragement. These considerations were sufficient for ECtHR to conclude that the actions of the undercover agent went beyond the mere passive investigation of existing criminal activity and that the prosecution of Mr. Ramanauskas contravened his right to a fair trial.

<sup>3</sup>ECtHR, *Ramanauskas v. Lithuania*, Application No. 74420/01, Judgement of 5 February 2008.

*Procedural issues:* In order to have a fair trial, an accused must be able to raise the question of entrapment at or prior to trial and to adduce evidence in relation to this. Where credible evidence of entrapment is raised by the defence, it will be necessary for a judge to decide whether evidence against the accused was obtained by entrapment. In the *Ramanauskas* case, the Grand Chamber of the European Court of Human Rights clarified that “[i]t falls to the prosecution to prove that there was no incitement, provided that the defendant’s allegations are not wholly improbable. In the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth ...”<sup>47</sup> Where an accused alleges that evidence has been obtained by entrapment “the criminal courts must carry out a careful examination of the material in the file, since for the trial to be fair ... all evidence obtained as a result of police incitement must be excluded”.<sup>48</sup> In some circumstances, for example, where a charge relates to a specific incident arising from entrapment, this may mean that the prosecution are able to offer no evidence and a case cannot proceed. In other circumstances, for instance where a charge relates to a criminal conspiracy relating to a series of acts of which evidence derived from entrapment forms only one part, it may be possible for the case to proceed in the absence of the evidence in question.

To ensure that the use of undercover agents and participating informants remains within the bounds established by human rights law and domestic criminal law, it is good practice to

<sup>46</sup> Organization for Security and Co-operation in Europe (OSCE), *Human Rights in Counter-Terrorism Investigations*, p. 41.

<sup>47</sup> ECtHR, *Ramanauskas v. Lithuania*, Application No. 74420/01, Judgement of 5 February 2008, para. 70.

<sup>48</sup> *Ibid.* para. 60.

establish written guidelines and to provide robust training to undercover agents and their handlers. An example of guidelines in this area are the United States *Department of Justice Guidelines Regarding the Use of Confidential Informants*. The Guidelines provide guidance as to matters such as the extent to which a participating informant may be permitted to participate in otherwise illegal activities (participation in acts of violence, for example, being prohibited), the registration of the participating informant, how they should be handled as well as requirements for notification (for instance, of unauthorized illegal activity). Similar guidelines exist in the United Kingdom, published by the United Kingdom Home Office, *Covert Human Intelligence Sources: Code of Practice*.



### Activities

- Are participating informants permitted within your own legal system, in the fight against terrorism or other serious crime? Have you, in your own professional experience, been involved in criminal investigations or trials in which they have been used? Where any problems encountered regarding their use either in those cases of which you have experience or of which you have knowledge? What were the key problems?
- If participating informants are used within your legal system, what rules, procedures or guidelines exist (if any) to ensure that their use is properly controlled? Are there safeguards to ensure that their role maintains respect for fundamental human rights standards?
- Are the safeguards within your own legal system adequate in relation to the use of participating informants? What steps could (a) prosecutors or (b) judges take in criminal investigations or trials to improve safeguards? What other legal reforms might, in your view, help improve the situation?



### Tools

- UNODC has developed Model Legislative Provisions against Organized Crime to assist States in implementing UNTOC in their domestic legal systems. Of particular relevance to the question of participating informants are model article 14 on *Assumed Identities* and model article 15 on *Infiltration*. The commentary to the model provisions also contains numerous examples of actual legislation from United Nations Member States: [http://www.unodc.org/documents/organized-crime/Publications/Model\\_Legislative\\_Provisions\\_UNTOC\\_Ebook.pdf](http://www.unodc.org/documents/organized-crime/Publications/Model_Legislative_Provisions_UNTOC_Ebook.pdf).
- The United Nations Special Rapporteur on the Protection of Human Rights while Countering Terrorism has produced a report on good practice by intelligence agencies in counter-terrorism efforts, including in respect of the use of agents. See Report of the Special Rapporteur on Human Rights and Counter-terrorism, A/HRC/14/46, available at: <http://www.ohchr.org/EN/Issues/Terrorism/Pages/Issues.aspx>.
- The Organization for Security and Co-operation in Europe (OSCE)'s manual *Human Rights in Counter-Terrorism Investigations* provides guidelines for the use of undercover agents and informants (pp. 40-41): <http://www.osce.org/odihr/108930>.
- The United States Department of Justice Guidelines for Confidential Informants which regulate the recruitment, operation, handling and deactivation of participating informants in organizations or groups involved in serious crime are available here: <http://www.justice.gov/ag/readingroom/ciguide.htm>.
- United Kingdom Code of Practice on the use of participating informers or agents by law enforcement agencies is available at: <http://www.homeoffice.gov.uk/publications/counter-terrorism/ripa-forms/code-practice-human-intel?view=Binary>.



### Further reading

- The 2010 annual Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, A/HRC/16/50, discusses specific challenges concerning the use of intelligence in the context of criminal justice processes:  
<http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-50.pdf>
- Practical guidance for law enforcement agencies on dealing with the tension between gathering intelligence and the potential disclosure of such material in terrorism trials is set out at section B.2. (c) in the UNODC publication, *Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-terrorism Instruments*, available at:  
[http://www.unodc.org/documents/terrorism/Publications/Preventing\\_Terrorist\\_Acts/English.pdf](http://www.unodc.org/documents/terrorism/Publications/Preventing_Terrorist_Acts/English.pdf).
- For an overview of international practice in relation to issues arising in the context of the investigation of terrorist incidents, including practice relating to the relationship between intelligence gathering and the gathering of evidence in relation to terrorist offences is set out in the *UNODC Digest of Terrorist Cases*, especially chapter V (B). The publication is available here:  
[http://www.unodc.org/documents/terrorism/Publications/Digest\\_of\\_Terrorist\\_Cases/English.pdf](http://www.unodc.org/documents/terrorism/Publications/Digest_of_Terrorist_Cases/English.pdf).

### 3.7.2 Surveillance and interception of communications

On 18 December 2013, the General Assembly adopted unanimously a resolution titled “Right to privacy in the digital age”. The resolution’s preamble “[emphasizes] that unlawful or arbitrary surveillance and/or interception of communications, as well as unlawful or arbitrary collection of personal data, as highly intrusive acts, violate the rights to privacy and freedom of expression and may contradict the tenets of a democratic society”. It notes “that while concerns about public security may justify the gathering and protection of certain sensitive information, States must ensure full compliance with their obligations under international human rights law”. The General Assembly finally “[reaffirms] that States must ensure that any measures taken to combat terrorism complies with their obligations under international law, in particular international human rights”.

In terrorism prevention and in the investigation of suspected terrorist plots, there is little doubt that the acquisition, analysis and use of information about terrorist groups by intercepting communications and other means of electronic surveillance are essential tools to pursue a legitimate and vital objective, the protection of lives and national security. Equally well-established are concerns about the impact such measures have on the enjoyment of human rights, in particular the right to privacy. ECtHR has warned against “the risk that a system of secret surveillance for the protection of national security may undermine or even destroy democracy under the cloak of defending it”.<sup>49</sup>

<sup>49</sup> ECtHR, *Weber and Saravia v. Germany*, Application No. 54934/00, Decision of 29 June 2006, para. 106.



### Electronic surveillance: what is it?

To better understand the kind of measures involved in electronic surveillance it is helpful to break this concept down into different illustrative elements.

<i>Audio surveillance</i>	<i>Visual surveillance</i>	<i>Tracking surveillance</i>	<i>Data surveillance</i>
Phone-tapping.	Hidden video surveillance devices.	Global positioning systems (GPS)/transponders.	Computer/internet (spyware/cookies).
Voice over internet protocol (VOIP).	In-car video systems.	Mobile phones.	Blackberries/mobile phones.
Listening devices (room bugging).	Body-worn video devices. Radio frequency identification devices (RFID).  Thermal imaging/forward looking infrared.	Keystroke monitoring.  Biometric information technology (retina scans at airports, etc.).	
	CCTV.		

Source: Chapter 1.2, UNODC *Current Practices in Electronic Surveillance in the Investigation of Serious and Organized Crime*, p. 2.

The right most often engaged by surveillance is the right to a private and family life and to respect for one's home and correspondence. Article 17 (1) of ICCPR stipulates that "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", and in 17(2) that "everyone has the right to the protection of the law against such interference or attacks". Similar protection is provided by the regional human rights instruments. The Arab Charter, for instance, in article 17 states that "private life is sacred". ECHR in article 8(2) provides in more detail the conditions for permissible interference with everyone's 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."

As in respect of search and seizure of property, electronic surveillance measures must meet the three conditions for legitimate interference with and limitation of non-absolute rights (see section 1.6.4 above):

- Being prescribed by law
- Having a legitimate aim
- Proportionality between the aim pursued and the interference with the right

The legal framework regulating surveillance measures must fulfil the requirements of sufficient clarity and precision, foreseeability as to its application, and accessibility, such that the legal framework in question is transparent and publicly accessible. Because of the constantly

evolving techniques of electronic surveillance, legislators will have to take particular care in crafting a legal framework that is sufficiently precise to fulfil these requirements while maintaining a degree of flexibility that ensures its ability to remain relevant as technologies evolve.



### Safeguards regarding the interception of communications

As ECtHR points out, “especially where a power vested in the executive is exercised in secret”, as is the case with the interception of communications, “the risks of arbitrariness are evident”.<sup>a</sup> The establishment of a range of procedural safeguards to prevent the arbitrary or unlawful use of the power is therefore essential for the protection of human rights. Below is a non-exhaustive list of some of the key procedural safeguards in respect of methods of interception of communications.

- A clear and precise legal framework setting out the circumstances in which electronic surveillance is permissible and the procedures which must be followed prior to its implementation.
- A requirement that where an individual, a communications system or premises are to be placed under electronic surveillance in circumstances potentially interfering with an individual or organization’s right to privacy, independent authorization be obtained before a measure is implemented.
- Precise criteria specifying the basis on which such approval may be granted as well as a requirement that the justification for an interference must be sufficient to merit the nature and degree of interference with privacy implied by the measure in question.
- Any authorization for surveillance in a particular instance must be sufficiently clear and precise, narrowly tailored to the purpose for which authorization has been granted and clear as to the person, premises or communications system to be targeted.
- Authorization for surveillance should be time-limited rather than open-ended.
- Domestic law should ensure that measures are in place to safeguard the confidentiality of the material, including measures to prevent the unauthorized disclosure of the information to third parties or for purposes other than that for which authorization was granted.

The ECtHR decision in the *Weber and Saravia* case<sup>a</sup> provides an illustration of a very thorough examination of domestic (in this case, German) legislation regarding the interception of communications for national security purposes. ECtHR examines the extent to which the German legislation contains the above safeguards. In the end it concludes that, although the legislation provides extensive powers of secret surveillance to the authorities, the safeguards are sufficient.

<sup>a</sup>ECtHR, *Weber and Saravia v. Germany*, Application No. 54934/00, Decision of 29 June 2006, para. 93.

Not all electronic surveillance techniques have the same level of intrusiveness into the private sphere of individuals: a hidden video surveillance device recording a public place constitutes much less of an invasion of the private sphere of individuals than the interception of phone calls or e-mails. The graver the interference with legitimate expectations of privacy, the greater the need for a detailed legal framework and strong procedural safeguards and oversight.

International human rights bodies and most countries’ national legislation and case law agree that the interception of contents of communications (whether by phone, e-mail, or voice-over-internet-protocol, or through a listening device placed in a private premise) must be authorized by judicial order.

The legislation and courts of some countries take the view that so-called communications metadata, e.g. the phone record data showing which numbers were called from a given phone, at what time and for how long, and where the mobile phone was located at the time of the call, can be subjected to a lesser standard of protection. A growing number of legal systems, however, subject communications metadata to the same privacy protections as communications contents (the actual words communicated on the phone, or by e-mail).

In a very important judgement in which it struck down European Union legislation on “data retention”, the Court of Justice of the European Union (CJEU) noted that communications metadata “make it possible, in particular, to know the identity of the person with whom a subscriber or registered user has communicated and by what means, and to identify the time of the communication as well as the place from which that communication took place. They also make it possible to know the frequency of the communications of the subscriber or registered user with certain persons during a given period. Those data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.”<sup>50</sup> The CJEU took the view that storing those data and allowing the authorities to access those data constitutes a wide ranging and particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data, a right specifically protected by the European Charter of Fundamental Rights. Furthermore, the storage and potential subsequent use of metadata without the user being informed is likely to generate in the persons concerned a feeling that their private lives are the subject of constant surveillance [art. 37].

Similarly, the gathering of GPS surveillance information (whether through the surreptitious placement of a GPS device in a suspect’s car, or by obtaining location information through the metadata generated by a mobile phone) has the potential to interfere seriously with the right to privacy, as well as rights to freedom of expression and association. As pointed out in a recent judgement of the United States Supreme Court:

“GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. [...] The Government can store such records and efficiently mine them for information years into the future. ... And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: ‘limited police resources and community hostility.’ ... .

Awareness that the Government may be watching chills associational and expressive freedoms. And the Government’s unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may ‘alter the relationship between citizen and government in a way that is inimical to democratic society’.”<sup>51</sup>

<sup>50</sup> Court of Justice of the European Union, Judgement in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and others*, Judgement of 8 April 2014, paras. 26–27.

<sup>51</sup> Supreme Court of the United States of America, *United States v. Jones*, 132 S.Ct. 945 (2012), Concurring Opinion of Justice Sotomayor, art. 955–956.



## Case studies regarding electronic surveillance

### The *Uzun* case<sup>a</sup>

Mr. Uzun was suspected of involvement with a terrorist group and a criminal investigation had been launched into charges that he, together with an accomplice, had participated in a number of bomb attacks designed to kill members of the public. The investigation by German police into the activities of the applicant involved surveillance and the use of phone taps and wireless transmitters. When the applicant and his accomplice destroyed the transmitters and stopped using the telephone, a global positioning system (GPS) device was placed in a car which they regularly used. At trial, the GPS evidence was used to corroborate information received through other surveillance methods and Mr. Uzun was convicted of attempted murder and causing explosions. Mr. Uzun submitted that the authorities' use of the GPS had breached his right to privacy in that it had enabled them to draw up a comprehensive pattern of his movements, to share that with third parties, and to initiate further investigations.

ECtHR found that, although the actions of the police had interfered with Mr. Uzun's rights, his rights had not been violated by the placing of the GPS and the collation and storage of information from it.

ECtHR noted that that extensive safeguards were available (and had been properly applied in the instance case) to prevent misuse of the power of surveillance. These included (a) the operation had been subject to judicial supervision throughout; (b) the duration of the operation had to be authorized and approved by a court; (c) an operation involving the tracking of an individual's movements with GPS could only be ordered in relation to a crime of particular gravity; and (d) evidence obtained through use of GPS could be challenged and, if necessary, excluded at trial.

Finally, ECtHR noted that the surveillance measures had been proportionate in that (a) other investigative means had been tried and failed owing to the conduct of the applicant; (b) the investigation was into a serious matter, involving terrorist bombing; and (c) the measures had only been employed for a short period of time.

Given the safeguards and proportionality of the measures applied, ECtHR considered that Mr. Uzun's right to privacy had not been violated.

### The *Escher* case<sup>b</sup>

In the late 1990s social conflict, including disorder and violence, arose out of issues of land reform in Paraná, a municipal state within Brazil. A number of social organizations were involved in campaigning around these issues. The Military Police of Paraná requested that a specific phone number be monitored. Permission was granted by the court. A second request was subsequently submitted in relation to a phone line used by a different organization without any accompanying justification. This was also granted. Subsequently, various recorded conversations between those using the phone line were broadcast on national television.

The case was brought before the Inter-American Court of Human Rights alleging violations of the rights to judicial guarantees, privacy, freedom of association and judicial protection established in the American Convention. In its judgement, the Court emphasized the importance of independent supervision of surveillance. The Court acknowledged that Brazil had a system for judicial authorization of telephone intercepts in place, and that applications had been filed and approved by a judge in the case at hand.



The Court underscored, however, that the judge has a special role to play in dealing with ex parte applications, such as applications for surveillance measures: “In proceedings whose juridical nature requires the decision to be issued without hearing the other party, the grounds and justification must show that all the legal requirements and other elements that justify granting or refusing the measure have been taken into consideration. Hence, the judge must state his or her opinion, respecting adequate and effective guarantees against possible illegalities and arbitrariness in the procedure in question” (art. 139).

In considering the way the Brazilian judge in the case had dealt with the applications submitted by the military police, the Court found that these requirements had not been met: “Contrary to the foregoing, [the judge] authorized the telephone interceptions with a mere annotation that she had received and examined the requests and granted them ... . In her decision, the judge did not explain her analysis of the legal requirements or the elements that caused her to grant the measure, or the way in which the procedure should be carried out or its duration” (art. 140). The Court also found that there had been insufficient safeguards to ensure that the private information was not obtained by third parties.

<sup>4</sup>ECtHR, *Uzun v Germany, Merits*, Application No. 35623/05, Judgement of 2 September 2010.

<sup>5</sup>Inter-American Court of Human Rights, *Escher et al. v. Brazil*, Judgement of 6 July 2009.



Where material is obtained through electronic surveillance in violation of domestic law or otherwise in violation of human rights law, the question of its admissibility as evidence in court arises. This is discussed in chapter 5, section 5.7.6 below.



## Tools

- Council of Europe, Committee of Ministers Recommendation 10 (2005) on Special Investigative Techniques in respect of Serious Crime including Terrorism adopted by the Committee of Ministers on 20 April 2005 is available at: <https://wcd.coe.int/ViewDoc.jsp?id=849269&Site=CM>. There is also an Explanatory Report to the Recommendation providing useful legal analysis: [http://www.coe.int/t/dlapil/codexter/Source/Rec%20\\_2005\\_%2010%20E%20Explanatory%20memorandum.pdf](http://www.coe.int/t/dlapil/codexter/Source/Rec%20_2005_%2010%20E%20Explanatory%20memorandum.pdf).
- For examples of good practice in dealing with the various problems that can arise in the context of electronic surveillance UNODC’s *Current Practices in Electronic Surveillance in the Investigation of Serious and Organized Crime* is available at: [https://www.unodc.org/documents/organized-crime/Law-Enforcement/Electronic\\_surveillance.pdf](https://www.unodc.org/documents/organized-crime/Law-Enforcement/Electronic_surveillance.pdf).
- The UNODC publication *The Use of the Internet for Terrorist Purposes* provides (chapter IV) examples of investigative techniques used in the investigation of terrorism-related internet activities. The publication is available at: [http://www.unodc.org/documents/terrorism/Publications/12-52159\\_Ebook\\_Internet\\_TPB.pdf](http://www.unodc.org/documents/terrorism/Publications/12-52159_Ebook_Internet_TPB.pdf).
- Model legislative provisions, which provide the necessary human rights safeguards in relation to surveillance and the interception of communications are available in the UNODC’s *Manual on Model Legislative Provisions Against Organized Crime*, especially chapter IV. This publication is available at: [https://www.unodc.org/documents/organized-crime/Publications/Model\\_Legislative\\_Provisions\\_UNTOC\\_Ebook.pdf](https://www.unodc.org/documents/organized-crime/Publications/Model_Legislative_Provisions_UNTOC_Ebook.pdf).

- Further examples of model legislation in respect of data gathering and the proper use of electronic surveillance is set out in chapter 4 of UNDOC's *Model Legislative Provisions Against Terrorism* available at: [https://www.unodc.org/tldb/en/model\\_laws\\_treaties.html](https://www.unodc.org/tldb/en/model_laws_treaties.html). Further legislative good practice produced by the Commonwealth Secretariat, is set out in Part IV *Model Legislative Provisions to Combat Terrorism* available at: [https://www.unodc.org/tldb/pdf/Commonwealth\\_modellaw\\_terr.pdf](https://www.unodc.org/tldb/pdf/Commonwealth_modellaw_terr.pdf).
- In resolution 68/167 on the "Right to privacy in the digital age", the General Assembly requested that OHCHR prepare a report on the right to privacy in the digital age. It is to examine, in the words of the resolution: "the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or interception of digital communications and collection of personal data, including on a mass scale". OHCHR has invited international organizations, all United Nations Member States, and civil society organizations to make submissions on this topic. The submissions received by OHCHR are publicly available at: <http://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx>.

### 3.7.3 Protection of personal information gathered through surveillance, interception of communications and other investigative measures

The General Assembly resolution on the "Right to privacy in the digital age" expresses its concern about the impact the mass collection and retention of communications data and other personal records may have on the enjoyment of human rights and fundamental freedoms.

Information such as records of public housing agencies and other social service providers, universities, immigration offices and labour market services, are obtained and stored by those collecting them for purposes that are not related to the prevention or investigation of terrorist activities. Law enforcement and other agencies involved in counter-terrorism efforts have, however, shown interest in these data sets for purposes of so-called "dragnet investigations", which raise delicate human rights questions, as illustrated by the following case.



#### Case study. German Constitutional Court decision regarding dragnet investigations<sup>a</sup>

Following the 11 September 2001 attacks with airplanes on targets in the United States of America, the German police authorities launched a sweeping dragnet investigation aimed at the identification of terrorist "sleeper cells" in Germany. The police obtained from universities, colleges, immigration offices and other private and public entities holding such information data sets about several hundred thousand individuals. This information was then screened automatically with regard to certain criteria such as male gender, age between 18 and 40, Islamic religious affiliation, country of origin with a predominantly Islamic population. The names of all the persons fulfilling such criteria were collected in a file (the so-called "sleeper" file) and subsequently matched with the register of persons holding licences to fly airplanes, with the aim to then initiate further investigation. This effort is not known to have resulted in the exposure of a potential terrorist, nor in any charges of membership in a terrorist organization being brought.

A 28-year-old Moroccan man of Islamic faith attending university in Germany filed a complaint before the Federal Constitutional Court. The Court noted that each individual piece of information gathered had relatively limited relevance to the right to privacy. However, the covert nature of the collection of this information and the stigmatizing effect of the criteria used (the religious profiling which resulted in only information on persons of Islamic faith being collected) meant that a very

strong justification would be needed for the mass data collection and screening. The Court noted that a situation of very specific heightened threat of a terrorist attack could have justified such measures. The general situation of heightened threat perceived in Germany following 11 September 2001, however, was not a sufficient justification.

<sup>a</sup>*Bundesverfassungsgericht* (BverfG—Federal Constitutional Court) of 4 April, 2006 (1 BvR 518/02).

Public authorities involved in the prevention and investigation of acts of terrorism and potential terrorist conspiracies have also shown great interest in ensuring that the records generated by communications service providers (e.g. public and private companies providing telecommunications and Internet services) are available to them for the purpose of the prevention, investigation and prosecution of serious crime, including terrorism. The technology available in the digital age makes it possible to retain such data for all users of a communications service, raising issues related to the protection of the right to privacy and other rights that are quite different from those arising in the context of the “traditional”, individually targeted tapping of telephone communications.



### Case study. ECJ judgement on the European Data Retention Directive<sup>a</sup>

In 2006, the European Union adopted legislation (the Data Retention Directive) intended to harmonize member States’ provisions concerning the retention of data which are generated or processed by providers of communications services. The Directive provides that the service providers must retain traffic and location data as well as related data necessary to identify the subscriber or user for all fixed telephony, mobile telephony, Internet access, Internet e-mail and Internet telephony traffic. By contrast, it does not permit the retention of the content of the communication or of information consulted. The Data Retention Directive was challenged before the Court of Justice of the European Union (CJEU) as a disproportionate interference with the right to privacy.

The CJEU observed that, while the Directive does not permit the acquisition of knowledge of the content of the electronic communications as such, the collection and retention of traffic and location metadata constitutes a serious interference with the right to privacy (this aspect of the judgement is summarized above in section 3.7.2).

The CJEU then proceeded to examine this interference with the right to privacy in the light of the requirements of a legitimate aim and of proportionality. It noted that the purpose of the retention of the data is their possible transmission to the competent national authorities for the investigation, prosecution and adjudication of serious crime, which genuinely satisfies an objective of general interest [art. 41].

Although the retention of the data was thus justified by a legitimate aim, the CJEU concluded that it was not sufficiently circumscribed to be considered strictly necessary, and therefore failed the proportionality test and constituted a violation of the right to privacy. The reasons for this finding included that:

- The Directive failed to lay down objective criteria which would ensure that the competent national authorities have access to the data and can use them only for the purposes of prevention, detection or criminal prosecutions concerning offences that may be considered to be sufficiently serious to justify such an interference [art. 61].

- Regarding the duration of data retention period, the Directive imposed a minimum retention period of at least six months and a maximum of 24 months. It failed, however, to provide objective criteria on the basis of which the period of retention must be determined in order to ensure that it is limited to what is strictly necessary [art. 64].
- The Directive does not provide for any exception, with the result that it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy [art. 58].

Finally, the Directive did not provide for sufficient safeguards to ensure effective protection of the data against the risk of abuse and against any unlawful access and use of the data [art. 66].

<sup>a</sup>Court of Justice of the European Union, Judgement in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and others*, Judgement of 8 April 2014.



### Further reading

The United Nations Special Rapporteur on the Protection of Human Rights while Countering Terrorism, has produced a report on the protection of privacy in counter-terrorism efforts. See *Report of the Special Rapporteur on the Protection of Human Rights while Countering Terrorism*, 28 December 2009 A/HRC/13/37, is available at: <http://www.ohchr.org/EN/Issues/Terrorism/Pages/Issues.aspx>.



### Assessment questions

- What obligations does the presumption of innocence create for public officials with regard to media coverage of a terrorism investigation and trial?
- Why is the right to legal assistance at the pretrial stage essential to the protection of the right to a fair trial? What other rights are protected by ensuring prompt access to legal assistance as soon as a terrorism suspect is arrested or, in case no arrest is made, as soon as a suspect is charged?
- What are the authorities' obligations with regard to legal assistance for a terrorism suspect who does not request the assistance of a lawyer or who cannot afford the services of a defence lawyer?
- List five measures criminal justice system authorities (legislators, judges, prosecutors, administrators of places of detention) should adopt to reduce the likelihood of the use of torture or inhuman or degrading treatment to compel confessions from terrorism suspects.
- What are the essential requirements a warrant authorizing interception of a terrorism suspect's telephone must satisfy in order to be legitimate under international human rights law?
- Discuss the conditions for the legitimate use of participating informants in a criminal investigation into the activities of a terrorist cell? If the investigators intend to subsequently use the participating informant as a witness at trial, what should they pay attention to?

## 4. THE DETENTION OF TERRORIST SUSPECTS

### 4.1 Introduction

Detention of one form or another often forms a central element of States' criminal justice response to terrorism. Imprisonment is by far the most frequent sanction for persons found guilty of terrorism offences. Detention prior to conviction may be used to prevent a suspect facing trial absconding, intimidating witnesses or otherwise tampering with the evidence. Detention is sometimes used outside the context of the criminal justice process, as a security measure, to protect the public or national security by controlling or limiting an individual's movements. Detention is also used to secure the presence of a person subject to extradition proceedings. In all these circumstances, the scope for the misuse of the power to detain is significant and the consequences for the individual of such misuse substantial. For this reason, international human rights law carefully limits the extent to which an individual may be deprived of his or her liberty and subjects it to procedural safeguards. The limits of the power to detain, and safeguards controlling its permissible use, will be explored in the present chapter. Chapter 6 deals with additional human rights questions relating to the imprisonment of terrorist offenders following conviction and the imposition of a custodial sentence.

### 4.2 Detention and human rights: overview

The right to liberty is protected in all of the major international and regional conventions on civil and political rights. Article 9(1) of the International Covenant on Civil and Political Rights reads as follows: "[e]veryone 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 procedures as are established by law." Protection against unlawful and arbitrary deprivation of liberty also takes a prominent role in the regional human rights treaties. Alongside the jurisprudence developed by human rights courts, tribunals and supervisory mechanisms in relation to the right to liberty, various bodies of principles also assist in the implementation of the right to liberty. At the United Nations level, these include the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, the Standard Minimum Rules for the Treatment of Prisoners, the Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders.



### Arrest, detention, deprivation of liberty and restrictions on freedom of movement

The terms “arrest” and “detention” carry slightly different meanings from one legal system to the other. Human rights treaties use the concept of “deprivation of liberty” as the overall concept. Examples of “deprivation of liberty” include, for instance, police custody, remand detention, imprisonment after conviction, house arrest, involuntary hospitalization, internment of captured combatants or civilians during armed conflict, and also include being involuntarily transported.

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the United Nations General Assembly (A/RES/43/173) defines “arrest” as “the act of apprehending a person for the alleged commission of an offence or by the action of an authority”. A “detained person” is defined as “any person deprived of personal liberty except as a result of conviction for an offence”. The Body of Principles defines “imprisonment” as deprivation of liberty as a result of conviction for an offence.

For the sake brevity, in this publication the term “detention” will be used to refer to all forms of deprivation of liberty, in the context of criminal justice and outside, from the moment of arrest to (and including) the serving of a sentence of imprisonment. This corresponds to the use of the term by the United Nations Working Group on Arbitrary Detention.

In addition to the right to liberty of person, international human rights law also protects liberty of movement. Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. International human rights law (e.g., article 12 of ICCPR) authorizes the State to restrict freedom of movement to protect national security, public order, public health or morals and the rights and freedoms of others. To be permissible, restrictions must have a basis in law, must be necessary in a democratic society for the protection of these purposes, and must be consistent with all other rights recognized in the Covenant. There is no bright line criterion to distinguish limitations on freedom of movement from “deprivation of liberty”, but deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement.

## 4.3 Use of force to effect an arrest or in detention

Law enforcement officials are permitted to use force in order to carry out an arrest. Such use of force must meet the twin requirements of “necessity” and “proportionality”. In the words of article 3 of the Code of Conduct for Law Enforcement Officials (A/RES/34/169) adopted by the General Assembly, “[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”

Regarding the use of firearms, the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials state that “[l]aw enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, *and only when less extreme means are insufficient to achieve these objectives*. In any event, *intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life*.” (principle 9, emphasis added). The Basic Principles add that “[e]xceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles” (principle 8).

Where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue of torture or inhuman or degrading treatment arises.<sup>52</sup> The burden of proof is on the authorities to explain and justify any injuries sustained. For this reason, keeping careful records (as explained in section 4.4.3) in relation to those in detention is crucial. Medical examination of those detained is important both to prevent abuse and also to protect the officials involved in detention against false allegations (see section 4.4.8). Any injuries suffered by an individual in detention must be fully investigated and, if necessary, criminal proceedings brought against those responsible, as set forth in chapter 3 (section 3.5).



### Tools

- The Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979, is available here: [http://www.unodc.org/pdf/criminal\\_justice/Code\\_of\\_Conduct\\_for\\_Law\\_Enforcement\\_Officials\\_GA\\_43\\_169.pdf](http://www.unodc.org/pdf/criminal_justice/Code_of_Conduct_for_Law_Enforcement_Officials_GA_43_169.pdf).
- The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, are available here: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>.
- The Special Rapporteur on extrajudicial, summary, or arbitrary executions has submitted to the General Assembly a report analysing the international standards applicable to the use of lethal force by law enforcement officers (A/61/311, paras. 33–45). The report can be of assistance in distinguishing the proportionality criterion from the necessity criterion and to fully evaluating the contribution each of the two safeguard makes.



### Further reading

The OSCE/ODIHR publication *Human Rights in Counter-Terrorism Investigations. A Practical Manual for Law Enforcement Officers*, sections 3.2 and 3.3, provides additional guidance and case studies on the use of force in effecting arrest and on body searches. It is available here: <http://www.osce.org/odihr/108930>.

## 4.4 Arrest and detention: general requirements and safeguards

International human rights law imposes a number of obligations in relation to the arrest and detention of any individual, whether in the context of criminal justice proceedings or in other circumstances.

### 4.4.1 Legality and non-arbitrariness

Arrest and detention of any individual must satisfy the requirements of legality and non-arbitrariness.

<sup>52</sup> ECtHR, *Selmouni v. France*, Application No. 25803/94, Judgement of 28 July 1999, para. 87.

## Legality

The arrest and detention of an individual must be authorized by domestic law. Domestic law must be sufficiently precise to ensure that all those affected by its application can foresee the circumstances in which they may be lawfully arrested or detained, and the remedies available against deprivation of liberty, if need be with appropriate advice.



### Case study. The *Nasrulloev* case<sup>a</sup>

Mr. Nasrulloev was a Tajik citizen who had fled to the Russian Federation. The Tajikistan Prosecutor General's Office charged him with, among other offences, participation in an armed group with a view to attacking Government institutions, subversive activities, high treason and conspiracy to seize State power, and sought his extradition from the Russian Federation. Mr. Nasrulloev was arrested in Moscow and detained for more than three years before the Supreme Court of the Russian Federation finally refused the extradition request.

In its decision in the *Nasrulloev* case, ECtHR found that Russian law regulating the detention of persons with a view to extradition lacked sufficient legal certainty. ECtHR noted that different domestic authorities adopted different positions as to the law applicable to those detained while facing extradition. In particular, ECtHR found insufficient certainty as to the time limits applicable under Russian law. ECtHR found [art. 77] that "[t]he provisions ... governing detention of persons with a view to extradition were neither precise nor foreseeable in their application and fell short of the 'quality of law' standard required under the Convention". Therefore, ECtHR concluded that detention was in violation of the right to liberty.

<sup>a</sup>ECtHR, *Nasrulloev v. Russia*, Application No. 656/06, Judgement of 11 October 2007.

Even where the legal basis for detention is clear, the law must not confer overbroad discretion on police officers or other public officials as to the way in which it can be exercised. In its Concluding Observations on Trinidad and Tobago (2000), the Human Rights Committee stated:

"The Committee is concerned about chapter 15-01 of the Police Act which enables policemen to arrest persons without a warrant in a large number of circumstances. Such a vague formulation of the circumstances in the Act gives too generous an opportunity to the police to exercise this power."<sup>53</sup>

Thus, even where the general legal basis for detention is clear, the law must provide a reasonably precise framework within which decisions to detain can be exercised.

## Requirement of non-arbitrary detention, reasonableness and necessity of detention

The requirement that detention not be arbitrary has a number of implications for the circumstances in which it is permissible to detain an individual. First, even if authorities have complied with the letter of national law, detention will be arbitrary where they have acted in bad faith, for instance, detaining a person on specious grounds of mental health in order to subsequently enable extradition for criminal offences. Second, detention must pursue a proper purpose (such as to prevent tampering with the evidence, including influencing witnesses, to

<sup>53</sup> Concluding observations of the Human Rights Committee, Trinidad and Tobago (CCPR/CO/70/TTO), 3 November 2000.



prevent flight, for purposes of punishment after a finding of guilt) and must be necessary in order to pursue that aim. Procedural safeguards must be in place to prevent the arbitrary exercise of the power of arrest or detention.

- Judicial oversight and prompt access to courts to challenge lawfulness of detention
- A requirement as to the threshold that must be met (such as reasonable suspicion) before the power to detain can be exercised
- Reasons for detention, of which the detainee is informed at the point of detention
- Time limits on the period during which an individual can be lawfully detained before review of detention is necessary
- Access to a lawyer
- Records as to the place, time, whereabouts and reasons for detention as well as records as to the circumstances and conditions of detention

In addition, the exercise of the power to arrest or detain must be reasonable in the circumstances. In the *Mukong* case the Human Rights Committee explained that “arbitrariness is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law”.



### Case study. The *Mukong* case<sup>9</sup>

Albert Mukong was arrested and detained for several months on charges of “intoxication of the national and international public opinion” (art. 2.6) following an interview with a British television company in which he criticized the Cameroonian government. He claimed that his arrest and detention were arbitrary. The Government of Cameroon claimed that the arrest had been carried out in accordance with its domestic law. It sought to justify its actions on grounds of national security and public order, by arguing that Mr Mukong had exercised his right to freedom of expression without regard to the country’s political context and high level of instability.

The Human Rights Committee found that Cameroon had violated article 9(1) of ICCPR in that the author’s detention “was neither reasonable nor necessary in the circumstances of the case”. Cameroon had not shown that the detention was “necessary ... to prevent flight, interference with evidence or the recurrence of crime”. As regards the government’s wider justification for arrest—the degree of instability facing the State—the Committee was of the view that “the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights”. The Committee concluded that Mr Mukong’s right to liberty had been violated.

<sup>9</sup>Human Rights Committee, *Mukong v. Cameroon*, Communication No. 458/1991, Views of 21 July 1994.

That detention can be “arbitrary” even if it does not violate domestic legislation is also reflected in the methods of work of the United Nations Working Group on Arbitrary Detention. These identify three categories of arbitrary deprivation of liberty: (a) detention without any legal basis; (b) when the total or partial non-observance of the international norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty an arbitrary character; and (c) when the deprivation of liberty results from the exercise of the rights or freedoms of religion, expression, assembly or association, or is in violation of the right to equality before the law.



## Tools

Information on the mandate and activities of the United Nations Working Group on Arbitrary Detention (WGAD) is available at: <http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx>. The web page also contains a searchable database of the opinions issued by the WGAD in individual cases, many of which deal with terrorism-related detention.

### 4.4.2 The right to be informed of reasons for arrest

According to article 9(2) of ICCPR, “[a]nyone 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”.

Article 9(2) of ICCPR imposes two requirements for the benefit of persons who are deprived of liberty. First, they shall be informed, at the time of arrest, of the reasons for the arrest. This requirement applies broadly to the reasons for any deprivation of liberty, also outside the context of criminal justice. Secondly, those charged with an offence, shall be promptly informed of any charges against them. This second requirement will be examined below, in the context of the safeguards specific to detention in criminal justice proceedings.

One major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded. The reasons must include not only the general legal basis of the arrest, but enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim. Oral notification of reasons for arrest satisfies the requirement. The reasons must be given in a language that the arrested person understands. Ordinarily this information must be provided immediately upon arrest. In exceptional circumstances, such immediate communication may not be possible. For example, a delay of several hours may be required before an interpreter can be present.

### 4.4.3 Maintaining records about arrest and detention

The authorities in charge of arrest and detention must maintain accurate and up-to-date records regarding all persons deprived of their liberty. This is crucial to safeguard the rights and the well-being of detainees, including to protect them against torture, other ill-treatment, and the risk of disappearances. It is equally crucial to protect the officials in charge of arrest and detention against false allegations of wrongdoing.

Principles 12 and 23 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (A/RES/173) provides that the records kept shall comprise:

- The reasons for the arrest
- The time of the arrest and the taking of the arrested person to a place of custody
- The identity of the law enforcement officials concerned
- Precise information concerning the place of custody

- The time of the arrested person's first appearance before a judicial or other authority
- The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present

These records shall be communicated to the detained person or his counsel upon request.



### Registration of detainees under the United Nations Convention on Enforced Disappearance

The recent United Nations Convention for the Protection of All Persons from Enforced Disappearance (CED), which is a binding instrument for the growing number of States who ratify it or accede to it, reaffirms the importance of record-keeping in places of detention as an essential measure to prevent serious human rights violations.

Article 17 (3) of CED sets out an obligation of registration, detailing what this obligation entails. It states:

“Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:

- (a) The identity of the person deprived of liberty;
- (b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
- (c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
- (d) The authority responsible for supervising the deprivation of liberty;
- (e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
- (f) Elements relating to the state of health of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;
- (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.”

Articles 18 to 20 of CED provide that each State shall guarantee access to this information (with certain restrictions spelled out in these articles) “to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel”.

#### 4.4.4 Informing detainees of their rights

Principle 13 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (A/RES/173) provides that “[a]ny person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights”. Indeed, in the case of many persons arrested or detained, all other rights and safeguards will not be effective in practice, but remain illusory, unless they are provided with information on their rights, in a language they understand.



#### Practical guidance

It is advisable to have an information sheet explaining in simple terms the basic rights of any person taken into police custody available in every police station. Where it is likely that detainees may not speak the official language, it is advisable to have the information sheet available in the languages most likely to be understood by detainees. In the report on its visit to Sweden, the Sub-Committee on Prevention of Torture (SPT) stated:

“The provision of information on rights is an important safeguard as well as a prerequisite for effective exercise of due process rights and the prompt production of the person concerned before a judge. The SPT emphasizes the duty of the Swedish authorities to ensure that all persons obliged to stay with the police are made aware of their basic rights as well as of all the relevant procedural rights that such persons may exercise at this stage of the proceedings. The SPT also stresses the obligation on the part of the police to assist in the exercise of all such rights as from the very outset of deprivation of liberty.

The SPT recommends that the information sheet listing the rights of the persons obliged to stay with the police be finalized as soon as possible and distributed to all police stations. Information on rights should be given orally for persons who do not know how to read and through interpretation for persons who do not have sufficient knowledge of any of the languages in which the written version is produced.”<sup>a</sup>

<sup>a</sup>Report on the visit of the Sub-Committee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment to Sweden, CAT/OP/SWE/1, paras. 48–49.



#### Tools

- The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (A/RES/173), is available here: <http://www.un.org/documents/ga/res/43/a43r173.htm>.
- The Convention for the Protection of All Persons from Enforced Disappearance, is available here: <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>.



### Activities

- What legislation or regulations applicable in your jurisdiction establish what records must be kept about detainees in places of detention? Does this legislation apply to all places of detention and all authorities with power to detain?
- Compare the information that is recorded in places of detention in your jurisdiction with the requirements of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and of the Convention on Enforced Disappearance. Is there any information required by these international instruments that is not recorded in your jurisdiction? If so, why is that information important?
- On what legal grounds can the police, other law enforcement bodies and other authorities deprive people suspected of involvement in terrorism of their freedom in your legal system?
- How are persons arrested and detained in your jurisdiction informed of their rights?

#### 4.4.5 Right to consult with legal counsel

All persons deprived of their liberty are entitled to communicate and consult with legal counsel without delay. They must be given adequate time to consult with legal counsel in full confidentiality. Where a detainee does not have the means to pay for legal counsel, legal aid must be available. As provided by principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, “the right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality with his legal counsel, may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order”.



The right to be assisted by legal counsel is discussed in more detail in chapter 3, section 3.4.1, which also provides case studies and reference materials.

#### 4.4.6 Notification of the detainee’s family

“Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody” (principle 16 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment). The Body of Principles recognizes that the “competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require” (principle 16(4)).



### Case study. Incommunicado detention of terrorism suspects in Spain

Under article 520 *bis* of the Spanish Criminal Procedure Code, a person apprehended on suspicion of terrorist offences could be detained for up to five days without having the right to have the very fact and place of his detention disclosed to his family or a third party. This incommunicado detention was ordered by a judge upon application from the law enforcement agency. Also access to legal counsel of his choice could be denied for up to five days (a lawyer was, however, officially appointed to assist the detainee).

The European Committee for the Prevention of Torture (CPT) accepted that the needs of the investigation may justify the withholding of information about the fact of someone's detention and the place where he is being held for a brief period of time. It remarked, however, that "the possibility under the law of withholding this information for several days (up to five days in certain cases) indicates that a proper balance has not been struck between the requirements of investigations and the interests of detained persons". The CPT recommended that this period of incommunicado detention be shortened substantially.<sup>a</sup>

Also the United Nations Special Rapporteur on human rights and counter-terrorism noted in his report on a visit to Spain (A/HRC/10/3/Add.2, para. 15) that "this regime is on its own highly problematic and both provides a possibility for the commission of prohibited treatment against the detainee and makes it difficult for Spain to defend itself against allegations of such treatment".

See more on incommunicado detention in section 4.7.3 below.

<sup>a</sup>European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report to the Spanish Government on the visit to Spain carried out by the Committee from 1 to 12 April 1991, para. 47.

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment further states (principle 15) that communication of the detainee with his family shall not be denied for more than a matter of days. Note the distinction between notification of the family or other appropriate persons of the detainee's choice by the authorities, which must be "promptly after arrest" and after each transfer, and communication between the detainee and his family, which can be delayed for a few days.

#### 4.4.7 Right to consular assistance

In recognition of the particular vulnerability of persons detained outside their home country, most counter-terrorism instruments enshrine a right to consular assistance (applying to the counter-terrorism context a general principle codified in article 36 of the Vienna Convention on Consular Relations of 1963). Article 7 of the 1997 Convention for the Suppression of Terrorist Bombings, for instance, provides:

"3. Any person [detained for the purpose of prosecution or extradition or otherwise subject to measures to ensure his attendance] shall be entitled to:

- (a) communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;

- (b) be visited by a representative of that State;
- (c) be informed of that person's rights under subparagraphs (a) and (b)."

#### 4.4.8 Medical examination and access to medical care

"A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge." (principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment).

Medical examination of a detainee as promptly as possible after his admission to the place of detention is essential not only for the protection of the welfare of detainees, but also to protect those detaining them. It assists in ensuring that unmeritorious claims of ill treatment can readily be disproved. As explained in chapter 3 (section 3.5) in the context of the prevention of torture and other ill-treatment, where a person deprived of liberty is found to be injured, the burden is on the authorities to prove that they are not responsible for the injuries.

The medical examination of the detainee ought to be conducted out of hearing from those responsible for the detention. Attention must be paid to the gender of the examining medical officer. Medical details of detainees must be stored in circumstances that ensure their confidentiality, allowing access to such records by medical professionals, the detainee, his lawyer and family with the consent of the detainee, but preventing unauthorized access by officials other than those for whom access is necessary in the discharge of their functions.

Failure to provide medical treatment to a detained prisoner may amount to inhuman or degrading treatment. In the *Lantsova* case,<sup>54</sup> a young man in pretrial detention died of acute pneumonia leading to cardiac insufficiency. The poor conditions of detention, including overcrowding, poor ventilation, inadequate food and hygiene, contributed to the fatal deterioration of Mr. Lantsov's health. Mr. Lantsov received medical care only during the last few minutes of his life. It remained unclear whether the authorities had previously refused medical care, or whether Mr. Lantsov had not requested care. The Human Rights Committee noted that "even if ... neither Mr. Lantsov himself nor his co-detainees had requested medical help in time, the essential fact remains that the State party by arresting and detaining individuals takes the responsibility to care for their life. It is up to the State party by organizing its detention facilities to know about the state of health of the detainees as far as may be reasonably expected. Lack of financial means cannot reduce this responsibility. The Committee considers that a properly functioning medical service within the detention centre could and should have known about the dangerous change in the state of health of Mr. Lantsov. It considers that the State party failed to take appropriate measures to protect Mr. Lantsov's life during the period he spent in the detention centre. Consequently, the Human Rights Committee concludes that, in this case, there has been a violation of [the right to life]." (para 9.2).

<sup>54</sup> Human Rights Committee, *Lantsova v. The Russian Federation*, Communication No. 763/1997, Views of 26 March 2002.



## Tools

- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by United Nations General Assembly in Resolution 43/173 (1988) available at: <http://www.un.org/documents/ga/res/43/a43r173.htm>.
- The African Commission on Human and People’s Rights adopted the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, <http://www.achpr.org/instruments/ouagadougou-planofaction/>. The *Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa* adopted by the African Commission on Human and People’s Rights encourage as a best practice to link the health care for prisoners to the country’s ministry of health.
- In its 23rd General Report, paras. 71-84, the European Committee for the Prevention of Torture sets out the standards which it has developed as regards the documenting and reporting of medical evidence of ill-treatment: <http://www.cpt.coe.int/en/annual/rep-23.pdf>.



## Activities

- What are the rules applicable to notification of a detainee’s family upon arrest or transfer from one place of detention to another in your legal system, and regarding communication between a terrorism suspect and his family? Compare these rules to the international standards explained above.
- Have you been involved in cases concerning the detention of foreign terrorism suspects? How was their right to consular assistance handled?
- What are the rules governing the medical examination of detainees upon arrest or transfer from one place of detention to another in your legal system? Are these rules adequate to ensure that false claims of ill-treatment can be disproved, and to identify those responsible for ill-treatment which actually occurred?

### 4.4.9 Right to challenge the lawfulness of detention

Anyone who is deprived of liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful (ICCPR, article 9(4)). In many jurisdictions, this right is known as habeas corpus.

This right applies to all persons deprived of their liberty, whether as part of criminal justice proceedings, or military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition. It also entitles persons held in solitary confinement to challenge the lawfulness of their confinement.

#### *Decision without delay*

The right to challenge the lawfulness of detention will remain ineffective in practice if the competent court does not render a decision “without delay”.





### Case study. The *Torres* case<sup>3</sup>

Mr. Torres, a Spanish citizen who had been previously detained in France and Spain because of involvement in terrorist activities, applied for asylum in Finland. The Finnish authorities detained him under the Finnish Aliens Act and subsequently rejected his application for asylum. Thereafter, Spain requested his extradition, and the legal basis of his detention changed from immigration detention to extradition detention.

During the first seven days of immigration detention, the Finnish Aliens Act only allowed the detainee to appeal to the Minister of Interior, and not to a court. Moreover, when Mr. Torres appealed against a decision by the Minister of Interior to extend his detention for another seven days, the administrative court took three months to decide on his appeal.

The Human Rights Committee noted that this case raised two issues under article 9(4) of ICCPR. First, it found that a delay of seven days before Mr. Torres could start proceedings before a court to have the lawfulness of his detention reviewed was excessive (art. 7.2). Second, regarding the three months it took the administrative court to decide on the lawfulness of Mr. Torres' detention, HRC took the view that "this period is in principle too extended" (art. 7.3). It did not rule out, however, that good reasons could justify a three-month delay.

<sup>3</sup>Human Rights Committee, *Torres v. Finland*, Communication No. 291/1988 (CCPR/C/38/D/291/1988) 5 April 1990.

### *Fair proceedings*

Proceedings concerning the lawfulness of detention must have judicial character, be fair and ensure "equality of arms" between the parties.<sup>55</sup> This does not mean that all guarantees of a fair trial as set forth in article 14 of ICCPR and corresponding provisions in regional treaties must be fully ensured in all cases. For instance, whether it will be necessary for the court to hold an oral hearing and hear witnesses will depend on the type of detention in question and its duration.

Where a person in detention has no access to legal assistance, whether because it is denied by the authorities or because the detainee has insufficient means and no legal aid is available, this will often mean that, in practice, the detainee has no means of challenging the decision to detain him. In the *Berry* case,<sup>56</sup> Mr. Berry was in remand detention on murder charges. The Human Rights Committee found that, although the Mr. Berry had, theoretically, available to him the possibility of applying for judicial review of his detention (the writ of habeas corpus), in practice he could not make any such application without legal assistance which had not been made available to him. The Committee concluded that there had been a violation of the right to challenge the lawfulness of detention.

Incommunicado detention (see section 4.7.3) often renders it impossible in practice for the detainee to challenge the lawfulness of detention. This is one of the reasons why the Human Rights Committee has called on States to abolish incommunicado detention.

<sup>55</sup> ECtHR, *A. and others v. the United Kingdom*, Application No. 3455/05, Judgement of 19 February 2009, paras. 203–204.

<sup>56</sup> Human Rights Committee, *Berry v. Jamaica*, Merits, Communication No. 330/1988 (CCPR/C/50/D/330/1988), 26 April 1994.

Where persons are detained on suspicion of involvement with terrorism, the authorities might perceive a need not to disclose to the detainee some of the grounds and documents on which the suspicions are based. In other words, the authorities might seek to rely on “secret evidence” to justify the detention. As will be explored in the context of the right to a fair trial (chapter 5, sections 5.7.4 and 5.7.5), the right to a fair trial requires disclosure of all material evidence in possession of the prosecution, both for and against the accused. Sometimes it might, however, be necessary to withhold certain evidence from the accused on grounds of witness protection, of national security, or of other public-interest grounds. The same applies in proceedings concerning the lawfulness of detention (habeas corpus proceedings). A fair balance between the authorities’ interest in keeping information from the detainee and the detainee’s right to be in a position to effectively challenge his detention must be struck, as illustrated by the following case study.



### Case study. The *A. and others* case<sup>a</sup>

Following the terrorist attacks on the United States of America of 11 September 2001, the United Kingdom adopted legislation allowing the arrest and extended detention without charges of foreign nationals on the basis of a “certificate” issued by a government minister to the effect that the detainee was an “international terrorist”. A. and the other men in this case were detained under this administrative detention scheme for three-and-a-half years.

The “certificate”, and therefore the administrative detention based on it, was subject to review by a Special Immigration Appeals Court (SIAC). In determining whether the government minister had had reasonable grounds for suspecting that the detainees were “international terrorists” whose presence in the United Kingdom gave rise to a risk to national security, SIAC used a procedure which enabled it to consider both evidence which could be made public (“open material”) and sensitive evidence which could not be disclosed for reasons of national security (“closed material”). The detainee and his legal representatives were given the open material and could comment on it in writing and at a hearing. The closed material was not disclosed to the detainee or his lawyers but to a “special advocate”, appointed on behalf of each detainee by the authorities. In addition to the open hearings, SIAC held closed hearings to examine the secret evidence, where the special advocate could make submissions on behalf of the detainee. However, once the special advocate had seen the closed material he could not have any contact with the detainee or his lawyers, except with the leave of the court. The special advocate could therefore not consult the detainee about any of the allegations contained in secret evidence.

ECtHR examined whether this procedure met the requirements of procedural fairness and “equality of arms”. ECtHR took as its starting point that there was an urgent need to protect the population of the United Kingdom from terrorist attacks, and a strong public interest in obtaining information about al-Qaeda and its associates and in maintaining the secrecy of the sources of such information (art. 216). Balanced against this public interest was the right of the detainees to procedural fairness. ECtHR maintained that “in view of the dramatic impact of the lengthy—and what appeared at that time indefinite—deprivation of liberty on the [detainees’] fundamental rights” (art. 217), fair-trial guarantees had to be substantially respected. “[I]t was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others.” (art. 218).

ECtHR noted that SIAC, as a fully independent court which could examine both the “open material” and the “closed material” was best placed to ensure that no material evidence was unnecessarily withheld from the detainees. The special advocates could provide an important, additional safeguard (art. 219).

ECtHR found that, in the end, the decisive question to establish whether there had been a fair procedure was whether the detainee “was provided with sufficient information about the allegations against him to enable him to give effective instructions to [his representative and] the special advocate” and to refute the allegations (art. 220). This was to be assessed on a case-by-case basis.

Where, for example, it was alleged that a detainee had attended a terrorist training camp, if the open material contained specific details about the dates and locations of the alleged training, that should have enabled the detainee to provide an alibi, even if the source of the allegation and other details were not disclosed to him. The same applied to allegations that a detainee had met on a specific date with a specific named terrorist (art. 220–222).

On the other hand, in the case of one of the men the open material included evidence that he had been involved in raising money through fraud. However, the evidence which allegedly provided the link between the money raised and terrorism was not disclosed to the detainee. In these circumstances, ECtHR concluded that, even with the assistance of the special advocate, the detainee was not in a position to effectively challenge the allegations against him. The right to challenge the lawfulness of his detention was violated (art. 223).

<sup>57</sup>ECtHR, *A. and others v. the United Kingdom*, Application No. 3455/05, Judgement of 19 February 2009. This case is also discussed in chapter 1 (section 1.6.5) from the point of view of the permissibility of the derogation in times of emergency sought by the United Kingdom.

## 4.5 Arrest and detention in the criminal justice context

There are a number of specific safeguards applying to detention in the context of criminal justice processes, given the risks of individuals being detained unnecessarily or unreasonably through operation of criminal enforcement powers.

### 4.5.1 The requirement of reasonable suspicion

Where an individual is detained in connection with a criminal charge there must exist “reasonable suspicion” that that individual has committed the offence. It is not sufficient for an arresting officer genuinely to believe that an individual may be responsible for a criminal act. In the words of ECtHR, “having a ‘reasonable suspicion’ presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence”.<sup>57</sup> Where a person is arrested and interrogated but subsequently released without being formally charged with an offence and prosecuted, this does not mean that there was no reasonable suspicion justifying the arrest.

### 4.5.2 The right to be promptly informed of any charges

As already mentioned (see section 4.4.2 above), all persons arrested shall be informed, at the time of arrest, of the reasons for the arrest. This requirement applies broadly to the reasons for any deprivation of liberty, also outside the context of criminal justice.

<sup>57</sup> ECtHR, *Fox Campbell and Hartley v. United Kingdom*, Application Nos. 12244/86, 12245/86 and 12383/86, Judgement of 30 August 1990, para. 32.

Where the deprivation of liberty takes place in a criminal justice context, the arrested persons shall be promptly informed of any charges against them.<sup>58</sup> Persons arrested for the purpose of investigating crimes they may have committed, or for the purpose of holding them for criminal trial, must be promptly informed of the crimes of which they are suspected or accused. The arrested person has to be informed “promptly” of any charges, not necessarily “at the time of arrest.” If particular charges are already contemplated, the arresting officer may inform the person of both reasons and charges, or the authorities may explain the legal basis of the detention some hours later.



### Case study. *The Fox, Campbell and Hartley case*<sup>a</sup>

Mr. Fox and Ms. Campbell were stopped at a police and army roadblock in Northern Ireland (which at the time was plagued by numerous terrorist attacks), and taken to a police station for questioning. Twenty-five minutes after their arrival at the police station they were informed that they were arrested under section 11(1) of the Northern Ireland (Emergency Provisions) Act 1978 on suspicion of “being terrorists”. No additional information was given at this time.

About five hours later (in the case of Mr. Fox) and seven hours later (in the case of Ms. Campbell), the police interrogated them with regard to their membership in the Provisional IRA, a terrorist group, and to their involvement in a specific criminal act.

Before ECtHR, Mr. Fox and Ms. Campbell complained that they had not been promptly informed of the reasons for their arrest and the charges against them.

ECtHR noted that the bare indication of the legal basis for the arrest, taken on its own, as it was provided at the time of the arrest, is insufficient for the purposes of providing information on the charges. ECtHR went on to note, however, that the two arrestees were questioned about very specific factual allegations a few hours after their arrest. “There is no ground to suppose that these interrogations were not such as to enable the applicants to understand why they had been arrested. The reasons why they were suspected of being terrorists were thereby brought to their attention during their interrogation.” (art. 41). ECtHR concluded that “[i]n the context of the present case these intervals of a few hours cannot be regarded as falling outside the constraints of time imposed by the notion of promptness” (art. 42).<sup>a</sup>

<sup>a</sup>ECtHR, *Fox Campbell and Hartley v. United Kingdom*, Application Nos. 12244/86, 12245/86 and 12383/86, Judgement of 30 August 1990.



The right to a fair trial also requires that any person charged with an offence be informed of the nature and cause of the charge(s) brought (see chapter 3, section 3.4.2). This fair trial guarantee applies to all persons charged with an offence, whether they are arrested and detained for the purposes of the investigation or remain at liberty. The two rights (in article 9(2) and article 14 of ICCPR) are therefore related, but have a different scope.

<sup>58</sup> To properly apply this provision, it is important to keep in mind that the meaning of “arrest” and “charges” in article 9(2) of ICCPR and other international human rights treaties does not depend on the meaning of these terms in any specific national legal system. For the purposes of article 9(2), “arrest” means the initiation of a deprivation of liberty, regardless of the formality or informality with which the arrest takes place, and regardless of the legitimate or improper reason on which it is based. “Charges” means the offences of which the arrested person is suspected or accused, whether or not these suspicions or accusations have been converted into formal “charges”.

### 4.5.3 The right to be brought promptly before a judge

As regards those charged with a criminal offence, article 9(3) of the International Covenant on Civil and Political Rights provides that “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”. There are four very important elements in this provision:

- (1) “Anyone arrested or detained on a criminal charge” refers to any person arrested or detained on suspicion of criminal activity, whether formal charges have been asserted or not. In the case of *Marques de Morais*, for instance, a journalist was arrested and detained by rapid intervention police and criminal investigators. He was detained and interrogated for forty days before he was charged with defamation of the country’s president and brought before a judge, who ordered his release pending trial. The Human Rights Committee made clear that the right to be brought “promptly” before a judge applied as of the moment of his deprivation of liberty on suspicion of having committed an offence, even though charges were formalized only 40 days later.<sup>59</sup>
- (2) “Prompt” presentation before a judicial officer: In the case of *Marques de Morais*, the Human Rights Committee stated that the “right to be brought ‘promptly’ before a judicial authority implies that delays must not exceed a few days”.<sup>60</sup> For most offences, any delay longer than 48 hours between initial deprivation of liberty and presentation before a judge will be excessive, unless justified by exceptional circumstances. The Human Rights Committee has found that detention for three days prior to presentation before a judicial officer breached the requirement of promptness.<sup>61</sup> A similar approach has been adopted by the European Court of Human Rights and the African Commission on Human and Peoples’ Rights. In all cases, the delays established by domestic law must be respected, also in case they should be stricter than what is required by international standards.

It is accepted that in the case of serious and complex offences, such as many terrorist offences, a delay of more than 48 hours might in some cases be justified. ECtHR holds that in the case of terrorism investigations, a delay of up to four days before a detainee is brought before a judge might be justifiable.<sup>62</sup> Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment.

- (3) The detainee must be brought to appear physically before the judge. Bringing the detainee before the judge is an automatic obligation. It does not depend on the detainee asserting his right to be brought before a judge. The physical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody. It also facilitates immediate transfer to a remand detention centre if continued detention is ordered.

<sup>59</sup> Human Rights Committee, *Marques de Morais v. Angola*, Communication No. 1128/2002 (CCPR/C/83/D/1128/2002), 1 April 2005, para. 6.3.

<sup>60</sup> *Ibid.*, para. 6.3.

<sup>61</sup> Human Rights Committee, *Borisenko v. Hungary*, Communication No. 852/1999 (CCPR/C/76/D/852/1999), 6 December 2002, para. 7.4.

<sup>62</sup> ECtHR, *Brogan and others v. United Kingdom*, Application Nos. 11209/84, 11234/84, 11266/84 and 11386/85, Judgement of 29 November 1988, paras. 61-62.

- (4) Judge or other officer authorized by law to exercise judicial power: The official before whom the detained person is brought must be independent and impartial. In the *Kulomin* case, the pretrial detention of a man charged with murder was repeatedly extended by the public prosecutor (as provided by Hungarian law at the time). The Human Rights Committee emphasized that a public prosecutor lacks the “institutional objectivity and impartiality” required by article 9(2) of ICCPR.<sup>63</sup>



### Case study. The *Yaman* case<sup>a</sup>

Mr. Yaman was a political activist, involved in agitation on behalf of a separatist movement. On 3 July 1995 he was taken into custody by counter-terrorism police officers. As allowed by Turkish law at the time, Mr. Yaman was held for a period of nine days before he was brought before a judge and given the opportunity to challenge the lawfulness of his detention.

ECtHR held [art. 73] that it “has already accepted on a number of occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems. This does not mean, however, that the authorities have *carte blanche* under article 5 of ECHR [the right to liberty] to arrest suspects and detain them in police custody, free from effective control by the domestic courts”. ECtHR recalled that it had earlier held that detention in police custody which “had lasted four days and six hours without judicial control fell outside the strict constraints as to the time laid down by ... the Convention, even though its purpose was to protect the community as a whole against terrorism”.

ECtHR accordingly confirmed its previous case law that more than four days of detention without judicial control are incompatible with the Convention and found a violation of Mr. Yaman’s rights.

<sup>a</sup>ECtHR, *Yaman v. Turkey*, Application No. 32446/96, Judgement of 2 November 2004.



### Activities

- What is the legal time limit within which individuals deprived of their liberty in criminal proceedings have to be brought before a judicial officer in your jurisdiction? Are there special rules applicable to persons suspected of involvement in terrorism offences?
- Are these time limits consistently respected in practice? Are the detained persons always brought in person before the judicial officer? What are the challenges law enforcement and prosecutors face in respecting the statutory time limits?

#### 4.5.4 Remand detention

“It shall not be the general rule that persons awaiting trial shall be detained in custody” (article 9(3), ICCPR). That remand detention is to be the exception rather than the rule is also stated in regional human rights treaties and in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (principle 39). There are two main requirements which must be respected in relation to prisoners remanded in custody awaiting trial:

<sup>63</sup> Human Rights Committee, *Kulomin v. Hungary*, Communication No. 521/1992 (CCPR/C/50/D/521/1992), 16 March 1994, para. 11.3.

- First, the grounds on which a person may be detained prior to trial are limited.
- Second, even where one of these grounds is applicable, the period of time during which a prisoner is held on remand must be reasonable.

Detention pending trial must be based on an individualized determination that it is reasonable and necessary, and that measures alternative to custody (such as a night time curfew, daily reporting to police, the surrender of a passport, or even a so-called “electronic bracelet”) will not be sufficient. International human rights bodies have clearly stated that pretrial detention must not be mandatory for all persons charged with a particular crime. Therefore, a law making pretrial detention mandatory for those charged with terrorism offences is not permissible. In reviewing the situation in Sri Lanka, e.g., the Human Rights Committee observed that the Prevention of Terrorism Act eliminated the power of the judge to order release pending trial. This was found to be incompatible with Sri Lanka’s obligations under ICCPR.<sup>64</sup>

The individualized determination that remand detention is reasonable and necessary concerns at least two elements: first, that there is a reasonable suspicion that the accused has committed an offence; and, second, that there are grounds justifying detention pending trial.

### *Grounds justifying remand detention*

According to most international human rights bodies, there are three main grounds on which remand detention may be justified:

- Risk of absconding
- Risk of the accused interfering with the investigation, e.g. by unduly influencing witnesses or evidence
- Risk of commission of a further offence

Some international bodies have added the preservation of public order as a fourth ground for pretrial detention.<sup>65</sup> The Human Rights Committee, however, has warned that “reasons of public security” is too vague a standard. The Committee was considering the Code of Criminal Procedure of Bosnia and Herzegovina which provided that, if the alleged offence is punishable by a prison sentence exceeding 10 years, the judge can place suspects in pretrial detention on the ground that reasons of public security or security of property warrant such detention. The Committee recommended that “[t]he State party should consider removing from [its] Code of Criminal Procedure ... the vague concept of public security or security of property as a ground for ordering pre-trial detention”.<sup>66</sup>

In its *Report on Terrorism and Human Rights*, the Inter-American Commission on Human Rights warns where “a person is held [on remand] in connection with criminal charges for a prolonged period of time [...] without proper justification, [...] such detention becomes a punitive rather than precautionary measure that is tantamount to anticipating a sentence”.<sup>67</sup> Such abuse of remand detention violates the presumption of innocence.

<sup>64</sup> CCPR/CO/79/LKA, para. 13.

<sup>65</sup> Inter-American Committee on Human Rights, *Report on Terrorism and Human Rights*, para. 123.

<sup>66</sup> CCPR/C/BIH/CO/1, para. 18.

<sup>67</sup> Inter-American Committee on Human Rights, *Report on Terrorism and Human Rights*, para. 223.



### Practical guidance

In determining whether any of these factors serve to justify the continued detention of an accused, the fact that other measures could be ordered so as to reduce the risk of the identified harm must be born in mind. If the judge can eliminate any real prospect of the identified risk (e.g. risk of flight, or of tampering with evidence) materializing by imposing one or a combination of measures alternative to detention, then pretrial detention must not be ordered.



### Criminal Procedure Code of Italy: grounds for remand detention and other precautionary measures

The Italian Criminal Procedure Code provides in article 274 the grounds on which remand detention and other “precautionary measures” (such as house arrest, or reporting to the police, or the withdrawal of the passport) can be imposed. In reading through the translation of this provision below, note the insistence of the legislator on the requirement that the authorities (the “precautionary measures” are ordered by a judge upon application from a prosecutor) must indicate the specific reasons why remand detention is necessary in the individual case:

“Precautionary measures are imposed:

- (a) When there are specific and imperative needs related to the ongoing investigation arising from a concrete and present risk to the collection of evidence or its integrity. The decision ordering the precautionary measure must identify the facts the risk is based on, otherwise it is void. ... The ... risk cannot consist of the fact that the suspect or the accused has refused to give a statement or has denied the charges.
- (b) When the accused has escaped, or there is a concrete risk that he might escape, ...
- (c) When, based on the specific modalities and circumstances of the offence or on the personality of the suspect or accused, as it emerges from his concrete conduct or actions or from his previous convictions, there is a concrete risk that he might commit serious crimes involving the use of weapons or other violence against persons, or involving attacks against the constitutional order, or offences related to organized crime, or of the same kind as the offence being investigated ... .”<sup>a</sup>

<sup>a</sup>Code of Criminal Procedure of Italy, article 274, unofficial translation.

### *Procedural guarantees*

The proceedings in which a court decides whether remand detention should be ordered or extended “must be adversarial and must always ensure ‘equality of arms’ between the parties (...). An oral hearing may be necessary, for example in cases of detention on remand (...). Moreover, in remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition sine qua non for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him (...). This may require the court to hear witnesses whose testimony appears prima facie to have a material bearing on the continuing lawfulness of the detention (...). It may also require that the detainee or his representative be given access to documents in the case file which form the basis of the prosecution case against him”.<sup>68</sup>

<sup>68</sup> ECtHR, *A. and others v. the United Kingdom*, Application No. 3455/05, Judgement of 19 February 2009, para. 204.





See section 4.4.9 on the right to challenge lawfulness of detention. The same considerations regarding the fairness of proceedings to challenge detention apply to the proceedings regarding extension of remand detention.

### *Place of detention on remand*

Detention on remand should not involve a return to police custody, but rather transfer to a separate facility under different authority, because continuing custody in the hands of the police creates too great a risk of ill-treatment. In its report on the Maldives, where at the time suspects could be kept in police custody for up to seven days, the Sub-Committee on Prevention of Torture noted its concern that suspects are “held in facilities which are under the responsibility of the police. For the prevention of ill-treatment, police investigations and custody should be separated both institutionally as functionally. The exercise by the police of both investigative and custodial functions may lead to the increased risk that police investigators try to exert strong influence over the persons held in custody or even to resort to ill-treatment for investigative purposes.”<sup>69</sup>



### **Tools**

- Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse is available here: <https://wcd.coe.int/ViewDoc.jsp?id=1041281&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.
- Legal basis and practical means for the implementation of measures alternative to detention are key to avoiding the abuse of remand detention. The *UNODC Handbook of basic principles and promising practices on Alternatives to Imprisonment*, available at: [http://www.unodc.org/pdf/criminal\\_justice/Handbook\\_of\\_Basic\\_Principles\\_and\\_Promising\\_Practices\\_on\\_Alternatives\\_to\\_Imprisonment.pdf](http://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf), introduces the reader to the basic principles central to understanding alternatives to imprisonment and describes promising practices implemented throughout the world.



### **Activities**

- On what grounds can remand detention be ordered in your legal system? How is the burden of proof allocated regarding the need for remand detention? Is remand detention mandatory for any offences?
- Does the law in your jurisdiction require the periodic review of the continued need for remand detention? At what intervals?
- What alternatives to remand detention are available in your jurisdiction? What are the obstacles to their application in terrorism cases?

<sup>69</sup> Report on the visit of the Sub-Committee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment to the Maldives (CAT/OP/MDV/1), para. 77.

## 4.6 Detention outside the criminal justice process

Detention in the context of the criminal justice process is not the only circumstance in which individuals suspected of involvement in terrorist activities may be detained in accordance with international human rights law. Individuals may be detained in a range of other circumstances, including in the context of proceedings for extradition to face trial or serve a sentence abroad,<sup>70</sup> or for purposes of immigration deportation, or—in very limited circumstances—on security grounds. Where acts of terrorism occur in the context of an armed conflict or during occupation, international humanitarian law might provide a legal basis for detention.

In all these cases, the safeguards of the right to liberty which are not specifically limited to persons charged with a criminal offence will apply.

### 4.6.1 Detention in view of extradition or deportation

The international counter-terrorism instruments provide that where a State party receives information that a person alleged to have committed a terrorist offence is on its territory, and investigations confirm this information, it “shall take appropriate measures under its domestic law so as to ensure that person’s presence for the purpose of prosecution or extradition”<sup>71</sup>. Such measures will often include detention for the purposes of extradition.

The international counter-terrorism instruments provide that any person who is taken into custody for purposes of extradition on charges of a terrorist offence “shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights”.<sup>72</sup>

Extradition proceedings can be complex and take considerable time. If a person is taken into custody following a request for extradition, the overall length of an individual’s detention must be reasonable in all the circumstances. In other words, there may be a point at which, notwithstanding the efforts a State is making to deport or extradite an individual, it is no longer reasonable to detain that individual. Reasonableness in this context is fact specific. Relevant considerations would include, for instance, the personal and family circumstances of the detainee, their health, the risk they pose, if any, if released and, crucially, the length of time during which they have been detained and the conditions of their detention. The same applies to persons detained pending a decision on their deportation.

One of the factors that often delay extradition and deportation proceedings in the case of persons suspected of involvement in terrorism is that the person to be extradited or deported alleges that he would be at risk of torture or other serious human rights violations in the country of destination. Where such allegations are arguably well-founded, the removal of the person from the State’s territory may become very difficult or simply impossible. If there is no actual prospect of deporting or extraditing an individual, further detention cannot be

<sup>70</sup> A person detained pending extradition is generally charged with or convicted of a crime, but not in the country depriving him of his liberty. The human rights safeguards specific to detention in the criminal justice process (e.g., the requirements for remand detention) are therefore not applicable in the case of detention pending extradition.

<sup>71</sup> See, for example, article 7(1) and (2) of the 1997 Convention for the Suppression of Terrorist Bombings.

<sup>72</sup> See, for example, article 17 of the 1999 Convention for the Suppression of the Financing of Terrorism, article 14 of the 1997 Convention for the Suppression of Terrorist Bombings, and article 15 of the International Convention for the Suppression of Acts of Nuclear Terrorism.

justified on grounds of pending extradition or deportation proceedings. The power to detain for purposes of extradition or deportation can only be used where there is an intention and a prospect of deporting or extraditing the individual in question.



See chapter 7 on the non-refoulement obligation, the obligation not to remove a person to a country where he or she would be at risk of torture or other serious human rights violations.



### Case studies on detention pending extradition or deportation

A number of cases already considered in this manual or discussed further below deal with issues arising in the context of detention pending extradition or deportation.

The *Nasrullojev* case (section 4.4.1 above) concerns the requirement of an adequate legal basis for extradition detention.

The *Torres* case (section 4.4.9 above) concerns delays for judicial review of lawfulness of detention in an extradition case.

The case of *A and others* (sections 1.6.5 and 4.4.9 above) deals with legislation enacted to ensure the long-term detention without criminal charges of persons suspected of involvement in terrorism who could not be deported because of the risk of serious ill-treatment in their country of origin.

Similarly, the *Ahani* case in the next section (4.6.2) concerns the detention under immigration laws of a man who could not be deported to his country of origin.

Finally, chapter 7 contains additional case studies dealing with human rights aspects of extradition and deportation proceedings.

## 4.6.2 Detention on national security grounds

International human rights law does not exclude that persons may be deprived of their freedom outside the context of criminal proceedings. As discussed in the previous section, such detention is permissible in the context of extradition or deportation. In very limited circumstances, it may also be permitted under ICCPR (and regional human rights treaties, except for ECHR) to detain a person on the ground that he or she is suspected of being engaged in terrorist activities and of therefore constitutes a threat to public security in the absence of criminal proceedings or extradition or deportation proceedings against him or her.

The Human Rights Committee has stated that “[a]lthough administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner, the Committee emphasizes that the guarantees enshrined in [...] article 9 [of ICCPR] fully apply in such instances”.<sup>73</sup> These guarantees include:

<sup>73</sup> Human Rights Committee, *David Alberto Cámpora Schweizer v. Uruguay*, Communication No. 66/1980 (CCPR/C/OP/2), 12 October 1982, para. 18.1.

- Administrative detention on national security grounds must be based on grounds and procedures clearly established in domestic law.
- The detainee must have access to effective means to challenge the lawfulness of his detention (including access to a lawyer and sufficient access to the evidence justifying his detention).
- A judicial body must decide without delay on challenges to the lawfulness of detention and periodically review the continuing lawfulness and necessity of detention.

In practice, the Human Rights Committee has adopted a very strict approach when assessing administrative detention on security grounds and has often found violations of article 9.



The safeguards to ensure that the right to challenge the lawfulness of detention discussed above in section 4.4.9 are particularly important in the case of detention without charges on national security grounds.



### Detention on national security grounds in the *Ahani* case

Mr. Ahani was granted asylum in Canada. Subsequently, the Solicitor-General of Canada and the Minister of Employment and Immigration received reports from the intelligence services according to which Mr. Ahani was trained to be an assassin by his home country's security services. As provided by the Canadian immigration law, the two ministers issued a certificate stating that there were reasonable grounds to believe that Mr. Ahani would engage in terrorist activities. Pursuant to the certificate, Mr. Ahani was taken into mandatory detention, where he remained until his deportation nine years later. He was never charged with an offence in Canada.

The Human Rights Committee was seized of this case. It observed that:

“while the author was mandatorily taken into detention upon issuance of the security certificate, under [Canada's] law the Federal Court is to promptly, that is within a week, examine the certificate and its evidentiary foundation in order to determine its “reasonableness”. In the event that the certificate is determined not to be reasonable, the person named in the certificate is released. The Committee observes ... that detention ... on national security grounds does not result *ipso facto* in arbitrary detention, contrary to article 9, paragraph 1 [ICCPR]. However, given that an individual under a security certificate has neither been convicted of any crime nor sentenced to a term of imprisonment, an individual must have appropriate access, in terms of article 9, paragraph 4 [ICCPR], to judicial review of the detention, that is to say, review of the substantive justification of detention, as well as sufficiently frequent review.”

In the case of Mr. Ahani, the Canadian courts took over four years to determine the lawfulness of detention under the security certificate. The Human Rights Committee found that this could not be said to constitute effective access to the courts for review of detention and that article 9, paragraph 4 of ICCPR had therefore been violated.

Source: Human Rights Committee, *Ahani v. Canada*, Communication No. 1051/2002 (CCPR/C/80/D/1051/2002), 15 June 2004.

Article 5 of ECHR, the provision enshrining the right to liberty in the European system, excludes such national security detention. The argument has been made that also under ICCPR and regional systems that do not outright exclude it, the detention of a terrorist suspect outside the context of criminal, extradition or deportation proceedings should not be permissible. It is argued that the right to a fair trial presupposes a “right to a trial”. In other words, States should not be allowed to circumvent the safeguards protecting criminal defendants by detaining terrorism suspects without charging them.



### Case study. The *Satray* case

Mr. Satray was suspected by the Malaysian authorities of being a member of the terrorist organization Jemaah Islamiyyah. The Minister of Home Affairs and Internal Security ordered his “preventive detention” under Internal Security Act No. 82. This law gives the police power to detain any person for up to 60 days on the ground that it reasonably believes he is engaged in acts prejudicial to the security of Malaysia. Thereafter, the Minister can issue an order for two years preventive detention, which can be renewed indefinitely. At the time of his communication to the United Nations Working Group on Arbitrary Detention (WGAD), Mr. Satray had been in preventive detention in various police detention facilities for more than six years.

Two remedies were available to those detained under the Internal Security Act. The detainee has the right to make representations to an advisory board challenging the reasons for his detention. However, this body is not empowered to order his release. The detainee can also avail himself of habeas corpus proceedings before the High Court. It remained unclear to what extent the High Court would review the substantive grounds justifying detention, or whether it would limit itself to controlling whether the formal requirements for arrest and detention under the Internal Security Act were fulfilled.

The WGAD considered Mr. Satray’s detention arbitrary. It found that the remedy of habeas corpus proceedings “cannot substitute the universal right of any person suspected of the commission of an offence or crime to a fair and public hearing by an independent and impartial tribunal” in which his guilt or innocence are determined. The WGAD also justified this finding with reference to the presumption of innocence.

*Source:* United Nations Working Group on Arbitrary Detention, Communication concerning Mr. Mat Sah Bin Mohammad Satray, Opinion No. 32/2008.

A different but related human rights issue arises where legal systems provide that a criminal sentence for a dangerous offender may include a punitive period of imprisonment followed by preventive deprivation of liberty after the offender has served the sentence. International human rights bodies have dealt with legislation allowing the imposition of preventive detention going beyond the serving of a sentence primarily with regard to violent sexual offenders. In such cases, once the punitive period has been served, to avoid arbitrariness, the preventive detention must be justified by compelling reasons, and regular periodic reviews by an independent body must be assured to determine the continued justification of the detention.<sup>74</sup>

<sup>74</sup> For example, *Rameka v New Zealand*, Communication No. 1090/2002 (CCPR/C/79/D/1090/2002), 15 December 2003.



## Activities

- Where is detention in view of extradition in terrorism cases regulated in your country's law? What procedures and safeguards apply? Is judicial control of extradition detention available?
- Where is detention in view of deportation regulated in your country's law? What procedures and safeguards apply in the case of a foreigner suspected of involvement in terrorism? Is judicial control of extradition detention available?
- Are persons detained in view of extradition or deportation in your country entitled to the assistance of legal counsel? In terrorism and other national security cases, do they have full access to the information on the basis of which they are to be extradited or deported, and detained?
- Is detention on grounds of national security provided for in the laws of your country? If so, which authority orders such detention, what procedures and safeguards are available?

### 4.6.3 Detention of terrorism suspects in situations of “armed conflict”

Where violence or instability reaches the threshold of constituting an “armed conflict”, i.e. involves “a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”,<sup>75</sup> international humanitarian law (IHL) becomes applicable in conjunction with international human rights law (see also chapter 1, section 1.7 above). In certain circumstances, IHL also provides a legal basis for the detention of persons suspected of being engaged in terrorist activities.

Which rules of IHL are applicable, and in particular whether those enshrined in the four Geneva Conventions of 1949 and the two additional protocols of 1977 are applicable, depends on whether the conflict is properly characterized as an “international armed conflict” or a “non-international armed conflict”. An international armed conflict is a conflict between two or more States.

The law of international armed conflict (primarily Geneva Conventions III and IV) allows the internment, i.e. the detention outside the context of criminal proceedings, of

- Prisoners of war, i.e. combatants captured by the adverse party. Their detention is not a form of punishment, but only aims to prevent further participation in the conflict. Prisoners of war must be released when active hostilities cease, unless they are to be tried for war crimes or other violations of international humanitarian law, or are serving a sentence for such offences.<sup>76</sup>
- Civilians who pose a serious threat to the security of the detaining power, if the security of the State makes internment absolutely necessary.<sup>77</sup> Internment must cease as soon as the detainee is no longer a threat for the security of the detaining State.<sup>78</sup> The person subject to internment has the right to request review of the decision on internment by a court or administrative board, review must be conducted expeditiously, and the need for continuation of internment must be reviewed periodically.<sup>79</sup>

<sup>75</sup> This definition of “armed conflict” was given by the United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case *Prosecutor v. Tadic*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1, art. 70.

<sup>76</sup> Geneva Convention III, article 4.

<sup>77</sup> Geneva Convention IV, articles 42 and 78.

<sup>78</sup> Geneva Convention IV, article 132 and Additional Protocol I, article 75(3).

<sup>79</sup> Geneva Convention IV, articles 41, 43 and 78.

The treaty rules of IHL applicable to non-international armed conflicts, i.e. all situations of violence that amount to an armed conflict but do not fulfil the criteria of an “international armed conflict”, do not regulate under what circumstances persons who pose a security threat can be detained. The opinions of legal experts differ on the extent to which there are customary IHL rules providing a legal basis for deprivation of liberty.

Human rights law, however, is fully applicable, in particular article 9, paragraphs 1, 2 and 4 of ICCPR: detention must be provided by law, legal procedures must be respected, and detention must not be otherwise arbitrary; any person deprived of liberty in such a situation is entitled to be brought before a court and to receive a decision on the lawfulness of detention without delay.

Turning from the question of the legal basis for detention to the treatment of interned persons, however, IHL applicable to non-international armed conflicts provides very specific rules, which stress that detainees must at all times be treated humanely.



### Humane treatment of detainees

Various provisions of international humanitarian law applicable in non-international armed conflict, in particular common article 3 of the Geneva Conventions of 1949 and article 5 of Additional Protocol II to the Geneva Conventions offer protection to detained persons. Both of these articles provide a number of basic guarantees applicable to all persons deprived of their liberty in the context of a non-international armed conflict and in all circumstances. These obligations exist alongside article 10 (1) of ICCPR which states that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.

Taking both of these provisions together the following obligations and prohibitions apply:

#### *Prohibitions:*

- Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment
- Collective punishments
- Outrages upon personal dignity, in particular humiliating and degrading treatment
- Rape, enforced prostitution and any form or indecent assault
- Threats to commit any of the foregoing acts
- Places of internment or detention must not be located near to areas of hostilities and detainees shall be evacuated in the event that their personal safety is placed at risk by hostilities

#### *Obligations:*

- Detainees are provided with adequate food and drinking water and safeguarded as regards health, hygiene, the rigours of the climate and dangers caused by military operations
- Detainees are allowed to receive individual or collective relief
- Detainees are allowed to practise their religion
- Detainees are provided with acceptable working conditions, if made to work
- Women are accommodated separately from men
- Detainees are allowed to communicate with their families



### Further reading

- The 1949 Geneva Conventions, 1977 Additional Protocols, and Commentaries thereto are available at:  
<http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>.
- The authoritative commentary on customary international law by the International Committee of the Red Cross (ICRC) is available here:  
[http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul](http://www.icrc.org/customary-ihl/eng/docs/v1_rul).
- The Institute of International Humanitarian Law's Manual on the Law of Non-International Armed Conflict is available here:  
<http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf>.
- The report of five United Nations Special Procedures mandate holders on the situation of detainees at Guantánamo Bay discusses the applicability of human rights and international humanitarian law to their detention. It is available here:  
[http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16\\_02\\_06\\_un\\_guantanamo.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_02_06_un_guantanamo.pdf).

## 4.7 Conditions of detention

### 4.7.1 Basic requirements

Where individuals are detained (regardless of the reasons for their detention) the conditions in which they are detained must satisfy certain basic requirements. Article 10(1) of ICCPR provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. In particular, the conditions of detention must not amount to inhuman and degrading treatment or, of course, torture. A variety of factors, individually or in combination, may result in conditions of detention amounting to degrading treatment, including:

- Overcrowded cells or conditions of detention
- Poor hygiene and sanitary conditions
- Inadequate food or water
- Spread of infectious diseases, where authorities have failed to take reasonable steps to prevent the spread
- Poor ventilation or heating and lack of natural light
- Limited (or no) availability of exercise and recreation for those detained

In general, the conditions of detention should not subject a prisoner to hardship of an intensity exceeding the level of suffering that is inherent in the fact of detention.<sup>80</sup>

<sup>80</sup> ECtHR, *Xiros v. Greece*, Application No. 1033/07, Judgement of 9 September 2010.





Other parts of this publication also deal with human rights aspects of conditions of detention:

- Section 3.5 on the treatment of suspects
- Section 4.4.8 on the obligation to ensure access to medical care for persons in detention
- Section 4.8 on the detention of children
- Section 6.2 on the objectives of punishment



### Tools

The United Nations Standard Minimum Rules for the Treatment of Prisoners were adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and approved by the Economic and Social Council (resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977). They provide guidance on issues such as accommodation, hygiene, food, and medical care for prisoners, discipline, instruments of restraint and contact with the outside world: [http://www.unodc.org/pdf/criminal\\_justice/UN\\_Standard\\_Minimum\\_Rules\\_for\\_the\\_Treatment\\_of\\_Prisoners.pdf](http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf).



### Activity: conditions of detention

An individual is detained for almost nine months in extremely overcrowded conditions with little access to daylight, limited availability of running water, especially during the night, while being given limited food or bed linen. Conditions in the cell are generally cold, particularly at night, although not to the point where the detainees health is placed at risk.

- Do these conditions, individually or in the aggregate, amount to inhuman or degrading treatment? Explain your view.
- Does the question of whether these conditions of detention amount to inhuman or degrading treatment depend on the economic development of the country concerned?
- In your own legal system, in circumstances such as these, what legal remedies exist for an individual to challenge the conditions of his detention?
- In your experience, are these legal avenues procedurally fair and effective?

## 4.7.2 High-security detention regimes and solitary confinement

States often seek to hold detainees suspected of terrorism-related offences or convicted on such charges in special detention regimes, including in solitary confinement, to prevent them from communicating with fellow detainees or other members of their terrorist organization outside the prison, from seeking to recruit other prisoners to their cause, or from preparing an escape.

In this regard, the Council of Europe *Guidelines on Human rights and the fight against terrorism* state (Guideline XI) that:

“1. A person deprived of his/her liberty for terrorist activities must in all circumstances be treated with due respect for human dignity.

2. The imperatives of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners, in particular with regard to:

- (i) the regulations concerning communications and surveillance of correspondence, including that between counsel and his/her client;
- (ii) placing persons deprived of their liberty for terrorist activities in specially secured quarters;
- (iii) the separation of such persons within a prison or among different prisons,

on condition that the measure taken is proportionate to the aim to be achieved.”



Surveillance of a prisoner’s correspondence with his defence counsel, one of the restrictions relevant to detainees suspected or accused of terrorism offences, is discussed in chapter 3 (section 3.4.1).



### **Case study. Italy’s section 41 *bis* high security detention regime**

Italy’s Prison Administration Act contains an article (section 41 *bis*) providing for a special detention regime that can be imposed, at the discretion of the Minister of Justice but subject to judicial review, on prisoners detained for crimes connected to mafia-like criminal organizations and to terrorism. The regime has been repeatedly amended, also in response to criticism from a human rights point of view.

In the *Enea* case,<sup>9</sup> Mr. Enea had been sentenced to several terms of imprisonment for, among other offences, membership of a mafia-type criminal organization, drug trafficking and illegal possession of firearms. The sentences imposed were aggregated into an overall term of thirty years. He was subject to the special section 41 *bis* prison regime for more than ten years. At the time of the facts of his case, the measures imposed were generally the following:

- A ban on participating in other prisoners’ recreational activities
- A ban on visits by persons other than family members or a lawyer
- A maximum of two visits by family members and one telephone call per month
- Monitoring of all the prisoner’s correspondence except for that with his lawyer
- Not more than two hours per day to be spent outdoors
- Restrictions on receiving from outside prison personal possessions otherwise authorized by the prison’s internal rules
- No more than two parcels per month

Mr. Enea complained to ECtHR that he was a victim of inhuman or degrading treatment and that his right to respect for family life and correspondence had been violated.

ECtHR, summarizing its case law on section 41 *bis* of the Prison Administration Act, noted [art. 126] that:

“the regime laid down in section 41 *bis* is designed to cut the links between the prisoners concerned and their original criminal environment, in order to minimise the risk that they will make use of their personal contacts with criminal organizations. Before the introduction of the special regime, many dangerous prisoners were able to maintain their positions within the criminal organizations to which they belonged, to exchange information with other prisoners and with the outside world and to organize and procure the commission of criminal offences. In that context the Court considers that, given the specific nature of the phenomenon of organized crime, particularly of the Mafia type, and the fact that family visits have frequently served as a means of conveying orders and instructions to the outside, the—admittedly substantial—restrictions on visits, and the accompanying controls, could not be said to be disproportionate to the legitimate aims pursued”.

In the case of Mr. Enea, as in other cases regarding this special detention regime before, ECtHR noted [art. 128] as relevant (positive) factors that “each time the measure was extended the Minister of Justice took account of recent police reports stating that the applicant was still dangerous”, that the measures were progressively eased, and that the special regime was eventually discontinued by the court responsible for the execution of sentences on the ground that the security considerations which had justified it were no longer valid.

<sup>80</sup>ECtHR has dealt with Italy's section 41 *bis* detention regime in a series of cases. The quotes in the present case study are from *Enea v. Italy*, Application No. 74912/01, Judgement of 17 September 2009.



### Practical guidance

The case of Italy's article 41 *bis* detention regime (as well as the material on solitary confinement considered below) shows that, in establishing a human rights compliant high security detention regime, the greatest attention must be paid to a clear legal framework, continuous monitoring of the detainee's well-being, transparent procedures and avenues for the detainee to challenge the measures, including judicial review.

The Special Rapporteur on torture has dedicated a report to the question of solitary confinement. He notes that “[t]here is no universally agreed upon definition of solitary confinement. The Istanbul Statement on the Use and Effects of Solitary Confinement defines solitary confinement as the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day. In many jurisdictions, prisoners held in solitary confinement are allowed out of their cells for one hour of solitary exercise a day. Meaningful contact with other people is typically reduced to a minimum”.

The Special Rapporteur takes the view that the use of solitary confinement of indefinite duration or of prolonged solitary confinement, which he defined as solitary confinement exceeding two weeks, constitutes a violation of the prohibition on torture, inhuman or degrading treatment.<sup>81</sup> “[T]he longer the duration of solitary confinement or the greater the uncertainty

<sup>81</sup> While there is no international agreement on what constitutes “prolonged” solitary confinement, also the European Committee for the Prevention of Torture has taken the view that fifteen days should be the maximum permissible duration of solitary confinement (21st General Report, pp. 39–50).

regarding the length of time, the greater the risk of serious and irreparable harm to the inmate that may constitute cruel, inhuman or degrading treatment or punishment or even torture.”<sup>82</sup>

With regard to the criminal justice response to terrorism, he observes with concern [art. 57] that:

“The use of prolonged or indefinite solitary confinement has increased in various jurisdictions, especially in the context of the “war on terror” and “a threat to national security”. Individuals subjected to either of these practices are in a sense in a prison within a prison and thus suffer an extreme form of anxiety and exclusion, which clearly supersede normal imprisonment. Owing to their isolation, prisoners held in prolonged or indefinite solitary confinement can easily slip out of sight of justice, and safeguarding their rights is therefore often difficult, even in States where there is a strong adherence to rule of law.”

Because detainees in solitary confinement are “in a prison within a prison”, they are entitled to challenge the lawfulness of their placement in solitary confinement and to receive without delay a decision of a judicial authority (see section 4.4.9 above on the right to challenge lawfulness of detention). Considering the situation of detainees in solitary confinement, particular attention must be paid to ensuring that the right to challenge the lawfulness of detention not only exists on paper, but is effective in practice.



### Case study. Solitary confinement in the *Polay Campos* case<sup>a</sup>

Mr. Polay Campos was detained on charges of being the leader of a terrorist organization. In its views on a complaint filed by his wife, the Human Rights Committee also addressed the question of solitary confinement and the prohibition on torture, inhuman and degrading treatment. The Committee noted that Mr. Polay Campos had been kept for nine months “in solitary confinement in a cell measuring two metres by two, and that apart from his daily recreation, he cannot see daylight for more than 10 minutes a day”. The Committee expressed “serious concern” over the latter aspects of Mr. Polay Campos’ detention. It found that these conditions “especially his isolation for 23 hours a day in a small cell and the fact that he cannot have more than 10 minutes’ sunlight a day”, constituted treatment contrary to article 7 of ICCPR (the prohibition on torture, inhuman and degrading treatment).

<sup>a</sup>Human Rights Committee, *Polay Campos v. Peru*, Communication No. 577/1994 (CCPR/C/61/D/577/1994), 9 January 1998.



### Standards on the use of solitary confinement

Both the United Nations Special Rapporteur against torture and the European Committee for the Prevention of Torture urge States to minimize the use of solitary confinement. The standards they propose are not identical, but mutually reinforce each other. They can be summarized as follows:

- Solitary confinement should only be used in *exceptional circumstances, as a last resort*.
- Solitary confinement should be governed by a *clear legal framework*. The authority ordering solitary confinement should document to the fullest extent possible and keep a record of the reasons justifying its imposition and its duration, and should communicate these clearly to the detainee and his legal counsel.

<sup>82</sup> A/66/268, para. 58.

- The detainee should have a *genuine and timely remedy* against orders placing him in solitary confinement, including the possibility of judicial review.
- Solitary confinement should be subject to *regular review and monitoring*, including monitoring of the detainees mental and physical health. If necessary measures should be put in place to mitigate the effects of solitary confinement, to provide physical and mental stimulus. This, however, is no substitute for the use of solitary confinement being as short as possible and as a last resort.
- *Reasons must be given* at the end of each review process for the continuation of solitary confinement. The longer the solitary confinement becomes, the more compelling the reasons for continuing solitary confinement must be.
- Solitary confinement should be *proportionate* to the reasons for its imposition and, the longer it is used, the stronger the reasons for it have to be. The impact on the detainee's mental and physical health should be continuously monitored by qualified medical personnel.
- Solitary confinement should never be imposed by a court as part of a sentence (i.e. as an aggravation of the sentence).
- Solitary confinement must not be used as a technique to extract confessions during pretrial detention.
- The duration of solitary confinement should not be indefinite and should be communicated to the detainee. The maximum period of solitary confinement should be fourteen days. There should be no sequential periods of solitary confinement as disciplinary sanction, i.e. there should not be one period of solitary confinement following another.
- A prisoner in solitary confinement should have at least one hour's outdoor exercise per day and other appropriate mental stimulation.

Source: Report of the Special Rapporteur against torture, A/66/268, paras. 82–101; European Committee for the Prevention of Torture, 21st General Report, pp. 39–50.

The Istanbul Statement on the Use and Effects of Solitary Confinement states that:

"The use of solitary confinement should be absolutely prohibited in the following circumstances:

- For death row and life-sentenced prisoners by virtue of their sentence.
- For mentally ill prisoners.
- For children under the age of 18."



### Activities

- Are high security detention facilities or wings used for terrorism-related detainees used in your country? What distinguishes detention in these facilities from ordinary detention facilities?
- Under what circumstances can solitary confinement of a prisoner be imposed under the laws of your country? What procedures and safeguards apply? Do prisoners have an effective remedy against decisions to place them in solitary confinement?
- Compare the rules and procedures applying in your country to the imposition of solitary confinement to the recommendations of the Special Rapporteur against torture and the European Committee for the Prevention of Torture. In what respects, if any, does the law and practice of your country fall short of those recommendations?



## Tools

- The report on solitary confinement by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/66/268, is available here: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=103](http://ap.ohchr.org/documents/dpage_e.aspx?m=103)
- The Council of Europe Ad Hoc Drafting Group on Dangerous Offenders has published a compilation of the case law of the European Court of Human Rights, which analyses the most significant cases dealing with prison treatment of particularly dangerous offenders, including terrorists. It is available here: [http://www.coe.int/t/dghl/standardsetting/CDPC/PC-GR-DD/Compilation%20case%20law%20dangerous%20offenders\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/CDPC/PC-GR-DD/Compilation%20case%20law%20dangerous%20offenders_EN.pdf).
- The report of the European Committee for the Prevention of Torture on the question of solitary confinement is available here: <http://www.cpt.coe.int/en/annual/rep-21.pdf>.
- The Istanbul Statement on the Use and Effects of Solitary Confinement, which was adopted at an international medical symposium on psychological trauma, is available here: [http://www.univie.ac.at/bimtor/dateien/topic8\\_istanbul\\_statement\\_effects\\_solconfinment.pdf](http://www.univie.ac.at/bimtor/dateien/topic8_istanbul_statement_effects_solconfinment.pdf).

In the study on solitary confinement, the Special Rapporteur on torture notes [art. 44] that “[s]olitary confinement ... is often an integral part of enforced disappearance or incommunicado detention”. It is to these that we now turn.

### 4.7.3 Incommunicado and secret detention

#### Incommunicado detention

Incommunicado detention refers to the practice whereby a detainee’s communication with human beings that are not prison staff, investigators or co-detainees is either highly restricted or nonexistent. In particular, a detainee held incommunicado is denied access to his family, friends and legal counsel, and is denied access to a court. The Human Rights Committee has often noted that incommunicado detention can in itself constitute a violation of article 9 of ICCPR.

By cutting off contact with the outside world, incommunicado detention is likely to entail undue psychological pressure on the detainee which may be misused to compel a self-incriminating statement. The African Commission on Human and Peoples’ Rights has therefore held that “where a confession is obtained during incommunicado detention, it should be considered to have been obtained by coercion and not be admitted as evidence”.<sup>83</sup>

Equally important, incommunicado detention greatly increases the likelihood of ill-treatment in detention and the risk of enforced disappearance. Moreover, because of the suffering entailed by detention without contact with the outside world, incommunicado detention for a prolonged or indefinite period constitutes in itself cruel, inhuman or degrading treatment.<sup>84</sup> The Human Rights Committee has therefore called on all States to abolish incommunicado detention.<sup>85</sup>

<sup>83</sup> See the *Taba* case in chapter 3, section 3.4.1.

<sup>84</sup> Human Rights Committee, *Medjnoune v. Algeria*, Communication No. 1297/2004 (CCPR/C/87/D/1297/2004), 9 August 2006, para. 8.4.

<sup>85</sup> Human Rights Committee, General Comment No. 20 on article 7 of ICCPR (prohibition on torture, inhuman and degrading treatment), para. 11.

## Secret detention

The practice of secret detention has often been used in the national security or counter-terrorism contexts. A substantial body of case law and practice now exists making clear that secret detention is absolutely prohibited, as detention practices that place the detainee outside the protection of the law are incompatible with fundamental human rights guarantees, in particular the prohibition on torture, inhuman and degrading treatment and the prohibition on enforced disappearance.



### Elements of “secret detention”

The definition of secret detention is addressed in the *United Nations Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*. According to this report “secret detention” is defined by three key elements:

- State authorities acting in their official capacity, or persons acting under the orders thereof, with the authorization, consent, support or acquiescence of the State, or in any other situation where the action or omission of the detaining person is attributable to the State, deprive persons of their liberty.
- The person deprived of liberty is not permitted any contact with the outside world (is detained incommunicado).
- The detaining or otherwise competent authority denies, refuses to confirm or deny, or actively conceals the fact that the person is deprived of his/her liberty hidden from the outside world, including, for example, family, independent lawyers or non-governmental organizations, or refuses to provide or actively conceals information about the fate or whereabouts of the detainee.

The Joint Study emphasizes that the concept of secret detention is not necessarily characterized by the location of the site of detention being secret (although it may be), “[w]hether detention is secret or not is determined by its incommunicado character and by the fact that State authorities, ..., do not disclose the place of detention or information about the fate of the detainee”.

*Source:* Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism (A/HRC/13/42), pp. 11–12.



As illustrated by the cases discussed in the Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism (A/HRC/13/42), secret detention is often linked to the unlawful transfer of terrorism suspects from one country to another (so-called “extraordinary rendition”). This practice is further examined in chapter 7, section 7.6.



### Practical guidance

Principles 12 and 23 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and articles 17 and 18 of the International Convention for the Protection of All Persons from Enforced Disappearance provide rules on maintaining records in places of detention. Maintaining such records in all places of detention constitutes an important protection against secret detention and disappearance. See section 4.4.3 above.



## Tools

- The International Convention on the Protection of All Persons from Enforced Disappearance is available here: <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>.
- The United Nations Declaration on the Protection of all Persons from Enforced Disappearance adopted by General Assembly resolution 47/133 of 18 December 1992 is available here: <http://www.un.org/documents/ga/res/47/a47r133.htm>.
- The Inter-American Convention on Enforced Disappearance is available here: <http://www.oas.org/juridico/english/treaties/a-60.html>.
- Information concerning the United Nations Working Group on Enforced or Involuntary Disappearances is available here: <http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx>.
- The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Adopted by General Assembly resolution 43/173 of 9 December 1988, is available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx>.



## Further reading

- The *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism* is available here: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>.
- The Parliamentary Assembly of the Council of Europe carried out an investigation into *Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States* in combating terrorism. The First Report (of 12 June 2006) is available at: [http://assembly.coe.int/ASP/Doc/XrefDocDetails\\_E.asp?FileID=11527](http://assembly.coe.int/ASP/Doc/XrefDocDetails_E.asp?FileID=11527), and the Second Report (of 11 June 2007) is available at: [http://assembly.coe.int/ASP/Doc/XrefDocDetails\\_E.asp?FileID=11555](http://assembly.coe.int/ASP/Doc/XrefDocDetails_E.asp?FileID=11555).

## 4.8 Detention of children suspected of involvement in terrorist offences

Special rules apply to the detention of persons suspected of being involved in terrorist offences who were aged less than 18 years at the time of the offence. These are set out particularly in article 37 of the Convention on the Rights of the Child, in the “Beijing Rules” (United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33), the “Havana Rules” (United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, A/RES/45/113), and in General Comment No. 10 of the United Nations Committee on the Rights of the Child, which deals with children’s rights in juvenile justice. They include:

- The arrest and pretrial detention of a child (i.e. any person aged less than 18 years) shall be used only as a measure of last resort and for the shortest appropriate period of time. Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care placement with a family or in an educational setting or home.



- Delays in the criminal procedure should be minimized. Every child arrested and deprived of his/her liberty should be brought before a judge to examine the lawfulness of detention within 24 hours and to decide whether remand detention is necessary or can be substituted with an alternative measure. Strict legal provisions should ensure that the lawfulness of and continued need for pretrial detention is reviewed regularly, preferably every two weeks. The right to trial within a reasonable time should be applied very strictly, adjournments once trial has started should be avoided.
- Every child deprived of liberty shall be treated in a manner which takes into account the needs of persons of his or her age. While in custody, children shall receive care, protection and all necessary individual assistance—social, educational, vocational, psychological, medical and physical—that they may require in view of their age, sex and personality.
- Every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.



The special international human rights law protections applicable to children accused of criminal offences are discussed in several places throughout this publication, including:

- Section 3.3.3 (treatment of children suspected of terrorism offences)
- Section 3.4.1 (right of access to legal counsel)
- Section 3.5.3 (questioning of children and right against self-incrimination)
- Sections 6.4 and 6.5 (death penalty and life imprisonment)



### Tools

- Committee on the Rights of the Child, General Comment No. 10 on *Children's Rights in Juvenile Justice* is available here: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f10&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f10&Lang=en).
- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") (A/RES/40/33), are available here: [http://www.unodc.org/pdf/criminal\\_justice/UN\\_Standard\\_Minimum\\_Rules\\_for\\_the\\_Admin\\_of\\_Juvenile\\_Justice\\_Beijing\\_Rules.pdf](http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Admin_of_Juvenile_Justice_Beijing_Rules.pdf).
- The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty ("the Havana Rules") (A/RES/45/113), are available here: [http://www.unodc.org/pdf/compendium/compendium\\_2006\\_part\\_01\\_02.pdf](http://www.unodc.org/pdf/compendium/compendium_2006_part_01_02.pdf).



### Activities

- Describe the law in your country regarding the detention of persons below 18 years of age suspected of criminal offences? In what respects does it differ from the generally applicable law? Do safeguards for persons below 18 years of age apply also when they are accused of serious offences, such as terrorist offences?
- Are persons below 18 consistently separated from adult offenders in places of detention in your country?



### Assessment questions

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- Article 9 of ICCPR is the central provision on the right to liberty and detention in the United Nations human rights instruments. It contains a number of rights and safeguards, some of them applicable to all forms of detention, others only to those deprived of their freedom in the context of criminal justice. List all the rights and safeguards in article 9 and identify which apply also outside the context of criminal justice. List also the rights and safeguards discussed in this chapter that are not explicitly mentioned in article 9.
- A person is arrested on suspicion of involvement in terrorist offences. The investigators and the prosecutor believe that, to protect the investigation, it is essential that the suspect remain in custody until his trial is over (and, thereafter, if convicted). Describe—in chronological order—the steps to be taken (under ICCPR and any regional treaty your country is party to) to ensure that detention remains lawful under human rights law at all times.
- Discuss the grounds on which remand detention can be imposed in accordance with international human rights law. Also list at least three grounds that would not be sufficient or compatible with human rights.
- In what circumstances and with which safeguards can the solitary detention of a terrorism suspect be justified, on remand and following conviction?
- Name five legislative or administrative measures regarding detention that constitute effective safeguards against torture, inhuman or degrading treatment, and disappearances in counter-terrorism.
- What criteria (under international human rights law) should guide the decision whether and for how long to detain a person whose extradition is sought to face terrorism charges?
- Describe the special safeguards applicable to persons below 18 years of age deprived of their liberty under international law (consider both treaty provisions and soft law standards).

## 5. THE TRIAL OF TERRORISM OFFENCES

### 5.1 Introduction

Terrorism trials are often very complex, with considerable amounts of evidence to be considered in respect of events that may have occurred a significant time before the trial takes place. The charges at issue may encompass events alleged to have occurred as part of a wider conspiracy, across borders or over a considerable time span. A variety of complex legal issues may also arise in the course of such a trial including the protection of witnesses, issues of disclosure and the use of sensitive evidence, and whether evidence obtained in violation of human rights guarantees should be excluded. Moreover, given the seriousness of charges commonly associated with terrorism, for those involved in terrorism cases the stakes are high. Ensuring the fairness of proceedings at all stages, through proper protection of human rights standards is an international law obligation also in terrorism cases. The present chapter considers the scope and application of these protections. Many of the same fundamental rights and principles, which are crucial in protecting a fair trial at the pretrial stage are also vital in protecting the overall fairness of the trial process itself. A number of these issues were addressed in chapter 3 and so both of these chapters should be read together. The present chapter will focus, however, on the protection of human rights in the course of a trial.

### 5.2 Human rights of victims and witnesses in criminal proceedings in terrorism cases

While in the context of criminal justice the rights of those charged with an offence have traditionally been the focus of human rights law, it is now well established that the human rights of victims of crime and witnesses also require attention. The important role played by victims of terrorism is highlighted in the United Nations Counter-Terrorism Strategy.<sup>86</sup> Among the human rights of victims and witnesses at stake are the rights to life, security, physical and mental integrity, respect for private and family life, and protection of dignity and reputation.

In 2005 the Council of Europe adopted Guidelines on the Protection of Victims of Terrorist Acts, which demand, at section VI (2), that “States should ensure that the position of victims of terrorist acts is adequately recognised in criminal proceedings”.

Clarity and information are very important to allow victims to take part meaningfully in the criminal proceedings. In this regard section X of the CoE Guidelines urges States to

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<sup>86</sup> The United Nations Global Counter-Terrorism Strategy stresses “the need to promote and protect the rights of victims of terrorism” and identifies the “dehumanization of victims of terrorism in all its forms and manifestations” as one of the conditions conducive to the spread of terrorism (General Assembly Resolution 60/288).

“ensure the provision to victims of appropriate information in particular about investigations, the final decision concerning prosecution, the date and place of the hearings and the conditions under which they may acquaint themselves with the decisions handed down”.

Legal aid to victims may also be important so that they can have their own legal adviser and fully take part in the criminal justice process. This is particularly important, *inter alia*, when the victim’s civil claim is heard at the same time as the criminal prosecution. Section V of the CoE Guidelines notes that “States should provide effective access to the law and to justice for victims of terrorist acts by providing: (i) the right of access to competent courts in order to bring a civil action in support of their rights, and (ii) legal aid in appropriate cases”. The use of trained counsellors to assist victims throughout the criminal justice process can be of assistance in protecting their dignity and well-being. Section XI of the CoE Guidelines emphasizes that “States should encourage specific training for persons responsible for assisting victims of terrorist acts, as well as granting the necessary resources to that effect”.

Section IX(2) of the CoE Guidelines notes that “States must ensure the protection and security of victims of terrorist acts and should take measures, where appropriate, to protect their identity, in particular where they intervene as witnesses”. Some witness protection measures have an impact on the right to a fair trial, particularly on the ability of the accused person to adequately prepare his defence and to effectively cross-examine the witnesses against him. Their adoption therefore requires the careful balancing of the rights of the accused and those of the victim, as will be explored below (section 5.7.4).



### **Recommendations on witness protection: Report of the United Nations High Commissioner for Human Rights on the Right to Truth (A/HRC/15/33)**

The Office of the High Commissioner for Human Rights has reported to the Human Rights Council on the question of witness protection in the context of criminal proceedings relating to gross human rights violations. It notes [art. 66] that “witness protection should start long before a trial is conducted” and that “measures taken during the first stages of investigation play a crucial role for the protection of witnesses”. Failure to do so may not only compromise the welfare of victims and witnesses but may also result in proceedings never reaching trial. The report [art. 69] urges States to “consider developing comprehensive witness protection programmes covering all types of crimes ...” and that “the effectiveness of witness protection methods should be ensured through the provision of adequate financial, technical and political support for programmes at the national level”.

The CoE Guidelines further recommend that “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 ...”. In this respect it is important that “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”. (Guideline VIII).



### Further reading

- UNODC's publication *The Criminal Justice Response to Support Victims of Terrorism* is available at: [http://www.unodc.org/documents/terrorism/Victims\\_Rights\\_E-Book\\_EN.pdf](http://www.unodc.org/documents/terrorism/Victims_Rights_E-Book_EN.pdf).
- *The Report of the United Nations Special Rapporteur on Promoting Human Rights while Countering Terrorism*, 2011, A/66/310 addresses the rights of victims of terrorism. It is available at: <http://www.ohchr.org/EN/Issues/Terrorism/Pages/Issues.aspx>.
- The Council of Europe Guidelines on the Protection of Victims of Terrorist Attacks, adopted by the Committee of Ministers on 2 March 2005, are available here: <https://wcd.coe.int/ViewDoc.jsp?id=829533>.
- The United Nations *Handbook on Justice for Victims* which provides guidance as to the establishment of a social solidarity fund for victims of terrorism is available at: <http://www.uncjin.org/Standards/9857854.pdf>.
- For an overview of good practice regarding support and assistance to victims during criminal proceedings: Commonwealth Secretariat, *Victims of crime in the Criminal Justice Process, The Best Practice Guide for the Protection of Victims/Witnesses in the Criminal Justice Process* (London, 2011), pp. 43–53.
- The Report of the United Nations High Commissioner for Human Rights on the Right to Truth, A/HRC/15/33, dealing with best practices in the field of witness protection is available here: [http://ap.ohchr.org/documents/E/HRC/d\\_res\\_dec/A\\_HRC\\_21\\_L16.doc](http://ap.ohchr.org/documents/E/HRC/d_res_dec/A_HRC_21_L16.doc).
- Information on the extensive witness protection arrangements available at the International Criminal Court is discussed in the report *Witnesses before the International Criminal Court: An International Bar Association International Criminal Court Programme report on the ICC's efforts and challenges to protect, support and ensure the rights of witnesses*, July 2013 International Bar Association, [http://www.ibanet.org/Human\\_Rights\\_Institute/ICC\\_Outreach\\_Monitoring/IBA\\_ICC\\_Programme\\_Homepage.aspx](http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/IBA_ICC_Programme_Homepage.aspx).

## 5.3 The fairness of a trial: overview

There are many component elements of a fair trial. As explained in chapter 3, adherence to fair procedure prior to trial is absolutely vital to ensure that the trial itself is fair and respects the rule of law. The human rights guarantees for all persons charged with criminal offences, including those charged with terrorism offences, require for instance, that an accused is properly informed of the charges faced and the alleged facts on which they are based to enable the defence to be prepared and to ensure that the accused is in a position to rigorously test the prosecution case at the trial. Prompt access to a lawyer plays a key role in ensuring a fair trial. Respect for guarantees during a trial is equally important. Guarantees such as the presumption of innocence, judicial independence and impartiality and the right of the accused to test prosecution evidence and its witness' testimonies at trial are crucial.

Not all of these guarantees, however, are absolute. There are permissible limitations on some of the rights: for example, a witness' identity may only be disclosed at the last minute in order to protect her from intimidation, thereby limiting the defence right to have adequate time and facilities for examination of prosecution witnesses. Nor does the violation of a human rights guarantee in one instance inevitably mean that a trial cannot be fair. Both in case of permissible limitations and in case of individual violation of fair trial guarantees,

the court will need to consider whether a fair trial is still possible or whether the violation of a particular human rights protection means that the accused cannot receive a fair trial. In this regard it will be helpful to consider whether there are measures that could be taken or safeguards that could be put in place to remedy unfairness. If potential unfairness cannot be remedied and the fairness of the trial as a whole cannot be protected, then the trial should not proceed.



### The right to a fair trial and times of emergency

The right to a fair trial is not listed among the rights that do not allow derogation in times of emergency under article 4(2) of ICCPR. The Human Rights Committee has clarified (General Comment No. 32, paras. 6 and 59), however, that deviating from the fundamental principles of a fair trial, such as the presumption of innocence, is never permitted. Additionally, the prohibition against the use of statements obtained under torture as evidence is absolute and can never be compromised because it protects the absolute prohibition against torture. Moreover, because the right to life is a non-derogable right, if a trial can result in the death penalty being imposed, no derogation can be made from any fair trial safeguards. The Arab Charter of Human Rights expressly includes the right to fair trial among the rights that cannot be derogated from even in time of “public emergency which threatens the life of the nation”.

The right to a fair trial is also vigorously protected in times of armed conflict by international humanitarian law: common article 3(1)(d) of the Geneva Conventions of 1949 prohibits the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Similar minimal guarantees are to be found in article 75(4) of Additional Protocol I (relating to international armed conflicts) and article 6(2) of Additional Protocol II (relating to non-international armed conflicts).



### Further reading

- Human Rights Committee General Comment 32 on the *Right to Equality Before Courts and Tribunals and to a Fair Trial* is available here: <http://www.refworld.org/docid/478b2b2f2.html>.
- The 2010 annual Report of the United Nations High Commissioner for Human Rights, A/HRC/16/50, discusses aspects of due process and the right to fair trial in the context of counter-terrorism: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-50.pdf>.
- The United Nations Special Rapporteur on Human Rights and Counter-terrorism has produced a report addressing the right to a fair trial, which includes summary and analysis of key issues arising in terrorism trials. See *Report of the Special Rapporteur on Human Rights and Counter-terrorism*, 6 August 2008, A/63/223 available at: <http://www.ohchr.org/EN/Issues/Terrorism/Pages/Issues.aspx>.
- Information about the jurisprudence of the European Court of Human Rights on the right to a fair trial, including the scope of the right and the protections it encompasses, is set out in *The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights* available at: [http://www.coe.int/t/dgji/publications/hrhandbooks/HRHAND-03\(2006\)\\_en.pdf](http://www.coe.int/t/dgji/publications/hrhandbooks/HRHAND-03(2006)_en.pdf).

## 5.4 Presumption of innocence at trial

The presumption of innocence is a crucial guarantee during both the investigation of terrorist offences as well as during a trial itself. The nature and scope of the principle has been addressed in detail in chapter 3. As regards the trial specifically, one of the most important implications of the presumption of innocence concerns the burden and standard of proof. As the Human Rights Committee set out in General Comment No. 32, in all criminal trials the presumption of innocence requires that the burden of proof be placed on the prosecution to prove all of the essential elements of the crime. The standard of proof to which the prosecution must establish its case is “beyond reasonable doubt”.

Some legal systems require the accused to bear the burden of proving an aspect of his defence, for instance a defence of insanity or entrapment (on the latter, see section 3.7.1). In addition, certain presumptions of fact or law may operate against an accused person. For example, in the context of the possession of illicit substances such as narcotics or explosive substances, some legal systems impose a rebuttable presumption that an individual has knowledge of such items when found in his or her possession. This places a burden on an accused person to show, on the balance of probabilities, that he or she did not have knowledge of the illicit substance. To what extent such presumptions are compatible with the presumption of innocence is open to dispute. The Supreme Court of Canada has held that “[i]f an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt ... as to the guilt of the accused”.<sup>87</sup> In the *Salabiaku* case examined below, on the other hand, ECtHR found no violation of the presumption of innocence. It stressed, however, that presumptions operating against an accused must be rebuttable, narrow, and handled with care by the courts.



### Case study. Reversing the burden of proof, the *Salabiaku* case<sup>a</sup>

Mr. Salabiaku was convicted in France of smuggling prohibited goods, namely cannabis. Under the French customs code, it was not necessary for the prosecution to prove that an individual found in possession of such goods actually had knowledge of the illicit item found in his possession. A legal presumption operated to the effect that he was presumed to have had knowledge of the goods unless he could show, on the balance of probabilities, that he did not know of their existence.

ECtHR noted that certain presumptions of fact and law are imposed on the defence in almost every legal system. The imposition of such presumptions is not inevitably contrary to the presumption of innocence, as long as such presumptions are kept within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. In the *Salabiaku* case, ECtHR found that the presumption of innocence had not been violated since the legal presumption was very narrowly confined to one issue in the case. Further, in considering the evidence against Mr. Salabiaku, French courts were “careful to avoid automatically resorting to the presumption” laid down. The French court had not found knowledge solely or mainly through operation of the presumption, but had also considered evidence regarding Mr. Salabiaku’s reaction to the goods being discovered in his luggage.

<sup>a</sup>ECtHR, *Salabiaku v. France*, Application No. 10519/83, Judgement of 7 October 1988

<sup>87</sup> Supreme Court of Canada, *R. v. Whyte*, Judgement of 14 July 1988, 2 S.C.R. 3.

In the context of counter-terrorism, some States have enacted legislation making it an offence to be in possession of terrorist propaganda material, or of information or objects suitable for terrorist purposes, and placing on the person found in possession of such material the burden to prove that it was possessed for legitimate purposes. In applying such offences, prosecutors and courts must pay great attention to the obligation to respect the presumption of innocence.



### Activities

- Can you think of any legal provisions in your country, relevant to the trial of terrorism-related offences, that shift the burden on the accused to rebut a presumption against him?
- Mr. Salabiaku received a fine and a custodial sentence of two years imprisonment. If he had been charged with an offence likely to result in a much longer sentence, e.g. of 8 years, would the reverse burden have remained proportionate?
- In its reasoning ECtHR attached significance to the fact that the burden placed on Mr. Salabiaku (a) related only to one aspect of the case (b) related only to a matter falling within the accused's personal knowledge; and (c) that his knowledge was not proven exclusively or mainly by reference to the presumption. Consider why each of these factors is important in keeping the presumption within reasonable limits, thereby respecting the rights of the defence, as required by the presumption of innocence.



### Tools

An overview of international jurisprudence on the presumption of innocence and its implications for criminal trials is set out in the OHCHR *Manual on Human Rights for Judges, Prosecutors and Lawyers*, chapter 6, The Right to a Fair Trial Part I: From Investigation to Trial available at: <http://www.ohchr.org/Documents/Publications/training9chapter6en.pdf>.

## 5.5 Trial by an independent and impartial tribunal

Trial by a competent, independent and impartial tribunal is a fundamental human right. It is guaranteed by article 14 (1) of ICCPR, which provides that “[i]n the determination of any criminal charge against him [...] everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. This right is also protected, in similar terms, by article 6 of ECHR, article 8 (1) of ACHR, and articles 7 and 26 of ACHPR. Importantly, the Human Rights Committee has held that the right to an independent, impartial and competent tribunal is absolute and not subject to any exception, even in wartime or during states of emergency.<sup>88</sup> As a consequence, “any criminal conviction by a body not constituting a tribunal is incompatible with the right to a fair trial. ... [T]he notion of a “tribunal” ... designates a body... that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature”.<sup>89</sup>

<sup>88</sup> Human Rights Committee, General Comment No. 32 (CCPR/C/GC/32), 23 August 2007, para. 19.

<sup>89</sup> *Ibid.*, para. 18



- *Independence*: Independence requires that courts or tribunals trying criminal cases be structurally and institutionally independent of the executive, which requires there to be safeguards in place to protect this independence. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.
- *Impartiality*: There are a number of requirements imposed by the idea of impartiality. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them. Impartiality requires that any conviction be based solely on the evidence before the court and the facts it finds proven. In addition, not only must a tribunal be impartial, it must also appear to a reasonable observer to be impartial.

In the case of children accused of having infringed the penal law, the Committee on the Rights of the Child recommends that States establish separate courts to try children charged with a criminal offence.<sup>90</sup> It further recommends that where it is not possible to establish juvenile courts, a State should nevertheless ensure the appointment of specialized judges or magistrates to deal with cases of juvenile justice.<sup>91</sup>

### 5.5.1 The use of special or military courts in terrorism cases

The trial of civilians, including those accused of terrorism or national security offences, by special or military courts is generally impermissible under international human rights law and can only be used in exceptional circumstances, as a last resort. In its General Comment No. 32, the Human Rights Committee explains that “[t]rials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”.<sup>92</sup>



#### Case study. The *Abbassi Madani* case<sup>a</sup>

Mr. Abbassi Madani was one of the founding members and the president of the *Front Islamique du Salut* (Islamic Salvation Front) (FIS), an Algerian political party. He was arrested in June 1991, according to the Government of Algeria “in the wake of a failed uprising which he and others had planned and organized, with a view to establishing a theocratic State through violence” (Human Rights Committee views, art. 4.2). He was brought before a military tribunal, which sentenced him to 15 years of imprisonment.

Mr. Abbassi Madani’s son submitted a communication to the Human Rights Committee, complaining that the military tribunal which tried him was under the authority of the Ministry of Defence and composed of officers directly reporting to the Minister of Defence and thus not independent.

<sup>90</sup> Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice* (CRC/C/GC/10), 25 April 2007, para. 93.

<sup>91</sup> *Ibid.*, para. 93.

<sup>92</sup> General Comment No. 32, article 14, *Right to Equality before Courts and Tribunals and to a Fair Trial* (CCPR/C/GC/32), 23 August 2007, art. 22.

He also complained that the tribunal did not respect fair trial guarantees. The Government replied that “in the context of these exceptional circumstances” prevailing at the time in Algeria, Mr. Abbasi Madani was brought before a military tribunal “to ensure the proper administration of justice” (art. 4.2).

The Human Rights Committee observed (art. 8.8) that “[the trial of civilians in military courts] should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14”. It further ruled that “a State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts is unavoidable” (art. 8.8). The mere invocation of domestic law or the seriousness of an offence does not justify recourse to special courts to try civilians. The Committee concluded that, as Algeria had not demonstrated why trial by a military court was necessary in the case of Mr. Abbasi Meidani, the right to a fair trial had been violated.

<sup>93</sup>Human Rights Committee, *Abassi v. Algeria*, Communication No. 1172/2003 (CCPR/C/89/D/1172/2003), 28 March 2007.

In the exceptional cases in which the trial of civilians by a military or special court is necessary and justified by objective and serious reasons, the court must still comply with fair trial guarantees as rigorously as an ordinary civilian court. Concerns that have often arisen with regard to special or military courts relate to:

- Independence: particularly the presence of serving military officers among the judges has repeatedly, with regard to numerous countries, been found to be incompatible with judicial independence
- Prolonged periods of pre-charge and pretrial detention
- Limitations on access to legal counsel, intrusion into the attorney-client confidentiality and/or privilege
- Serious limitations on the public character of court hearings
- Lower procedural and evidential standards, admission of statements obtained under torture or by other forms of impermissible coercion
- Limitations on or elimination of the right to appeal

The Special Rapporteur on human rights and countering terrorism has welcomed the fact that “several countries, such as Algeria and India, have abolished the practice of trying terrorist suspects at special courts and have transferred jurisdiction over terrorism cases back to ordinary courts”.<sup>93</sup>

It is important to distinguish between “specialized courts” and special courts. While there is no definition of what constitutes a “special court”, this term often refers to courts constituted ad hoc, or with a different composition of regular courts, or with lesser procedural safeguards. Some countries have decided to centralize all terrorism prosecutions and/or trials in one or a few courts, which may be staffed with particularly experienced prosecutors and judges specializing in terrorism cases, and may be equipped with heightened security for the facilities and the prosecutors, judges and other officials working there. Such specialized courts, or specialized sections of ordinary courts, do not generally raise the same concerns as do special courts as long as there is no limitation of fair trial guarantees.

<sup>93</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/63/223), para. 27.



### Case study. The Military Tribunal Trial of Lieutenant General Diya and others<sup>a</sup>

In December 1997, the Nigerian Military Government announced that it had uncovered a coup plot. Twenty-six persons were arrested, mostly military officers, but also some civilians. In February 1998, a Special Military Tribunal was constituted. Members of the tribunal included serving judges, but the chairman was a member of the Provisional Ruling Council (PRC). The Tribunal concluded its proceedings in early April 1998. It sentenced six of the accused, including one civilian, to death. The decision of the Tribunal was not subject to appeal.

Three non-governmental organizations brought a case before the African Commission on Human and Peoples' Rights.

In its decision, the African Commission took the stance that the "civilian accused is part of the common conspiracy and as such it is reasonable that he be charged with his military co-accused in the same judicial process". The African Commission also observed, however, with regard to the fact that Nigeria was in a state of emergency and under military rule, "[f]ar from this suggesting that military rulers have carte blanche to govern at the whim of a gun, we wish to underscore the fact that the laws of human rights, justice and fairness must still prevail. It is our view that the provisions of article 7 [right to a fair trial] should be considered non-derogable providing as they do the minimum protection to citizens and military officers alike".

The African Commission then examined the complaints made against the proceedings before the Special Military Tribunal and found many of the serious violations of fair trial guarantees that are common to such trials:

- The military tribunal was not sufficiently independent.
- "The assignment of military lawyers to accused persons is capable of exposing the victims to a situation of not being able to communicate, in confidence, with counsel of their choice. The Commission therefore finds the assignment of military counsel to the accused persons, despite their objections, and especially in a criminal proceeding which carries the ultimate punishment a breach of [the right to defence] under article 7(1)(c) of the Charter."
- "The foreclosure of any avenue of appeal to competent national organs in a criminal case attracting punishment as severe as the death penalty clearly violates the [right to a fair trial]."
- "[E]xcept for the opening and closing ceremonies, the trial was conducted in camera in contravention of article 7 of the Charter. The Charter does not specifically mention the right to public trials [...]. Mindful of developments in international human rights law and practice, [...] the Committee considers that a hearing must be open to the public in general, including members of the press [...]. The publicity of hearings is an important safeguard in the interest of the individual and the society at large. [...] Article 14 of ICCPR explains that the trial should also guarantee the right of the accused "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." Where the trial is held in camera, there can be no independent demonstration that these requirements have been met. [...] The State party has not shown that the holding of the proceedings in secret was within the parameters of the exceptional circumstances contemplated above."

The African Commission concluded that "a military tribunal per se is not offensive to the rights in the Charter nor does it imply an unfair or unjust process. We make the point that Military Tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process. What causes offence is failure to observe basic or fundamental standards that would ensure fairness".

<sup>a</sup>African Commission on Human Rights, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication No. 218/98.



### Activities

- In what circumstances may it be permissible for a military court to try a civilian? What special arrangements or safeguards may be necessary in such cases? What type of cases would it not be appropriate for such tribunals to consider?
- Are there special courts to try terrorism cases in your own legal system? What safeguards exist to ensure (a) the independence of these courts or tribunals in terrorism cases generally, and (b) the impartiality of these courts or tribunals when trying specific terrorism cases. Are these safeguards sufficient to ensure independence, competence and impartiality?



### Tools

- Human Rights Committee General Comment No. 32 addresses the use of special tribunals or military courts in trying civilians in paras. 22–23: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.
- The United Nations Special Rapporteur on human rights while countering terrorism provides guidance as to the necessary limitations on the use of specialized tribunals and military trials in terrorism cases, (A/63/223), paras. 23–28, available at: <http://www.ohchr.org/EN/Issues/Terrorism/Pages/Issues.aspx>.
- Further guidance as to the principles with which a fair, impartial and independent tribunal must comply are set out in the United Nations Basic Principles on the Independence of the Judiciary, available here: <http://www2.ohchr.org/english/law/indjudiciary.htm>.
- The Bangalore Principles on Judicial Conduct set out ethical and professional standards which judicial officials ought to meet. They are available here: [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf).

## 5.6 Trial within a reasonable period of time

Trials on terrorism offences are undoubtedly often as complex as the investigations which precede them. Expert evidence, including forensic evidence may need to be gathered. Issues of cross-border cooperation and legal assistance often create considerable delays. Nonetheless, it is important for both suspects and, indeed, the victims of terrorist acts that those suspected and accused of involvement in terrorist offences face trial as quickly as possible. It is also important for the fairness of the trial itself, since the ability of witnesses to recall events accurately may diminish over time. Lengthy delay prior to a trial may also amount to a violation of the presumption of innocence, particularly if the accused is detained on remand.

The obligation to try an accused without undue delay applies regardless of whether an individual is detained. The time runs from the moment an individual is charged in respect of a criminal accusation to the final appeal. It is also particularly important to note that where an individual is in detention awaiting trial, the obligation of expedition is all the more significant. Courts should examine any delays in proceedings where an individual has been remanded in custody with anxious scrutiny.



See chapter 4, section 4.5.4 on the requirement of reasonable length of pretrial detention.

Key factors relevant in determining the reasonableness of a delay include the complexity of a case, the conduct of investigative, prosecutorial and judicial authorities, and the conduct of the defendant. Although complexity is an important consideration regarding reasonableness, the Human Rights Committee has made clear that where delays are caused by a lack of resources, additional resources should be allocated. Inadequacy of resources cannot be relied upon to justify unreasonable delays. This was emphasized by the Human Rights Committee in the *Lubuto* case, where the State expressly relied on its limited resources as well as the country's economic situation to explain the difficulty it faced in ensuring the promptness of trials. The Committee emphasized that economic hardship could not be relied on to justify failure to comply with article 14 of ICCPR obligations.<sup>94</sup>



### Activities

- Are delays in criminal trials a significant problem in your country? Does this problem affect trials in respect of terrorism and related offences?
- Identify the three most important factors which, in your experience, contribute to such delays. What steps could judges or prosecutors within your legal system take to reduce delays? What reforms (legal, administrative or institutional) would assist in reducing delays in complex cases such as terrorism trials?
- In light of the principles discussed above, do the delays raise concerns in relation to the right to trial without undue delay?

## 5.7 Procedural guarantees at trial

Aside from the human rights protections which are necessary in relation to the court or tribunal before which terrorism trials are heard, a variety of protections are also necessary in respect of the trial itself. These will be examined in the following section.

### 5.7.1 Public hearings and publicly accessible judgements

An important element of the administration of justice is that justice be done openly, so that both the accused and the public in general can be reassured as to the standards of justice applied. Openness to scrutiny by the public will act as an additional safeguard to protect against improper procedure. This right is guaranteed by article 14 (1) of ICCPR and by the regional human rights treaties.

The requirement of publicity is, however, not absolute. Pretrial decisions made by prosecutors may be made other than in public. Where this is necessary for the protection of a witness (and the witness protection needs cannot be achieved by other means), hearings may be

<sup>94</sup> Human Rights Committee, *Lubuto v. Zambia*, Communication No. 390/90 (CCPR/C/55/D/390/1990/Rev.1), 31 October 1995.

conducted in sessions closed to the public. Appellate proceedings may be conducted in writing where this is appropriate. More generally, the press and the public may be excluded from all or part of a trial only where this serves a legitimate aim. Under article 14 of ICCPR, such aims are limited to the protection of morals, public order, national security, the interests of the parties' private lives or the interests of justice. Restrictions for any other purpose are not generally permissible.

Any judgement must be made accessible to the public, unless the interests of juvenile persons otherwise require, or the proceedings concern matrimonial disputes or the guardianship of children. This does not mean that all judgements must be read out in open court. In some instances (often in the case of appeals decisions), depositing the judgement in the court registry, which makes the full text of the judgement available to everyone, will be sufficient to satisfy the requirement of being publicly accessible.

Moreover, any restriction that is placed on publicity in relation to a case must be proportionate in pursuit of the legitimate aim, bearing in mind the particular importance of the principle of open justice.



In the case of the military tribunal trial of Lieutenant General Diya and others (section 5.5.1 above), the African Commission on Human and Peoples' Rights examined also the question of the right to a public hearing.

### 5.7.2 Trial in presence of accused/trial in absentia

Article 14(3)(d) of the Covenant on Civil and Political Rights provides that an accused has the right to be tried in his or her presence. At the regional level, ECHR, ACHR and ACHPR have all been interpreted to similar effect. The right to participate in one's own trial is clearly essential to the fairness of trial proceedings. The accused person is best able to adequately instruct defence lawyers, to identify points on which prosecution witnesses and evidence can be challenged, and to suggest appropriate lines of enquiry to be pursued.

Many jurisdictions, particularly common law countries, do not allow trial in the absence of the accused. Under international law, "[p]roceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present."<sup>95</sup>

Where trial in absentia is permitted, the authorities must take all due steps to notify an accused of the charges and the date and time of trial. Where the authorities decide to proceed to try a fugitive, they need to appoint legal counsel to act on his behalf (the trial will still be considered trial in absentia).

Whether and under what circumstances an individual convicted in absentia can obtain a retrial once apprehended will also be an important element in assessing whether the right to be tried in one's presence is respected. Where a person is convicted in his or her absence, and seeks to challenge his conviction on that ground, the burden is on the State to show that it took all reasonable steps to notify the accused of the charges as well as the date and

<sup>95</sup> Human Rights Committee, General Comment No. 32 (CCPR/C/GC/32), 23 August 2007, para. 36.

time of trial (and other relevant proceedings). In the *Maleki* case, the Human Rights Committee was faced with an applicant who had been convicted in absentia of serious drug trafficking offences. The Committee observed that the government had “failed to show that [Mr. Maleki] was summoned in a timely manner and that he was informed of the proceedings against him. ... This is clearly insufficient to lift the burden on the State Party if it is to justify trying an accused in absentia”.<sup>96</sup> This and other aspects of trials in absentia were also discussed by the Human Rights Committee in the *Mbenge* case.



### Case study. The *Mbenge* case<sup>97</sup>

Mr. Mbenge, a politician in the Democratic Republic of the Congo (at the time, Zaire) was tried in his home country and sentenced to death as the alleged instigator of a plot against the regime at a time when he had already fled the country. He complained to the Human Rights Committee, amongst others with regard to his trial in absentia. The Committee’s findings on the right to be tried in one’s presence also highlight how this safeguard is intertwined with other fair trial guarantees:

“14.1 [...] According to article 14 (3) of the Covenant, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings *in absentia* inadmissible irrespective of the reasons for the accused person’s absence. Indeed, proceedings *in absentia* are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice. Nevertheless, the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him (art. 14(3)(a)). Judgement *in absentia* requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance. Otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defence (art. 14(3)(b)), cannot defend himself through legal assistance of his own choosing (art. 14(3)(d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination and to obtain the attendance and examination of witnesses on his behalf (art. 14(3)(e)).

14.2 The Committee acknowledges that there must be certain limits to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused. With regard to the present communication, however, those limits need not be specified. [...] It is true that both judgements state explicitly that summonses to appear had been issued by the clerk of the court. However, no indication is given of any steps actually taken by the [authorities] in order to transmit the summonses to the author, whose address in Belgium is correctly reproduced in the judgement of 17 August 1977 and which was therefore known to the judicial authorities. The fact that, according to the judgement in the second trial of March 1978, the summons had been issued only three days before the beginning of the hearings before the court, confirms the Committee in its conclusion that the State party failed to make sufficient efforts with a view to informing the author about the impending court proceedings, thus enabling him to prepare his defence. In the view of the Committee, therefore, the State party has not respected D. Monguya Mbenge’s rights under article 14 (3)(a), (b), (d) and (e) of the Covenant.”

<sup>97</sup>Human Rights Committee, *Mbenge v. Zaire*, Communication No. 16/77 (CCPR/C/OP/2), 25 March 1983.

<sup>96</sup>Human Rights Committee, *Maleki v. Italy*, Communication No. 669/96 (CCPR/C/60/D/699/1996), 15 July 1999.



### Trial in absentia before the Special Tribunal for Lebanon

The United Nations international criminal tribunals and the International Criminal Court do not allow trials in absentia. An exception to this is the Special Tribunal for Lebanon, the first international tribunal to try a terrorism case. Rules 105*bis* and following of the Special Tribunal's Rules of Procedure and Evidence (available here: <http://www.stl-tsl.org/en/documents/rules-of-procedure-and-evidence/rules-of-procedure-and-evidence> ) provide detailed rules on the judicial determination of the accused's intention to avoid trial and regarding the accused's rights if he appears in the course of proceedings in absentia or after them.

On 1 February 2012, the Trial Chamber of the Special Tribunal for Lebanon decided to hold a trial in absentia in its first case. In reaching this decision the Trial Chamber reviewed numerous documents from the Tribunal's Prosecutor and the Lebanese authorities detailing the steps taken to notify the accused about the proceedings and apprehend them. This decision was challenged by the lawyers appointed by the Tribunal to represent the accused. The Appeals Chamber upheld the Trial Chamber's decision in November 2012.

The Trial Chamber's *Decision to Hold Trial in Absentia* is available here: <http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/trial-chamber/f0112>.



### Interview

You can see an interview with the Registrar of the Special Tribunal for Lebanon concerning the in absentia proceedings and the protection of the rights of the accused here: <http://www.stl-tsl.org/en/ask-the-tribunal/can-the-special-tribunal-for-lebanon-hold-trials-in-absentia-and-is-that-compatible-with-the-rights-of-the-accused>.

## 5.7.3 Rights in relation to witness attendance and examination

Article 14(3)(e) of ICCPR provides that, in the determination of any criminal charge, everyone shall be entitled 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”. Article 6(3)(d) of ECHR contains an identically worded provision, while article 8(2)(f) of ACHR provides for the “right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts”. Although the African Charter does not expressly provide for the right to call and cross-examine witnesses as part of the right to a fair hearing, there is no doubt that the right to a fair trial in article 7 of the Charter also implies this requirement.

As ECtHR has explained, these provisions enshrine “the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings”.<sup>97</sup>

<sup>97</sup> ECtHR, *Al-Khawaja and Tahery v. United Kingdom*, Application Nos. 26766/05 and 22228/06, Judgement of 15 December 2011, para. 119.



ECtHR derived two requirements from this general principle, which will be explored in turn:

- There must be a good reason for the non-attendance of a witness.
- When a conviction is based to a decisive degree on witness statements taken during pretrial proceedings and the witness cannot be examined by the defence, this situation may be incompatible with the right to a fair trial even if there are good reasons for the non-attendance of the witness.

### 5.7.3.1 Non-attendance of a witness requested by the defence

Regarding the requirement that there must be a good reason for the non-attendance of a witness, some of the reasons particularly relevant to terrorism trials will be explored in the next sections, such as the witness' fear of retaliation or a public interest against the witness being called to testify. Other reasons may include the death of the witness, or that the witness is outside the jurisdiction and her attendance cannot be secured. Where the defence requests the attendance of a witness and the request is refused or insufficient efforts are made to secure the presence of the witness, the right to a fair hearing may be violated.

Moreover, in some jurisdictions, there are general rules or practices which preclude an accused from cross-examining certain categories of witness, such as police officers or interrogators (the *Van Mechelen* case discussed in the section 5.7.4 took place in such a context). This is incompatible with the right to call and examine witnesses. An accused must generally be permitted to challenge the evidence of his accuser.



#### Case study. The right to call and examine witnesses

*Grant's case:*<sup>a</sup> Mr. Grant was on trial for murder. His defence was one of alibi, namely that at the time of the crime he had been at home with his girlfriend. At trial, it became apparent that the accused was unable to secure the attendance of his girlfriend. The judge instructed the police to contact the girlfriend who indicated that she had no means to attend. The Human Rights Committee found a violation of the right to a fair trial, on grounds that the judge should have adjourned the trial and issued a subpoena to secure the attendance of Mr. Grant's girlfriend in court and, if necessary, transportation should have been arranged to enable her to come to court, given the seriousness of the matters at stake in the trial.

*Dugin's case:*<sup>b</sup> Mr. Dugin and a friend, Mr. Egunov, got into a fight with two other men, Messrs. Naumkin and Chikin. Mr. Naumkin died of his injuries, and Messrs. Dugin and Egunov were charged with homicide. During the pretrial phase Mr. Chikin gave a statement incriminating Mr. Dugin.

When the trial started, Mr. Chikin did not respond to the summons. The Human Rights Committee noted that while some efforts had been made by the authorities to trace Mr. Chikin, these had been insufficient. It also noted that the court gave very considerable weight to the statement Mr. Chikin had made during the pretrial proceedings. Yet Mr. Dugin was unable to cross-examine this witness and therefore unable to test the prosecution's case, which rested heavily on Mr. Chikin's statement. The Committee concluded that this amounted to a denial of justice.

<sup>a</sup>Human Rights Committee, *Grant v. Jamaica*, Communication No. 353/88 (CCPR/C/50/D/353/1988), 31 March 1994.

<sup>b</sup>Human Rights Committee, *Dugin v. Russian Federation*, Communication No. 815/1998 (CCPR/C/81/D/815/1998), 5 July 2004.



### Practical guidance

In terrorism trials, witnesses for both the prosecution and the defence will frequently be located abroad. This may constitute a considerable obstacle to obtaining statements from them during the investigation and to securing their attendance at trial.

Mutual legal assistance (MLA) may therefore become key to obtain not only evidence for the prosecution, but also to secure the accused's right to "adequate time and facilities" to prepare the defence and to "examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf". When statements from witnesses located abroad are obtained through MLA before trial and these statements might become evidence at trial, it will be very important to consider ways to secure defence rights in the examination of the witness.

### Expert evidence

Expert evidence often plays an important role in terrorism trials. Given that terrorist offences often involve explosive devices or various forms of armaments, forensic evidence is often at the centre of evidence against an accused. In this context it is very important that defendants are given time and facilities to examine expert evidence, including forensic evidence, where necessary with the assistance of defence experts. In part, this is an aspect of the right to adequate time and facilities in the preparation of an accused's defence.

Related to the right to adequate time and facilities in the preparation of a defence, is the right to call expert witnesses or evidence (as an aspect of the overall right to call and examine witnesses). In the *Fuenzalida* case,<sup>98</sup> the accused had been convicted of rape. The prosecution relied on blood samples taken from the victim, which showed the existence of an enzyme the author did not have in his blood. The author requested that he be afforded opportunity to submit his blood to expert analysis and to call expert evidence. The court rejected this request. The Human Rights Committee found in favour of Mr. Fuenzalida, highlighting the importance of expert evidence to ensure a fair trial. It found that "the court's refusal to order expert testimony of crucial importance to the case" constituted a violation of the right to a fair trial.



See chapter 3, section 3.4.3 on the right to adequate time and facilities in the preparation of a defence.

The right to request the attendance and examination of witnesses and experts, however, is not absolute. In the *Gordon* case, the Human Rights Committee noted that article 14(3)(e) of ICCPR, "does not provide an unlimited right to obtain the attendance of witnesses requested by the accused or his counsel", for instance, where it is not material to the matters in issue in a case or where the evidence is not relevant to the advancement of the case of the defence.<sup>99</sup> Moreover, it is generally for the accused and his lawyer to request the attendance of a particular witness at trial and, if necessary, to request an adjournment to enable the witness' presence to be secured.

<sup>98</sup> Human Rights Committee, *Fuenzalida v. Ecuador*, Communication No. 480/1991 (CCPR/C/57/D/480/1991), 12 July 1996.

<sup>99</sup> Human Rights Committee, *Gordon v. Jamaica*, Communication No. 237/1987 (CCPR/C/46/D/237/1987), 5 November 1992.

### 5.7.3.2 Use of pretrial statements by a witness as evidence in case of non-attendance of the witness

Where it is not possible to obtain the attendance of a witness (whether because that witness is deceased or abroad or has vanished, or because the witness refuses to testify in court out of fear), national law may allow statements given by the witness to the police or to a judge prior to trial to be introduced as evidence at trial. Legal systems vary significantly in this regard, and international human rights law does not govern the admissibility as evidence of such statements made prior to trial.

ECtHR has generally held that “when a conviction is based solely or to a decisive degree on depositions [witness statements made prior to trial] that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by article 6”.<sup>100</sup> In other words, even when there are good reasons for the non-attendance of a witness at trial (such as the intervening death of the witness), courts must be exceedingly careful in admitting and relying on pretrial statements by that witness, where those statements are decisive for the conviction of the accused.



#### Activities

- What are the most frequent difficulties in obtaining attendance from witnesses at trial in terrorism cases in your country?
- Are there limitations in your country's legislation to a defendant's right 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”?
- What rules apply in your country to the admission in evidence at trial of statements made by witnesses to the police or to a judge before trial, when the witness does not take the stand at trial and cannot be examined by the defence? Do you think that these rules ensure that the right to an overall fair trial is secured in all cases?

### 5.7.4 Rights of defence and witness protection measures

The risk of intimidation of witnesses or retaliation against them is particularly acute in many terrorism cases, as it is in organized crime cases. Moreover, in this type of cases, witnesses might be afraid to testify even if the accused has not threatened them. Witness protection measures therefore have an important role to play. Such measures can include limiting public disclosure of the witness' identity (by excluding the public from live testimony, assigning a pseudonym, the use of technology to distort the face or the voice of the witness when it is broadcast), delaying the disclosure of the witness's identity to the accused, or—in exceptional cases—completely denying the accused the benefit of knowing the identity of a witness against him.

To fully exercise the right to “examine, or have examined, the witnesses against him” an accused needs to know the identity of the witnesses. It will not be sufficient to learn the identity of the witness on the day of the trial hearing. Effective preparation for

<sup>100</sup> ECtHR, *Al-Khawaja and Tahery v. United Kingdom*, Application Nos. 26766/05 and 22228/06, Judgement of 15 December 2011, para. 119.

cross-examination of prosecution witnesses takes time: the sooner an accused person knows the identity of the witnesses against him, the better his chances of identifying information that undermines their credibility. Moreover, it is not sufficient for the accused himself to know the identity of the witness. For example, a court's decision to shield a witness' identity from the public is only effective if it goes along with an order that the identity of the witness must not be disclosed to third parties. This in turn can be a significant obstacle to defence investigations into the background of the witness.<sup>101</sup>

It is usually desirable that the parties examine a witness in the courtroom and that the judges (and the jury in the case of a jury trial) have the opportunity to see the demeanour of a witness in person. Nonetheless, an option to protect witnesses can be to allow them to be examined without coming to the court. It may be appropriate for certain vulnerable witnesses such as children to give their evidence by deposition prior to a hearing. Other options include the use of screens, with the witness only being visible to the judges and lawyers but not to the public, or evidence by CCTV, rather than in a packed courtroom filled with people.

As noted above, the general position is that an accused must be able to examine and challenge witness evidence adduced by the prosecution against him or her. This position has been reiterated on many occasions by human rights bodies at the universal and regional levels. The Human Rights Committee, for instance, has repeatedly found that the practice of prohibiting an accused from cross-examining law enforcement officials violates the right to a fair hearing.

Where the threat to a witness's personal safety is particularly high and cannot be effectively mitigated by lesser measures, it may be permissible for that individual to give evidence anonymously. Three requirements are important:

- First, the use of anonymous witnesses should only be resorted to in exceptional circumstances and where it is strictly necessary for a legitimate aim such as the protection of the safety of a witness. The concerns for witness safety must be based on good evidence, not only on assertions from the police or the prosecution. If a measure less restrictive than witness anonymity can suffice, then that measure should be deployed.
- Second, an accused should not be convicted "solely or decisively" on the basis of evidence furnished by anonymous witnesses.
- Third, where evidence from anonymous witnesses is admitted at trial, sufficient steps must be taken to safeguard the rights of the defence and a fair trial.



#### Case study. Anonymous witnesses, the *Van Mechelen* case<sup>a</sup>

The accused Mr. Van Mechelen was alleged to have been involved in a sophisticated armed robbery and attempted murder. Investigative police had placed a caravan site under surveillance on suspicion that it was used as a base for organized crime. In the course of the surveillance, three cars left the caravan site and were then used in a robbery and attempted murder. A man identified by a surveillance officer as the accused was seen at the site shortly before the cars left. At trial, the investigating officers testified anonymously from a separate room by sound link. Their testimony was crucial in the conviction of the accused.

<sup>101</sup> These points are discussed in more detail in the Commonwealth Secretariat publication *Victims of Crime in the Criminal Justice Process, The Best Practice Guide for the Protection of Victims/Witnesses in the Criminal Justice Process*, para. 1.6.1.

ECtHR held [art. 56] that the use of anonymous police witnesses gives rise to particular difficulties since “they owe a general duty of obedience to the State’s executive authorities and usually have links with the prosecution”. Police witnesses should therefore only give evidence anonymously in very exceptional circumstances, where strictly necessary, in other words, where other means of ensuring the safety of the witness are not available. ECtHR noted that:

- The accused and his lawyers were unable to see or assess the demeanour of witnesses when giving evidence.
- Although the investigating judge himself questioned the witnesses and produced a detailed report as to their reliability and credibility, this was not a proper substitute for the possibility of the defence questioning the witnesses in their presence and making their own judgement as to their demeanour and reliability.
- Insufficient evidence had been produced to show a risk sufficiently real to justify the exceptional measure of anonymous evidence.
- Finally, the conviction of the accused was based to a decisive extent on these anonymous witnesses.

ECtHR concluded that, taken together, these factors meant that Mr. Van Mechelen did not receive a fair trial.

<sup>9</sup>ECtHR, *Van Mechelen v. Netherlands*, Application No. 26668/95, Judgement of 23 April 1997.



## Interview

The Rules of Procedure and Evidence of the United Nations Special Tribunal for Lebanon (in particular Rule 93) contain detailed procedures and safeguards to allow the use of anonymous witnesses under certain circumstances, while upholding the right to a fair trial.

You can see an interview with a Senior Legal Officer of the Tribunal on this question here: <http://www.stl-tsl.org/en/ask-the-tribunal/how-can-the-special-tribunal-for-lebanon-ensure-the-confidentiality-and-protection-of-witnesses-while-protecting-the-rights-of-the-accused>.



## Practical guidance

Witness protection measures can be very expensive. This is particularly the case of programmes providing relocation of witnesses or even the creation of new identities. Other witness protection measures might involve technological means not available in the courts of your country. There are, however, some highly effective measures that can be implemented at little cost, such as ensuring that witnesses do not enter into contact with the accused or the public when they come to the courthouse, using screens to protect witnesses from the sight of the public while they give testimony, or using pseudonyms to protect the witness’s identity vis-à-vis the public.



## Tools

For an overview of good practice in witness protection measures see these two publications:

- UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, (2008), available at: <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>.
- Commonwealth Secretariat, *Victims of Crime in the Criminal Justice Process, The Best Practice Guide for the Protection of Victims/Witnesses in the Criminal Justice Process* (London, 2011).

### 5.7.5 Exclusion of evidence on grounds of public interest

As already noted with regard to the use of anonymous witnesses, in international human rights law the general rule in criminal trials is that all material which the prosecution will rely on at trial must be disclosed to the defence, as must any evidence which may assist the defence. There are, however, certain exceptions to this principle as regards the disclosure of information which may raise concerns on grounds of public interest or in respect of the rights of others. Great caution, however, is required in this field.

The High Commissioner for Human Rights has noted that “[w]hile the legitimate use of a State secrets privilege—as in cases where it is invoked to exclude specific evidence, the exposure of which would necessarily harm national security—can be critical to considerations of national security, its overly broad application by some States has resulted in a lack of accountability including for serious human rights violations”, and further that “[s]erious concerns have been raised in the course of legal proceedings regarding the broad use of State secrecy in several countries”.<sup>102</sup>

In the context of trials concerning terrorism, a State may, in certain very limited circumstances, decline to provide information or evidence to the defence if to do so would jeopardize the rights of others (for instance, place the life of an informant in danger) or where revealing certain evidence would otherwise endanger an important public interest such as the protection of national security, or reveal the investigative methods of the police or intelligence services.



### Case study. Refusal of disclosure on grounds of public interest

*The P.G. and J.H. case:*<sup>a</sup> Relying on proactive covert investigation techniques, the police obtained information that P.G., J.H. and others were possibly planning and preparing to commit an armed robbery against a cash-collection van. They then obtained warrants to subject the gang to surveillance measures. These surveillance measures in turn allowed the police to arrest P.G., J.H. and others before the robbery was committed.

To protect the confidentiality of its covert investigative techniques, the prosecution did not disclose to the defence part of a report issued by the investigating police officer relating to the surveillance measures. Instead, the prosecution submitted the report to the judge. When this police officer gave

<sup>102</sup> Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/16/50), 15 December 2010, art. 37.

evidence at trial he refused to answer certain questions put in cross-examination by defence counsel which related to the background to the surveillance. The judge decided to put those questions to the police officer in chamber, in other words without the presence of the public and the defence. The judge then weighed the harm to public interests against the benefit to the defence, and took the decision that part of the report and the oral answers should not be disclosed [art. 70]. P.G. and J.H. were convicted of conspiracy to commit armed robbery and were sentenced to fifteen years' imprisonment. Their domestic appeals failed and they appealed to ECtHR.

ECtHR recalled the general principle [art. 67] that:

“it is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (...). In addition, [the right to a fair trial requires] that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (...).”

ECtHR then proceeded to describe conditions for permissible limitation of the entitlement to disclosure of relevant evidence [art. 68]

- In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of criminal investigation, which must be weighed against the rights of the accused.
- Only such measures restricting the rights of the defence which are “strictly necessary” are permissible. In other words, such measures are only permissible if there are no alternative ways (such as, for example, witness protection measures) to protect the public interest at stake.
- Procedural safeguards are necessary to ensure that the accused receives a fair trial. Any difficulties caused to the defence must be sufficiently counterbalanced by the procedures followed by the judicial authorities, in particular, the ability of the defence to challenge whether the exclusion of the evidence prejudices the overall fairness of the trial. This is something the trial judge must keep under constant review throughout the trial, as new evidence and information come to light.

ECtHR then applied these principles to the case of P.G. and J.H. It observed [art. 71] that:

- As far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds, the defence were kept informed and were permitted to make submissions and participate in the decision-making process regarding the disclosure of the sensitive material.
- The questions which defence counsel had wished to put to the witness were asked by the judge in chambers.
- The material which was not disclosed was not evidence against P.G. and J.H.; and,
- Finally, throughout the trial the judge had continuously assessed whether the withholding of the evidence regarding the surveillance measures affected the overall fairness of the proceedings.

On all these grounds taken together, ECtHR found that the decision not to disclose to the defence parts of the information on the surveillance measures had not affected the fairness of the trial.

Two cases considered in other parts of this publication, the *Ghailani* case (see section 3.5.2) and the *A. and others* case (see section 4.4.9) also deal with the question of non-disclosure of evidence on public interest grounds.

In the *Ghailani* case,<sup>b</sup> the prosecution refused to disclose the circumstances under which Mr. Ghailani had been interrogated and had made statements to the CIA investigators that led them to Husein Abebe, who subsequently told the investigators that he had sold Mr. Ghailani the explosives used in the terrorist attacks. The prosecution accepted that the judge would, as a consequence, assume that Mr. Ghailani's statements had been coerced. The judge held closed hearings at which he heard as witnesses persons who were present when Mr. Abebe was persuaded to confess his role, to implicate the accused, and to cooperate with the authorities. He then ruled Mr. Abebe could not be called as a witness.

In the *A. and others* case,<sup>c</sup> which dealt with administrative detention and not criminal procedure, the United Kingdom introduced a procedure whereby "closed material", which the government refused to disclose to the detainees on grounds of national security, would be reviewed on the detainees' behalf by "special advocates" appointed by the government. ECtHR found that the use of "special advocates" could be a way of mitigating the disadvantage suffered by the detainees due to the refusal to disclose to them the material justifying the allegations against them. The more important question, however, was whether the "open material" accessible to the detainees provided them sufficient information to be able to challenge the allegations against them.

<sup>a</sup>ECtHR, *P. G. and J. H. v. United Kingdom*, Application No. 44787/98, Judgement of 25 September 2001.

<sup>b</sup>United States District Court Southern District of New York, *United States of America v. Ahmed Khalfan Ghailani*, Case No. S10 98 Crim. 1023 (LAK), 12 July 2010.

<sup>c</sup>ECtHR, *A. and others v. the United Kingdom*, Application No. 3455/05, Judgement of 19 February 2009, paras. 203–204.

In circumstances where the prosecution or another authority request the non-disclosure of information or evidence to the defence, the judge will have to decide whether the information is such that it must be disclosed to the accused (in order that a fair trial is possible). There are three possible options or scenarios:

- It may be possible that the overall fairness of the trial and, in particular, the ability of a defendant to mount his or her defence, do not require disclosure of the evidence or information. Great caution is required in reaching this conclusion. It may well simply be impossible for a prosecutor to know whether information is or is not relevant or helpful to the defence. A judge may also face similar difficulties, even in the course of a trial, given that a complex trial often develops fluidly the direction of evidence and arguments often change, sometimes quite radically, in the course of the trial. Furthermore, a judge does not of course know all of the matters known to a defendant and may not therefore realize the significance of undisclosed material. In this scenario, at the very least a judge will have to keep the need for disclosure of undisclosed public interest material under very careful review throughout the trial process. If the time comes, the judge must be willing to revisit his or her decision that the information or evidence need not be disclosed.
- Second, the court may conclude that the fairness of the trial and the rights of the defence require the disclosure of the evidence. In this case the court must order that, if the trial continues, the evidence is disclosed to the defence (perhaps with safeguards to protect, insofar as possible, the public interest). Examples of information or evidence which fairness will likely require the disclosure of includes information which may call into question to truthfulness or reliability of a prosecution witness (for instance, that he has been receiving payments from the police may be an example of such information).



- Third, a prosecutor may decide that rather than disclose the information in question, the charges or the case ought to be discontinued. If, all things considered, a judge concludes that it is necessary to disclose information in the interests of a fair trial, this leaves the prosecutor with the, perhaps difficult, choice of either disclosing the information or evidence to the defence or discontinuing the prosecution or those charges which cannot be fairly tried without the defence having access to the information in question.



### Activities

- How would confidential information such as that relating to the police investigation methods in P.G. and J.H. be dealt with in your legal system? Are there sufficient safeguards to protect information that should remain confidential in the public interest while meeting the requirements of the right to a fair trial in international human rights law?
- Have you encountered problems such as the one faced by the judge in P. G. and J. H. in your own professional experience? Without revealing any confidential information, how did you deal with these problems? On reflection, is there anything now you would do differently to ensure the requirements of the right to a fair trial are met?



### Protection of sensitive information in proceedings before the Special Tribunal for Lebanon

The Rules of Procedure and Evidence of the Special Tribunal for Lebanon, Rules 117–119, strike a balance between the requirement not to disclose the source or the exact content of confidential information in the possession of the prosecution or the defence, such as information the disclosure of which may affect the security interests of a State, and the need to ensure a fair trial fully respectful of the rights of the other party. The task of ensuring that the use of that information is not such as to affect the rights of the other party is entrusted to the pretrial judge, who thus plays the crucial role of a neutral and objective “organ of justice” acting in the interest of the overarching need to ensure that the principles of fair trial are respected (see the *Explanatory Memorandum by the Tribunal’s President on the Rules of Procedure and Evidence*, para. 37, available at:

<http://www.stl-tsl.org/en/documents/rules-of-procedure-and-evidence/rules-of-procedure-and-evidence-explanatory-memorandum-by-the-tribunal-s-president-25-november-2010>.



### Further reading

The 2010 annual Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, A/HRC/16/50, discusses specific challenges concerning the use of intelligence in the context of criminal justice processes, including the application of the national security or “State secrets” doctrine to prevent disclosure of information in the context of criminal trials: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-50.pdf>.

### 5.7.6 Exclusion of evidence obtained in violation of human rights law

One of the possibly most difficult problems dealt with in this book arises when it turns out that the outcome of an investigation or a trial against a person suspected of having committed a serious terrorist crime, even resulting in the murder of innocent people, depends on the use of evidence obtained in violation of human rights law.

International human rights law provides one fundamental bright line rule on the admissibility of evidence obtained in violation of human rights law: “any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings” (article 15 of the Convention Against Torture). This is an absolute rule that may not be balanced against other interests, however pressing they might be. It cannot be derogated from, even in time of emergency that threatens the life of the nation. Moreover, it is a position which does not merely apply to torture. The Committee Against Torture has stated in General Comment No. 2 (paragraph 6) that this prohibition also applies in relation to statements made as a result of inhuman or degrading treatment.

Beyond this clear rule, however, many difficult questions arise. Here are some of them:

- What if statements obtained under torture or inhuman or degrading treatment lead the investigators to other evidence (sometimes referred to as “real evidence” or “derivative evidence”), which the prosecution then seeks to introduce at trial?
- What if statements made to an investigator under torture or inhuman or degrading treatment are then confirmed before a prosecutor or investigating judge?
- What if evidence is obtained in violation of other, less absolute and preemptory human rights guarantees, such as the right to assistance by legal counsel, or safeguards relating to surveillance measures and other special investigative techniques?



The first two questions are explored in chapter 3, section 3.5.2, particularly through the case studies examined there. The first question is at the forefront in the *Mthembu and Ghailani* cases, the second in the *Haratyunyan* case.

In the following we will turn to the third question, i.e. evidence obtained in violation of human rights norms other than torture or cruel, inhuman or degrading treatment.

According to Guideline 16 of the United Nations Guidelines on the Role of Prosecutors:

“[w]hen prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute 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”.

It is clear from the above that prosecutors’ professional responsibilities are not limited to eschewing evidence obtained through ill-treatment of suspects (as set out in chapter 3). Prosecutors should also eschew other evidence which has been obtained in circumstances

amounting to a grave violation of that individual's human rights. It is incumbent on all prosecutors to exercise vigilance and caution in relation to the evidence they rely on at trial. While this Guideline provides important guidance, it leaves open which violations of human rights and procedural safeguards amount to "grave violations".

National criminal procedure laws are far from adopting a uniform approach to the question of the extent to which evidence obtained as a result of illegal investigation methods can be relied on. Some legal systems adopt a strict approach known (primarily in the United States of America) as "fruit of the poisonous tree" doctrine, whereby evidence gathered illegally and evidence gathered with the assistance of illegally obtained information must—with some exceptions—be excluded from trial.

Other legal systems give broader discretion to the judges to decide whether such evidence should be admitted, as illustrated by the following two cases. This is permissible, as long as the courts do not lose sight of the need to protect the fundamental rights of the accused and to ensure a fair trial.



#### Admissibility of phone intercepts in the *Karadžić* case<sup>a</sup>

Mr. Karadžić was on trial before the United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague on charges of genocide, war crimes and crimes against humanity. Among the evidence against him presented by the prosecution were intercepts of telephone conversations he allegedly made. Mr. Karadžić filed a motion seeking their exclusion on the basis that the intercepts were obtained illegally by the Bosnian authorities at the time, that they violated his right to respect for privacy, and that their "admission [into evidence] would be antithetical to the integrity of the proceedings". He added that the illegal tapping of the phone by the government had been part of the deliberate misuse of the government apparatus against his ethnic group.

The ICTY Trial Chamber recalled that the relevant provision of the ICTY Rules of Procedure and Evidence states that "[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings". It also recalled the approach in the ICTY case law whereby the admission of evidence is favoured "as long as it is relevant and is deemed to have probative value which is not substantially outweighed by the need to ensure a fair trial. Accordingly, the Chamber must balance the fundamental rights of the accused with the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law". [art. 7] In the case at hand, the ICTY Trial Chamber concluded that the admission of evidence obtained by Bosnian authorities in violation of Bosnian law would not damage the integrity of its proceedings. It rejected Mr. Karadžić's motion.

<sup>a</sup>International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Karadžić*, Case No. IT95-5/18-T, *Decision on the Accused's Motion to Exclude Intercepted Conversations*, 30 September 2010.



### Admissibility of unlawful covert recordings in the *Bykov* case<sup>2</sup>

Mr. Anatoliy Bykov was suspected of involvement in serious organized crime and of ordering an associate to kill a rival, known as V. The associate did not kill the rival but subsequently reported to the security forces that he had been asked to do so. The security forces arranged a ruse to obtain Mr. Bykov's confession. They arranged for a false news story to be placed stating that V. and another man had been killed in his house. The associate then met with Mr. Bykov at his country estate and told him that he had killed V. as per Mr. Bykov's instructions. The associate also gave Mr. Bykov various objects belonging to the V. as proof that he had killed him. The whole conversation was recorded using a device attached to Mr. Bykov's associate. The operation was not judicially authorized.

Mr. Bykov was tried on charges of conspiracy to murder. The prosecution sought to rely on the evidence of the covertly recorded conversations. Mr. Bykov challenged these on grounds that they had been obtained in a procedurally improper manner. The court rejected this challenge and the recording of Mr. Bykov's conversation with his associate was played during the trial. The court found Mr. Bykov guilty as charged.

ECtHR found that the recording of the applicant in the circumstances of the case had violated article 8 of ECHR, protecting the right to respect for private life. It found that the legal framework regulating the covert recording of conversations in these circumstances lacked legal certainty. It also found that there were insufficient safeguards (such independent oversight by a judge) to protect against arbitrariness in the use of the power of covert surveillance.

ECtHR also found, however, that, in the circumstances of the case, the introduction of this evidence did not deny Mr. Bykov a fair hearing. ECtHR noted that key considerations as to whether the admission of the evidence had prejudiced the fairness of the proceedings including (a) whether Mr. Bykov was given the opportunity to challenge the authenticity of the evidence and to oppose its use; (b) the quality of the evidence, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy; (c) whether the evidence was independently corroborated by other evidence; (d) whether the conviction was based solely on the evidence obtained in violation of the Mr. Bykov's privacy; and (e) the nature and gravity of the violation.

In applying these criteria, ECtHR noted that (a) the evidence obtained from the covert operation was not the sole basis for Mr. Bykov's conviction, corroborated as it was by other conclusive evidence; (b) Mr. Bykov had had ample opportunity to challenge the authenticity and reliability of the evidence and to seek to have it excluded on grounds of fairness; and (c) in its judgement, the Russian court did not place a great deal of weight on the covert recordings which rather "played a limited role in the complex body of evidence considered by the [Russian c]ourt". In the light of these factors, ECtHR considered that the right to a fair hearing had not been violated.

<sup>2</sup>ECtHR, *Bykov v. Russia*, Application No. 4378/02, Judgement of 10 March 2009.

On the basis of the cases examined in section 3.5.2 (relating to evidence allegedly obtained under torture or inhuman or degrading treatment) and of the material considered in this section, it may be possible to draw the following conclusions:

- Statements that have been made as a direct result of torture or inhuman or degrading treatment can never be admitted at trial without rendering the whole proceeding unfair.
- Where statements made under torture have led the investigators to other evidence ("real evidence" or "derivative evidence"), the use of such evidence will still taint the

integrity of the proceedings so seriously that it should not be relied on as evidence, irrespective of its probative value.

- Where statements made under torture are subsequently confirmed under circumstances that do not, on their face, suggest any coercion, judges should still exercise great caution, both because the torture suffered may influence the statements of the victim long after the ill-treatment ended, and because the risk of tainting the integrity of the criminal justice process remains.
- Evidence that has been obtained in violation of human rights guarantees other than the prohibition on torture or inhuman or degrading treatment is not necessarily rendered inadmissible at trial as a consequence of that violation (except by application of a strict “fruits of the poisonous tree” rule in domestic law). It only becomes inadmissible, by operation of the right to a fair trial, if the illegality or violation is such as to risk the fairness of the proceedings against an accused as a whole.
- In ensuring that the rights of the accused and the fairness of proceedings as a whole are given due consideration, regard must be had to:
  - (i) whether the accused is afforded meaningful opportunity to challenge the authenticity and reliability of any evidence offered in contravention of human rights standards;
  - (ii) whether the trial proceedings as a whole are made unfair by the introduction of illegally obtained evidence into the proceedings;
  - (iii) whether there is other evidence to corroborate that which has been illegally obtained. In this regard, where illegally obtained evidence is the main evidence against an accused, there needs to be a high degree of assurance as to the reliability and authenticity of the material, with very strong procedural safeguards.<sup>103</sup>

In practice, the most significant safeguards will often be the ability of the defence to challenge at any stage of the trial the impact which the inclusion or exclusion of evidence has on the fairness of the proceeding as a whole and, second, the duty of the judge to keep the fairness of the trial as a whole under constant review. The latter is particularly important since the judge, unlike the defence, will know the content of the evidence that has not been disclosed to the defence and may be able to perceive an issue that the defence cannot see. For example, the evidence might be that one of the prosecution witnesses has received cash payments from the police. In this case, an issue arises as to the reliability of his evidence in light of such payments.

From the point of view of investigators, the conclusion can be drawn that the violation of human rights norms at the investigative stage of terrorism cases puts the successful prosecution at great risk, as the court may decide to order the exclusion of evidence important to the prosecution case, or even a stay of proceedings where a fair hearing has become impossible. Adhering to human rights guarantees is thus not only important in its own right, but it is also an important and essential aspect of an effective investigation and ensuring that those responsible for acts of terrorism are brought to justice.

<sup>103</sup> ECtHR, *Chalkley v. the United Kingdom*, Application No. 63831/00, Judgement of 12 June 2003; *Khan v. the United Kingdom*, Application No. 35394/97, Judgement of 12 May 2000.



## Tools

- The United Nations Guidelines on the Role of Prosecutors, in particular Principle 16, set out the professional responsibilities of prosecutors who come into possession of unlawfully obtained evidence. They are available here: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.
- Further information about ECtHR's jurisprudence on the exclusion of evidence, whether obtained in violation of human rights law or otherwise illegally, is set out in the Council of Europe's Handbook on the Right to a Fair Trial available at: [http://www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-03\(2006\)\\_en.pdf](http://www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-03(2006)_en.pdf).
- For a detailed comparative analysis of the admissibility of illegally obtained evidence in criminal proceedings in EU jurisdictions see the Opinion on the status of illegally obtained evidence in criminal procedures in the Member States of the European Union available at: [http://ec.europa.eu/justice/fundamental-rights/files/cfr\\_cdf\\_opinion3\\_2003\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf_opinion3_2003_en.pdf).

### 5.7.7 Other procedural rights at trial

The right to assistance by competent legal counsel, if necessary free of charge and to confidential communication with that lawyer, the assistance of an interpreter if required, and adequate time and facilities in the preparation of a defence are essential to the overall right to a fair trial. They have been set out in some detail in chapter 3 of this publication, to highlight that the protection of these rights must start long before the trial, at the time of arrest or when a suspect is informed of the charges brought against him.

## 5.8 The right to review by a higher tribunal

Article 14(5) of ICCPR provides that “everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”.

This brief sentence has been elaborated in the case law of the Human Rights Committee, which clarifies that:

- The right to review by a higher tribunal is violated not only if the decision by the court of first instance is final, but also where, following acquittal by a lower court, an accused is found guilty at the appeals stage and cannot obtain review of the conviction by a higher court.
- The review by a higher tribunal must be substantive, covering both sufficiency of the evidence and the law, the conviction and sentence. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient. However, no full retrial or a “hearing” is required, as long as the tribunal carrying out the review can look at the factual dimensions of the case.
- The right to have one’s conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court.
- The right of appeal is of particular importance in death penalty cases. Legal aid cannot be denied to an indigent convicted person seeking review of the death penalty.

The right to review of a conviction by a higher tribunal is enshrined also in the regional human rights instruments, with the exception of ACHPR. The African Commission on Human and Peoples' Rights has held, however, that to "foreclose any avenue of appeal to 'competent national organs' in criminal cases bearing such penalties [imprisonment or the death penalty] clearly violates article 7.1(a) of the African Charter, and increases the risk that even severe violations may go unredressed". This was said with regard to trials under the Nigerian Civil Disturbances (Special Tribunal) Act of 1987, which excluded any review by any court of law of the "validity of any decision, sentence, judgement ... or order given or made ... or any other thing whatsoever done under this Act".<sup>104</sup> The Act empowered the Armed Forces Ruling Council to confirm the decisions of the Special Tribunal established by the Act, but the African Commission considered that only a judicial remedy would satisfy the requirements of the article 7.1(a) of the African Charter (see the case of the Military Tribunal Trial of Lieutenant General Diya and others in section 5.5.1 above).



### Assessment questions

- List and explain four aspects or consequences of the presumption of innocence (consult also the section on the presumption of innocence in chapter 3 for this purpose).
- Explain the difference between the requirement of independence of a court and impartiality. Can any of the two be limited for compelling reasons of security in terrorism trials?
- Why are public trials in terrorism cases so important? For what reasons and in what circumstances can parts of a terrorism trial (or the whole trial) be made secret? Can there be a permissible reason to make the judgement rendered by the court in a terrorism case secret?
- Are trials in the absence of the accused permissible under international human rights law? If so, under what circumstances?
- What obligation is on a State's authorities in circumstances where a witness, whose statements during the investigation phase the prosecution will introduce as evidence at trial, cannot be located?
- Identify the main disadvantages for an accused who faces evidence in court given by an anonymous witness. What alternative means could be used to protect a witness' safety other than giving evidence anonymously?
- What criteria must be satisfied if a court is to permit a witness to give evidence anonymously?
- In cases where the prosecution refuses to disclose evidence to the defence on grounds of national security, or to protect the confidentiality of the methods of intelligence agencies or investigators: What steps could a trial judge take to ensure that the refusal to disclose the information to the defence, either before or during the trial, does not cause unfairness?
- If a judge (at a pretrial or trial stage) considers that the evidence the prosecution refuses to disclose to the defence is relevant to the defence in that it may undermine prosecution evidence, including the credibility of a prosecution witness, can the accused have a fair trial if the evidence is not disclosed?
- Does the right to a fair trial require the exclusion of all evidence obtained in violation of human rights law? If not, under what circumstances can such "tainted" evidence be permissible?
- Can the right to appeal against a conviction be abolished in counter-terrorism cases in the interest of national security?

<sup>104</sup> African Commission on Human Rights, *Constitutional Rights Project (on behalf of Zamani Lekwot and six others) v. Nigeria*, Communication No. 87/93 (ACHPR/LR/A/1), at 12.





## 6. THE PUNISHMENT OF TERRORIST OFFENCES

### 6.1 Introduction

The universal counter-terrorism Conventions and Protocols typically require States to criminalize certain conduct (for instance, “unlawfully and intentionally deliver[ing], plac[ing], discharg[ing] or detonat[ing] an explosive or other lethal device in, into or against a place of public use”),<sup>105</sup> as well as the actions of those who participate as accomplices or organize or direct the commission of offences. The universal counter-terrorism instruments also require State Parties to “make those offences punishable by appropriate penalties which take into account the grave nature of those offences”.<sup>106</sup> Not surprisingly, considering the great differences between approaches to punishment of criminal offences between the World’s legal systems, the universal counter-terrorism instruments do not indicate what the appropriate punishment for terrorist offences might be.

Also at the regional level, counter-terrorism instruments generally do not provide guidance to States as to what adequate penalties for terrorism offences are. The European Council Framework Decision on combating terrorism of 2002 is a notable exception. In article 5 it not only requires member States to make terrorist offences “punishable by effective, proportionate and dissuasive criminal penalties”. The Framework Decision also requires that member States must make the same conduct, for example, kidnapping, punishable by a heavier custodial sentence when committed with terrorist intent. The Framework Decision goes further and dictates minimum sentences for some offences: directing a terrorist group, for example, must be punishable by “a maximum sentence of not less than fifteen years”. Finally, it allows member States to introduce certain mitigating circumstances, such as providing assistance in bringing other offenders to justice.

The present chapter will examine human rights questions that typically arise in the context of the punishment of convicted terrorist offenders. Four topics will be examined from the point of view of international human rights law: the objectives of punishment, the principle of legality, capital punishment, and sentences of lifelong imprisonment. A fourth topic that is highly relevant with regard to human rights in the punishment of terrorist offenders, the question of solitary confinement and other special detention regimes, is dealt with in chapter 4 from the point of view of conditions of detention.

### 6.2 The objectives of punishment

Court judgements, academic writing in criminal law, political and journalistic debate commonly cite four objectives to justify the punishment of criminal offenders:

<sup>105</sup> International Convention for the Suppression of Terrorist Bombings, article 2(1).

<sup>106</sup> See, for example, article 4(b) of the International Convention for the Suppression of Terrorist Bombings. In resolution 1373 (2001) the Security Council similarly decided that “2. ... all States shall ... (e) Ensure that ... the punishment duly reflects the seriousness of such terrorist acts”.

- Retribution (both in the sense of taking vengeance and of “punishment that fits the crime”)
- Deterrence of others who might be inclined to offend
- Public protection
- Reformation and social rehabilitation of the offender<sup>107</sup>

The language of the universal counter-terrorism instruments, requiring States to “make [terrorist] offences punishable by appropriate penalties which take into account the grave nature of those offences”, is compatible with the objectives of retribution, deterrence and incapacitation. The European Union Framework Decision on combating terrorism could be read to refer to these three objectives in requiring criminal penalties that are “effective” (in terms of incapacitation of the terrorist offender), “proportionate” (fitting the crime) and “dissuasive” (detering future potential offenders).

Some international human rights instruments expressly require that criminal punishment should aim at the rehabilitation of offenders. Article 10(3) of ICCPR demands that “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.” The Arab Charter on Human Rights goes further and provides in article 20(3): “The essential aim of the penitentiary system is the reformation and social rehabilitation of prisoners.” Similarly, the American Convention on Human Rights provides in article 5(6): “Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.” The constitutional or criminal law of many States equally enshrines this principle. The Italian Constitution, for instance, provides in article 27(3) that “punishment ... shall aim at rehabilitating the convicted.”

International human rights law, however, is not oblivious to the need to balance the objective of rehabilitating the offender with the competing need to protect society and individual human beings’ right to life and physical integrity against dangerous offenders.



### Case study. *The Maiorano case*<sup>a</sup>

In 1976 one Mr Izzo was sentenced to life imprisonment for the abduction, rape and brutal abuse of two young women and the murder of one of them. In spite of his involvement in numerous incidents in prison, which led to further convictions, in November 2004 the court overseeing execution of prison sentences granted him day release as a measure to promote reintegration into society. While on day release he murdered two women. He was re-arrested, tried and given a further life sentence. Following an administrative inquiry into the procedure which had led to Mr Izzo being granted day release, the judges of the sentence-execution court were reprimanded.

The relatives of the women killed by Mr. Izzo while on day release filed an application to ECtHR alleging a violation of the right to life of their murdered loved ones.

ECtHR did not find fault with the arrangements in Italy for the rehabilitation of prisoners per se, as they afforded sufficient safeguards to ensure the protection of society. ECtHR also noted, however, that article 2 of ECHR, protecting the right to life, imposed a duty of care on the authorities.

<sup>107</sup> ECtHR, *Vinter and others v. United Kingdom*, Application Nos. 66069/09, 130/10 and 3896/10, Grand Chamber Judgement of 9 July 2013.

It took into account the various positive indicators which had led to the granting of measures to assist Mr. Izzo's rehabilitation, in particular the favourable reports by probation officers and psychiatrists. But those had been counterbalanced by many others that should have counselled greater prudence. In addition to the incidents in prison, Mr Izzo had violated the conditions of his day release, and an informant in prison had told a local public prosecutor that Mr Izzo was planning a murder. These were not brought to the attention of the court overseeing execution of the sentences. ECtHR, balancing Mr Izzo's interest in his gradual social rehabilitation with the need to protect the community, concluded that there had been a breach of the duty of care arising from the obligation to protect life under article 2 of ECHR.

<sup>a</sup>ECtHR, *Maiorano and others v. Italy*, Merits, Application No. 28634/06, Judgement of 15 December 2009.

### 6.3 The principle of “no punishment without law”

The principle of “no punishment without law” is a fundamental principle of criminal justice and an essential safeguard against arbitrariness. Its importance is such that no derogation from it is allowed even “in time of public emergency which threatens the life of the nation” (article 4(2) of ICCPR, article 15 of ECHR and article 27(2) of ACHR). As discussed in chapter 2, the principle prohibits the prosecution and punishment for conduct that is not proscribed as an offence, as well as the retroactive creation or expansion of offences. It also requires criminal laws to be written in an accessible and foreseeable way that gives “fair notice” of what conduct is prohibited.

The principle of “no punishment without law” also prohibits retroactive changes to the criminal sanctions for offences, including terrorist offences. As stated in article 15(1) of ICCPR, no heavier penalty may be imposed than the one that was applicable at the time when the criminal offence was committed. If, however, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Retroactive changes to the criminal law in violation of the principle of “no punishment without law” can be the result of new legislation. They also can, and possibly more frequently are, the result of a change in judicial practice, as illustrated by the following case.



#### Case study. *The Del Río Prada case*<sup>a</sup>

The *Del Río Prada* case illustrates that violations of the principle of non-retroactivity of criminal law can result not only from changes in legislation, but also from changes in the courts' interpretation of laws, when well-established case law changes to a defendant's detriment.

Ms. Inés Del Río Prada was convicted of offences linked to terrorist attacks in eight sets of criminal proceedings and sentenced to various prison terms. Served successively, the prison sentences would have totalled more than 3,000 years. Having regard to the close legal and chronological connection between the offences, the competent court combined the various sentences and fixed a maximum term of imprisonment of 30 years. This was done in accordance with the then prevailing judicial interpretation of the relevant article of Spain's criminal code.

At the time, this also meant that early release due to the benefit of remission for work performed in prison would be calculated on the basis of the composite 30-year sentence. When she had served 19 years, Ms. Del Río Prada would have come up for early release. The Supreme Court of Spain, however, had in the meantime changed its case law on remission. Under the new interpretation of the law, remission for work done in prison was to be applied to each sentence individually (i.e. to the overall 3,000 years of imprisonment), and not to the maximum 30-year term. As a result, the Supreme Court ruled that Ms. Del Río Prada's date of release had to be re-calculated on the basis of the new case law, which meant that she had to serve nine more years in prison.

Ms. Del Río Prada applied to ECtHR. In its judgement ECtHR held that there had been a violation of the prohibition on retroactive criminal laws. It considered that it had been impossible for Ms Del Río Prada to foresee the retroactive application to her case of the change in the case law on calculating remission, which resulted in an extension of nine years to the length of her sentence. ECtHR therefore found that there was a violation of the principle "no punishment without law" and that the continued detention of Ms Del Río Prada lacked a proper legal basis. ECtHR ordered the government to release her at the earliest possible date and to pay a substantial sum as compensation for the non-pecuniary damage suffered as a result of the unlawful detention.

<sup>9</sup>ECtHR, *Del Río Prada v. Spain*, Application No. 42750/09, Judgement of 22 October 2013.

As briefly examined in chapter 4 (section 4.6.2), some legal systems allow the continued detention of certain categories of dangerous offenders on preventive grounds (for the protection of the public) after they have served the sentence imposed as punishment following conviction in criminal proceedings. Such preventive deprivation of liberty is not excluded by international human rights law, but to avoid arbitrariness a number of criteria must be fulfilled:<sup>108</sup>

- The grounds for detention and procedure must be clearly set out in the law.
- Preventive detention must be ordered by the judge at the time of the criminal sentence.
- Preventive detention must be justified by compelling reasons which remain applicable as long as detention for these purposes continues.
- Preventive detention must be subject to periodic review by a judicial authority.
- Conditions of detention during preventive detention must be sufficiently distinguishable from those regarding the serving of a criminal sentence.

## 6.4 Capital punishment

Currently about 140 of the 193 States Members of the United Nations are believed to have abolished the death penalty or introduced a moratorium either legally, or in practice. Seventy-eight States are parties to the Second Optional Protocol to the ICCPR, which obliges States to abolish the death penalty. The 47 member States of the Council of Europe have all abolished the death penalty.

Since 2007, the General Assembly has repeatedly adopted (by majority vote) a resolution calling upon Member States that still maintain the death penalty to respect international

<sup>108</sup> For example, *Rameka v New Zealand*, Communications No. 1090/2002 (CCPR/C/79/D/1090/2002), 15 December 2003.

standards, progressively restrict the use of the death penalty, reduce the number of offences for which it may be imposed, and establish a moratorium on executions with a view to abolishing the death penalty (General Assembly resolution 62/149 of 18 December 2007). In establishing international criminal tribunals dealing with the most heinous crimes such as genocide, war crimes and crimes against humanity, the Security Council has ruled out the imposition of the death penalty at these tribunals, including at the Special Tribunal for Lebanon, the first United Nations tribunal dealing specifically with terrorist crimes.

In countries which have not abolished the death penalty, according to the international human rights treaties and the practice of international courts and treaty bodies, strict limitations apply to the use of capital punishment, including:

- Sentence of death may only be imposed following a trial in which the guarantees of a fair trial were most scrupulously respected.
- Fair trial guarantees include the right to equality before the law and trial by an impartial tribunal: in death penalty cases, heightened attention must be paid to avoiding any racial, ethnic, political or other discrimination, or even only appearance thereof.<sup>109</sup>
- Sentence of death shall never be imposed for offences committed by persons below eighteen years of age at the time of the offence (CRC article 37(a), ICCPR, article 6(5)).
- Sentence of death shall never be carried out against pregnant women (ICCPR, article 6(5)). Moreover, international human rights bodies have called on States to exclude mothers with dependent infants from capital punishment.<sup>110</sup> A number of countries prohibit the application of the death penalty for individuals over a certain age either at the time of the crime's commission or at the time of sentencing).<sup>111</sup>
- Persons suffering from any form of mental disorder or extremely limited intellectual competence must not be sentenced to death or executed.<sup>112</sup>
- Sentence of death may only be imposed for the "most serious" crimes.
- The death sentence may not be mandatory for any crime. The independent judge who decides on the sentence must always be allowed to decide that under the circumstances of the case a prison sentence is more appropriate.
- Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
- Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible physical and mental suffering.<sup>113</sup>

The fair trial guarantees that must be observed most scrupulously in capital punishment cases are the topic of chapters 3 and 5 above. In the following, we will focus on the "most serious crime" requirement, the prohibition of the mandatory death penalty, and the right to seek pardon or commutation.

<sup>109</sup> IACHR, Report No. 57/96, Case 11.139, William Andrews, United States, 6 December 1996, paras. 144, 147–177.

<sup>110</sup> Commission on Human Rights resolution 2005/59, The question of the death penalty, para. 7(b).

<sup>111</sup> The ACHR provides that "(c)apital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age" (art. 4, para. 5).

<sup>112</sup> Commission on Human Rights resolution 2005/59, The question of the death penalty, para. 7(c).

<sup>113</sup> Commission on Human Rights resolution 2005/59, The question of the death penalty, para. 7(i).

### 6.4.1 Sentence of death may only be imposed for the most serious crimes

That capital punishment may only be imposed for the “most serious crimes” is enshrined in article 6(2) of ICCPR, article 4(2) of ACHR, and article 6 of the Arab Charter (States party to ECHR have to abolish the death sentence).

Terrorism offences are of course grave crimes, as recognized in the international counter-terrorism instruments. However, the 1984 United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty provide that “capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes, with lethal or other extremely grave consequences”. Other United Nations organs and international human rights bodies go further. The Human Rights Committee states that “crimes that do not result in loss of life” may not be punished by the death penalty.<sup>114</sup> The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that “[i]t is clear that ‘most serious crimes’ only includes crimes where there was an intention to kill which resulted in the loss of life” (A/HRC/4/20, para. 53). The Human Rights Committee has also identified a wide range of specific offences that fall outside the scope of the “most serious crimes” for which the death penalty may be imposed. These include: abduction not resulting in death, illicit sex, theft or aggravated robbery, and political offences.



#### Case study. The *Raxcacó-Reyes case*<sup>a</sup>

Mr. Raxcacó-Reyes and his accomplices abducted a child and demanded ransom from the child's family. The following day, the police managed to find the child and captured the kidnappers. The kidnappers were brought to trial and found guilty. Three of them, including Mr. Raxcacó-Reyes, were found to be the perpetrators of the kidnapping and sentenced to death, while two accomplices were sentenced to forty and twenty years imprisonment respectively.

Then article 201 of the Penal Code of Guatemala, the provision applied by the court in sentencing, read:

“The death penalty shall be imposed on the perpetrators or masterminds of the crime of the kidnapping or abduction of one or more persons in order to obtain a ransom, an exchange of persons, or a decision contrary to the will of the person kidnapped, or with any similar or equal purpose . . . . In this case, no attenuating circumstances shall be taken into consideration.

Accomplices or accessories after the fact shall be punished with twenty to forty years of imprisonment.”

The Inter-American Court of Human Rights found that by making kidnapping subject to the death penalty whether it had resulted in the death of the victim or not, the Guatemalan penal code violated the limitations international human rights law places on the use of the death penalty. It held that:

“70. A distinction must be made between the different degrees of seriousness of the facts that permits distinguishing serious crimes from the ‘most serious crimes’; namely, those that affect most severely the most important individual and social rights and therefore merit the most vigorous censure and the most severe punishment.

<sup>114</sup> Cf. Human Rights Committee, Concluding Observations on Iran (CCPR/C/79/Add.25), 3 August 1993, para. 8; Human Rights Committee, Concluding Observations on Iraq (CCPR/C/79/Add.84), 19 November 1997, paras. 10 and 11.

71. The crime of kidnapping or abduction may include different nuances of seriousness, ranging from simple kidnapping, which does not fall within the category of the ‘most serious crimes,’ to kidnapping followed by the death of the victim. Even in the latter case, which would constitute an extremely serious act, it would be necessary to consider the conditions or circumstances of the case sub judice. All of this must be examined by the court and, to this end, the law must grant it a margin of subjective appraisal.

72. In the case that concerns us, article 201 of the Penal Code, applied to Mr. Raxcacó Reyes, punished both simple kidnapping and any other form of kidnapping or abduction with the death penalty, thus disregarding the restriction imposed by article 4(2) of the American Convention regarding the application of the death penalty only for the ‘most serious crimes.’”

<sup>a</sup>Inter-American Court of Human Rights, *Raxcacó-Reyes v. Guatemala*, Merits, 15 December 2005, paras. 67–72.

#### 6.4.2 Prohibition on the mandatory death penalty

The term “mandatory death penalty” is used to describe laws which establish the death penalty as the only possible penalty for a crime, in such a way that a judge is prohibited from taking the circumstances of an individual accused person into account in sentencing. The Human Rights Committee and other international human rights bodies have concluded that a mandatory death penalty is not compatible with the limitation of capital punishment to the “most serious crimes”. Making the death penalty mandatory for certain crimes is therefore a violation of international human rights law. This is not to say that countries which retain the death penalty are unable to apply that penalty in the majority of cases involving a most serious crime, but they are obligated to at least provide for the possibility that a judge might find a death sentence impermissible in a particular individual’s case because of mitigating circumstances of one kind or another.

In the *Raxcacó-Reyes* case discussed above, the Inter-American Court of Human Rights found also a violation on the ground that the death penalty for kidnapping was mandatory. It reasoned:

“Article 201 of the Penal Code, as it is written, has the effect of subjecting those accused of the crime of kidnapping or abduction to criminal proceedings in which the specific circumstances of the crime and of the accused are never considered, such as the criminal record of the accused and of the victim, the motive, the extent and severity of the harm caused, and the possible attenuating or aggravating circumstances, among other considerations concerning the perpetrator and the crime.”



#### National cases on the mandatory death penalty

In addition to the international case law regarding the mandatory death penalty, the highest national courts in a number of countries have found the mandatory imposition of the death penalty for murder to be incompatible with their Constitution or with international law obligations. The first national court to strike down the mandatory death penalty as a violation of rights was that of the United States of America in 1976.<sup>a</sup>

In the *Mithu* case the Supreme Court of India invalidated that country's last remaining mandatory death penalty law in 1983.<sup>b</sup> It reasoned that a:

"standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case."

In Uganda, the Constitutional Court and the Supreme Court ruled in 2003 that:

"all those laws on the statute book in Uganda which provid[e] for a mandatory death sentence are inconsistent with the Constitution and therefore are void to the extent of that inconsistency. Such mandatory sentence can only be regarded as a maximum sentence".<sup>c</sup>

The Court of Appeal of Kenya more recently ruled that

"... section 204 of the Penal Code which provides for a mandatory death sentence [for murder] is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that section 204 ..., to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the constitution, which as we have said, makes no such mandatory provision".<sup>d</sup>

The Supreme Court of Kenya added that the same reasoning would apply to other crimes punished by the mandatory death sentence, such as robbery with violence and treason.

<sup>a</sup>*Woodson et al. v. North Carolina*, 428 U.S. 280 (1976).

<sup>b</sup>*Mithu v. State of Punjab*, 2 S.C.R. 690 (1983), available at: <http://www.indiankanoon.org/doc/590378/>.

<sup>c</sup>*Susan Kigula and 416 others vs. A.G.* (Constitutional Petition No. 6 of 2003), available at: <http://www.ulii.org/ug/judgment/supreme-court/2009/6>.

<sup>d</sup>*Godfrey Ngotho Mutiso v. Republic* [2010], reported in Kenya Law Reports and available at: [http://kenyalaw.org/Downloads\\_FreeCases/76411.pdf](http://kenyalaw.org/Downloads_FreeCases/76411.pdf).

### 6.4.3 Right to seek pardon or commutation of death sentence

Under international law, any person sentenced to death has the right to seek a pardon or to seek the commutation of a death sentence to a less severe one. This right is reflected in international and regional instruments as well as in the domestic practice of almost every country that applies capital punishment.<sup>115</sup>

ICCPR article 6(4) reads: "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."

As the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has pointed out, "[t]he right thus has two separate parts. The first is the right of the individual offender to seek pardon or commutation. This implies no entitlement to receive a positive response, but it does imply the existence of a meaningful procedure through which

<sup>115</sup> The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has analysed this right in a report to the Human Rights Council. See Report of the Special Rapporteur Summary on Arbitrary Executions (A/HRC/8/3), 2 May 2008, paras. 59–67. The following text relies heavily on that report.



to make such an application”.<sup>116</sup> The Special Rapporteur warned that this right can be rendered illusory if the relevant procedures are only a formality as a result of which no genuine consideration is accorded to the case for pardon or commutation, if the decision-making body does not meet, or if the procedure is entirely lacking transparency. The second part of the right is the need to ensure that neither the legislature nor other authorities can eliminate the possibility to apply for and obtain amnesties, pardons and commutations for certain offences such as terrorism.

The Special Rapporteur on extrajudicial, summary or arbitrary executions also highlighted the important functions this right plays within the legal system: “It serves:

- (a) As a final safety valve when new evidence indicating that a conviction was erroneous emerges but in a form that is inadequate to reopen the case through normal procedures;
- (b) To enable account to be taken of post-conviction developments of which an appeals court might not be able to take cognizance but which nevertheless warrant being considered in the context of an otherwise irreversible remedy;
- (c) To provide an opportunity for the political process, which is rightly excluded from otherwise interfering in the course of criminal justice, to show mercy to someone whose life would otherwise be forfeited.”<sup>117</sup>



### Activities

- Does your country retain the death penalty as a matter of law? Is a moratorium in place as a matter of law or de facto?
- Transparency in the use of the death penalty: the General Assembly (resolutions 62/249, 63/168 and 65/206) has called on all States that retain capital punishment to provide the Secretary-General with information relating to the use of capital punishment and to make that information publicly available so that it could contribute to informed and transparent national debates regarding the death penalty. The United Nations Economic and Social Council (resolution 1989/64, paragraph 5) has equally called on States to “publish, for each category of offence for which the death penalty is authorized, and if possible on an annual basis, information about the use of the death penalty, including the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted”. Is this information publicly available in your country?
- What offences carry the death penalty in your legal system? Is this compatible with the “most serious crime” requirement under international law?
- Is there any offence for which the death penalty is mandatory in case of conviction?
- Clemency measures: (a) What is the procedure to request a pardon or commutation of the death sentence in your legal system? (b) Are there any offences in your legal system for which clemency measures are not available? (c) Is the procedure to seek a pardon or commutation of sentence such that genuine consideration is given to the petition? (d) Are death row inmates seeking a clemency measure entitled to legal aid if they cannot afford the assistance of a lawyer?

<sup>116</sup> *Ibid.* para. 60.

<sup>117</sup> *Ibid.* para. 62.



### Further reading

- The United Nations Secretary-General periodically reports on capital punishment to the Economic and Social Council (2010 report available here: [http://www.unodc.org/documents/commissions/CCPCJ\\_session19/E2010\\_10eV0989256.pdf](http://www.unodc.org/documents/commissions/CCPCJ_session19/E2010_10eV0989256.pdf)) and to the Human Rights Council (2013 report available here: <http://www.refworld.org/topic,50ffbce582,50ffbce59d,522727da4,0,UNHRC,,.html>).
- The Special Rapporteur on extrajudicial, summary or arbitrary has dedicated his 2012 report to the General Assembly to the question of the death penalty (A/67/275). The report deals, amongst others, with the “most serious crime” requirement, the question of international cooperation (including extradition and mutual legal assistance) with countries that retain the death penalty, and the requirement of transparency regarding the use of the death penalty: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/457/80/PDF/N1245780.pdf?OpenElement>.
- The former Special Rapporteur on extrajudicial, summary or arbitrary executions has made available the *United Nations Special Rapporteur on Extrajudicial Executions Handbook*, an edited collection of his published reports and other writings on the law and policy of unlawful killings (2004–2010). The *Handbook* organizes his writings into thematic chapters on each of the issues the Special Rapporteur’s mandate covers, including the death penalty, available here: <http://www.extrajudicialexecutions.org/LegalObservations.html>.
- An overview of the death penalty in the Inter-American human rights system is provided by the publication Inter-American Commission on Human Rights, *The Death Penalty in the Inter-American Human Rights System: from restrictions to Abolition*, available at: <http://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf>.

## 6.5 Imprisonment for life

As discussed above (section 6.2), international human rights law enshrines the principle that the penitentiary system shall have as its objective the reformation and social rehabilitation of the prisoner. The punishment of imprisonment for life does not negate this objective as radically as the death penalty, but it has been criticized and challenged on this ground. A number of jurisdictions have found that to condemn a person to be imprisoned for the rest of his or her life without the possibility of release amounts to cruel or inhuman treatment. Some countries have abolished life sentences. The Convention on the Rights of the Child, which with 193 States Parties is the most widely ratified human rights treaty, provides that imprisonment for life cannot be imposed in the case of offences committed by persons under 18 years of age (article 37(a)).

The United Nations international criminal tribunals for the former Yugoslavia and for Rwanda have imposed sentences of imprisonment for life, though less frequently than one could expect considering the gravity of the offences they deal with. In the *Stakic* case, the defendant argued that a life sentence constitutes a form of punitive retribution rather than social rehabilitation, and thus constitutes cruel, inhumane and degrading punishment. The Appeals Chamber of the International Tribunal for the Former Yugoslavia disagreed: “[w]here the crimes for which the accused is held responsible are particularly grave, the imposition of a life sentence does not constitute a form of inhumane treatment but, in accordance with proper sentencing practice common to many countries, reflects a specific level of criminality”.<sup>118</sup>

<sup>118</sup> Appeals Chambers, *Prosecutor v. Stakic* (IT-97-24-A), 22 March 2006, paras. 394–395.

To sum up, for adult offenders convicted of the most serious crimes, particularly in cases of aggravated murder, the sentence of life imprisonment is compatible with international human rights law. There is, however, an emerging trend by national and international courts to find that a life sentence will violate human dignity and the prohibition against inhumane treatment if the prisoner has no prospect of release after having served a substantial part of the life sentence, if the sentence is irreducible de facto and de jure and “locks the gates of the prison irreversibly for the offender” (in the words of the Namibian Chief Justice, see below).

As the cases below show, this does not mean that a prisoner sentenced to life should not remain in prison until the end of his life if his continued dangerousness and the protection of the public so require. What the prohibition against inhumane treatment requires according to these courts, is that there should be a transparent legal process by which the continued need for detention of a life prisoner is reviewed at some point in time.



### National and international cases concerning life imprisonment

*Germany:* The Constitutional Court of the Federal Republic of Germany decided in 1977 that life imprisonment sentences were not incompatible with the German Constitution in the case of aggravated murder. The Constitutional Court ruled, however, that respect for human dignity and the rule of law requires that the prisoner be given a concrete and realistically attainable chance of regaining his freedom at some point in time. It added that the possibility of obtaining a pardon is not sufficient to meet this requirement. The rule of law demands that there should be an opportunity for a legal procedure for the review of lifelong imprisonment sentences.<sup>a</sup> In a subsequent case, the Constitutional Court reiterated that life imprisonment sentences were not excluded by the Constitution. It added, however, that it would not be compatible with human dignity if the possibility of release was limited to cases of mental or physical infirmity or closeness to death.<sup>b</sup>

*Namibia:* The Namibian Supreme Court considered, in the case of a vicious double murder,<sup>c</sup> the compatibility of a life sentence with article 8(2)(b) of Namibia's Constitution, which provides “No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment”. The Supreme Court noted that “[t]here can be little doubt that a sentence which compels any person to spend the whole of his or her natural life in incarceration ... is indeed a punishment of distressing severity”. Civilised countries should resort to this punishment “only in extreme cases either because society legitimately needs to be protected against the risk of a repetition of such conduct by the offender in the future or because the offence committed by the offender is so monstrous in its gravity as to legitimise the extreme degree of disapprobation which the community seeks to express through such a sentence” (para. 19).

The Supreme Court also took the stance, however, that an irreducible sentence of life imprisonment would violate the prohibition of cruel or inhumane treatment:

“[A]n order deliberately incarcerating a citizen for the rest of his or her natural life ... cannot be justified if it effectively amounts to a sentence which locks the gates of the prison irreversibly for the offender without any prospect whatever of any lawful escape from that condition for the rest of his or her natural life and regardless of any circumstances which might subsequently arise. Such circumstances might include sociological and psychological re-evaluation of the character of the offender which might destroy the previous fear that his or her release after a few years might endanger the safety of others or evidence which might otherwise show that the offender has reached such an advanced age or become so infirm and sick or so repentant about his or her past, that continuous incarceration of the offender at state expense constitutes a cruelty which can no longer be defended in the public interest.” (para. 20)

*Peru:* The Constitutional Court of Peru was called in 2003 to rule on the compatibility of the provisions allowing the imposition of life sentences in Peru's counter-terrorism legislation with the Peruvian Constitution.<sup>d</sup> The Constitutional Court noted that the rehabilitation of the offender and his reintegration into society were the objectives of criminal punishment under both the Constitution of Peru and article 10(3) of ICCPR. It found that the imposition of life-long imprisonment is not compatible with these objectives.

The Constitutional Court of Peru also found that by taking away all the prisoner's hope of regaining freedom one day, a sentence of life imprisonment was incompatible with the principle of human dignity solemnly enshrined in article 1 of the Constitution.

The judges of the Constitutional Court concluded, however, that it was not necessary to eliminate the punishment of life imprisonment from the counter-terrorism law. What was required was additional legislation that would provide for mechanisms of early release for offenders sentenced to life imprisonment. In this regard, the Constitutional Court referred to the rules on review of life imprisonment sentences before the International Criminal Court (see the text box below) as a model.

*European Court of Human Rights:* In *Vinter and others*,<sup>e</sup> ECtHR dealt with the case of three men sentenced to life imprisonment for murder in England and given "whole life orders" by the trial judge in consideration of the particular gravity of their crimes. ECtHR observed that "issues related to just and proportionate punishment are the subject of rational debate and civilised disagreement" (art. 105). States must "remain free to impose life sentences on adult offenders for especially serious crimes such as murder: the imposition of such a sentence on an adult offender is not in itself prohibited by or incompatible with [the prohibition against inhuman punishment]. This is particularly so when such a sentence is not mandatory but is imposed by an independent judge after he or she has considered all of the mitigating and aggravating factors which are present in any given case". (art. 106).

ECtHR, however, went on to state that the imposition of an "irreducible" life sentence would be a violation of the prohibition against inhuman treatment or punishment in article 3 of ECHR. For a life sentence to be compatible with article 3 of ECHR, "there must be both a prospect of release and a possibility of review" of the sentence with a view to its commutation, remission, termination or the conditional release of the offender (art. 109–110).

ECtHR emphasized that "no article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she continued to pose a danger to society. This is because States have a duty under the Convention to take measures for the protection of the public from violent crime and the Convention does not prohibit States from subjecting a person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention where necessary for the protection of the public [...]. Indeed, preventing a criminal from re-offending is one of the 'essential functions' of a prison sentence".

ECtHR concluded "that, in the context of a life sentence, article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds" (art. 119).

Regarding the question of what could be an adequate minimum amount of a life sentence to be served before the question of early release is considered, ECtHR observed that "comparative and international law materials [...] show clear support for the institution of a dedicated

mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter” (art. 120).

<sup>a</sup>Constitutional Court of the Federal Republic of Germany, 45 BVerfGE 187, Judgement of 21 June 1977.

<sup>b</sup>Constitutional Court of the Federal Republic of Germany, 72 BVerfGE 105, Judgement of 24 April 1986.

<sup>c</sup>Supreme Court of Namibia, *State v. Tcoeib*, Judgement of 6 February 1996.

<sup>d</sup>Constitutional Court of Peru, Exp. No. 010-2002-AI/TC, Judgement of 3 January 2003, paras. 178–190.

<sup>e</sup>ECtHR, *Vinter and others v. United Kingdom*, Application Nos. 66069/09, 130/10 and 3896/10, Grand Chamber Judgement of 9 July 2013.



### Review of life imprisonment sentences before the International Criminal Court

The International Criminal Court is mandated to deal with some of the most serious crimes under international law, genocide, war crimes and crimes against humanity.

Article 77 of the Rome Statute of the International Criminal Court allows for the imposition of a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. Article 110(3) provides that when a person has served twenty-five years of a sentence of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time. Article 110(4) and (5) provide:

“4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

- (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
- (b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
- (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.”

Rules 223 and 224 of the Rules of Procedure and Evidence set out the procedure and further criteria for review.



### Activities

- For which terrorism-related offences is life imprisonment available under the laws of your country?
- What are the procedures applying to and the practical reality of early release of offenders sentenced to life in prison in your country?

## 6.6 Conditions of imprisonment of convicted terrorist offenders

The principle whereby “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” (article 10(1), ICCPR) applies to the imprisonment of persons convicted of terrorist offences no less than to prisoners convicted of other offences. In general, the conditions of detention should not subject a prisoner to hardship of an intensity exceeding the level of suffering that is inherent in the fact of detention.<sup>119</sup>

As stated in the Council of Europe Guidelines on *Human rights and the fight against terrorism* (Guideline XI), however, the “imperatives of the fight against terrorism may nevertheless require that a person deprived of his/her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners”. This can include separating prisoners convicted for terrorist activities within a prison or placing them in specially secured quarters. Any special detention measure, however, must be necessary and proportionate to the aim to be achieved. Solitary confinement, in particular, should not be imposed by a court as part of the sentence (as an aggravation of the punishment).



See chapter 4, sections 4.7.1 and 4.7.2 for more information on conditions of detention and high security detention regimes, including solitary confinement.



### Tools

The United Nations Standard Minimum Rules for the Treatment of Prisoners provide guidance on issues such as “discipline and punishment” within prison settings, instruments of restraint, contacts with the outside world and religion:  
[http://www.unodc.org/pdf/criminal\\_justice/UN\\_Standard\\_Minimum\\_Rules\\_for\\_the\\_Treatment\\_of\\_Prisoners.pdf](http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf).



### Activities

Is there a special detention regime for persons convicted of terrorism-related offences in your country? What are the special measures applying? Are they applied automatically to terrorism convicts, or as a result of an individual assessment? What remedies are available to terrorism convicts to whom special measures are applied in serving their prison sentence?

<sup>119</sup> ECtHR, *Xiros v. Greece*, Application No. 1033/07, Judgement of 9 September 2010.



### Assessment questions

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- To what extent do the international counter-terrorism legal instruments provide guidance to States as to what is the appropriate punishment for terrorism-related offences?
- What limitations and safeguards does international law establish with regard to the use of the death penalty against persons found guilty of terrorist crimes (in those countries that retain the death penalty)?
- Explain the “most serious crime” requirement regarding capital punishment.
- Explain what is meant by a “mandatory death sentence”. Why is legislation providing for a “mandatory death sentence” incompatible with international human rights law?
- What does international law say about clemency measures where the death penalty has been imposed for a terrorism offence?
- What limitations and safeguards does international law establish with regard to the sentence of life imprisonment against persons found guilty of terrorist crimes?
- What grounds could justify the placement of a convicted terrorism offender in solitary confinement? What procedural safeguards would have to be in place to ensure compliance with international human rights law?





# 7. THE INTERNATIONAL TRANSFER OF PERSONS IN COUNTERING TERRORISM

## 7.1 Introduction

In the context of counter-terrorism efforts it is often necessary for States to cooperate with one another in apprehending, investigating, prosecuting and punishing those responsible for acts of terror. International cooperation in criminal matters is essential to the success of global counter-terrorism efforts. This is also emphasized by the United Nations resolutions and conventions against terrorism. The 1997 Terrorist Bombing Convention (article 10(1)), e.g., requires “States Parties [to] afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect” of terrorist bombing attacks. Provisions aimed at increasing cooperation between States Parties, particularly in the form of extradition and mutual legal assistance, are at the centre of the United Nations and regional counter-terrorism treaties. The same obligation to “[a]fford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings” is imposed by the Security Council in resolution 1373 (2001) (OP 2(f)).

International counter-terrorism cooperation, in the form of information exchange between intelligence and law enforcement agencies of different States, mutual legal assistance or extradition, raises many significant human rights issues. The present chapter will focus on the human rights aspects of the transfer between States of persons suspected, accused or convicted of terrorist offences.



### Lawful inter-State transfer of detainees

In 2006 the European Commission for Democracy Through Law (the “Venice Commission”), an expert advisory body of the Council of Europe, was asked by the Council of Europe Parliamentary Assembly to examine member States’ obligations with regard to the inter-State transfer of terrorism suspects. In its legal opinion the Venice Commission observed:

“10. Under international law and human rights law, there are four situations in which a State may lawfully transfer a prisoner to another State: deportation, extradition, transit and transfer of sentenced persons for the purposes of serving their sentence in another country.

11. *Deportation* is the expulsion from a country of an alien whose presence is unwanted or deemed prejudicial. ...

12. *Extradition* is a formal procedure whereby an individual who is suspected to have committed a criminal offence and is held by one State is transferred to another State for trial or, if the suspect has already been tried and found guilty, to serve his or her sentence. ...

17. *Transit* is an act whereby State B provides facilities for State A to send a prisoner through its territory. ...

23. States may enter into agreements concerning the *transfer of sentenced persons* for the purpose of serving their sentence in their country of origin. ...

24. A transfer is unlawful or irregular when the government of State B transfers a person from State B to the custody of State A, against his or her consent, in a procedure not set out in law (i.e. not extradition, deportation, transit or transfer with a view to sentence-serving)."<sup>a</sup>

<sup>a</sup>European Commission for Democracy Through Law, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners* (Opinion 363/2005): [http://www.venice.coe.int/webforms/documents/CDL-AD\(2006\)009.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2006)009.aspx).



See the discussion of the international legal framework for extradition and international cooperation in counter-terrorism efforts in UNODC's *International Cooperation in Criminal Matters: Counter-terrorism*, available at: [http://www.unodc.org/documents/terrorism/Publications/Training\\_Curriculum\\_Module3/Module3\\_EN.pdf](http://www.unodc.org/documents/terrorism/Publications/Training_Curriculum_Module3/Module3_EN.pdf).

## 7.2 Requirement of legality and right to seek review of decisions to deport or extradite

International human rights law requires that any transfer of a terrorism suspect or convict from one State to another be based on law and follow the procedures set forth in law. Moreover, and equally importantly, there is a right to an effective review mechanism for any decision to expel, deport or extradite. Article 13 of the International Covenant on Civil and Political Rights provides:

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

The African Commission on Human Rights has also emphasized in a number of cases in which “ouster legislation” had prevented individuals from accessing courts in order to challenge the lawfulness of deportation decisions that it is a fundamental requirement of international human rights law that persons to be deported have access to the courts in order to challenge the legality of their removal.<sup>120</sup>

The Human Rights Committee has made clear that the right to challenge an expulsion decision and to have one's case reviewed applies not only to expulsion and deportation decisions, but also to extradition. The review proceedings must provide a real opportunity to submit reasons against deportation or extradition, and not be a mere formality.

<sup>120</sup> African Commission on Human and Peoples' Rights, *Amnesty International v. Zambia*, Merits, 1999 Communication No. 212/98, Judgement of 5 May; *Kenneth Good v. Botswana*, Merits, Communication No. 313/05, Judgement of 26 May 2010.



### Case studies on procedural safeguards regarding deportation and extradition

*The Giry case:*<sup>a</sup> Following a two-day visit to the Dominican Republic, Mr. Giry, a French citizen, went to the airport of Santo Domingo to take a flight back to his place of residence, Saint-Barthélemy (Antilles), a French overseas territory. There law enforcement officers, acting on information that he was sought on drug trafficking charges by the United States of America, took him to the police office at the airport and, after less than three hours, forced him on a plane to the United States, where he was arrested and charged with drugs offences. He was subsequently sentenced to 28 years imprisonment by a United States court. The government of the Dominican Republic justified this process on the ground that Mr. Giry was internationally sought on charges of drug-trafficking, and therefore constituted a national security danger for the Dominican Republic, which, as any sovereign State, was entitled to take the necessary steps to protect national security, public order, and public health and morals (art. 4.3).

The Human Rights Committee observed that extradition comes within the scope of article 13 of ICCPR. It further noted that Mr. Giry was neither afforded an opportunity to submit the reasons against the decision to remove him to the United States nor to have his case reviewed by the competent authority. The Human Rights Committee “stresse[d] that States are fully entitled vigorously to protect their territory against the menace of drug dealing by entering into extradition treaties with other States. But practice under such treaties must comply with article 13 of the Covenant, as indeed would have been the case, had the relevant Dominican law been applied in the present case” (art. 5.5).

*The I.M. case:*<sup>b</sup> I.M. was a young man from Darfur living as a student in Khartoum, the capital of Sudan. He was suspected by the security services of links to the Justice and Equality Movement (“JEM”), an armed rebel group in Darfur designated as terrorist by the government of Sudan. He alleged that he was repeatedly arrested, interrogated and subjected to beating by the security services until he managed to travel to Europe with false identity documents. In France he was stopped by the police and arrested as his documents were found to be false. An expulsion decision was issued against him. I.M. challenged the decision arguing that he would be at risk of torture, inhuman or degrading treatment if returned to Sudan (see section 7.3 below on the *non-refoulement* principle). His appeal to the higher administrative authority was not successful, as his statements were found to be unsubstantiated and contradictory. I.M. appealed to ECtHR, which issued an interim measure asking the French authorities to put the deportation on hold.

Dealing with the merits of the case, ECtHR noted that, as provided by French law, I.M. had been able to challenge the expulsion decision before a higher administrative authority, and that the negative decision of that authority could be challenged before the courts. The appeal for judicial review of the expulsion, however, did not have suspensive effect, i.e. it would not have put the deportation on hold. The French authorities had also given I.M. a legal aid lawyer to assist him. However, because of the expedited procedure for the review of his case, the delays in the availability of an Arabic-French interpreter to assist him, and the very limited time his lawyer had to prepare the appeals together with I.M., in practice the right to challenge the expulsion could not be considered effective.

While the interim measure of ECtHR prevented his removal to Sudan, I.M. was able to obtain documents from Sudan and undergo a medical examination which confirmed his allegations. He was subsequently granted asylum as a refugee in France.

<sup>a</sup>Human Rights Committee, *Giry v. Dominican Republic*, Communication No. 193/1985, 20 July 1990.

<sup>b</sup>ECtHR, *I.M. v. France*, Application No. 9152/09, Judgement of 2 February 2012.

The right to be expelled, deported or extradited only on the basis of a decision adopted in accordance with the applicable law, and to submit reasons against expulsion and to have them examined, applies also in the case of terrorism suspects. Article 14 of the 1997 Terrorist Bombing Convention (and analogous provisions in other global legal instruments against terrorism) provides that:

“Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights.”

## 7.3 The prohibition on “refoulement”

The principle of non-refoulement is a fundamental principle of international law which has its origin in refugee law. The term comes from the French “refouler”, which can be translated as “pushing back” or “turning back” a person. The principle of non-refoulement obliges States not to extradite, expel or otherwise remove a person to another State where that person faces a real risk of being subjected to arbitrary killing, torture or other serious violations of his or her human rights. The non-refoulement principle is contained in international refugee law (section 7.3.1), in international human rights law (section 7.3.2) and also in the universal counter-terrorism legal instruments (section 7.3.3). While the core of the principle is the same in the three bodies of law, there are differences regarding some details, as explained on the next pages.

### 7.3.1 The “non-refoulement” principle in international refugee law

The office of the United Nations High Commissioner for Refugees (UNHCR) has called the principle of non-refoulement “the cornerstone of asylum and of international refugee law”.<sup>121</sup> In a *Note on the Principle of Non-Refoulement*, UNHCR explains: “Following from the right to seek and to enjoy in other countries asylum from persecution, as set forth in article 14 of the Universal Declaration of Human Rights, this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returned to persecution or danger.”

Article 33 of the 1951 Convention Relating to the Status of Refugees (together with its 1967 Protocol) provides that no State party shall expel or return (“refouler” in the French version of the Convention) “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

<sup>121</sup> United Nations High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.refworld.org/docid/438c6d972.html>.



### Who is a refugee?

A refugee is defined in article 1(A)(2) of the Refugee Convention (read alongside the 1967 Protocol Relating to the Status of Refugees). It states that a refugee is “a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him or herself of the protection of that country, or to return there, for fear of persecution”. Article 1(1) of the OAU Convention Governing Specific Aspects of the Refugee Problem in Africa defines the concept of refugee in the same terms. Refugees are entitled to the rights conferred upon refugees by the 1951 Convention. Given the declaratory nature of refugee status, the principle of *non-refoulement* applies even where individuals have not had their status as refugee formally recognized by a host state or its courts, including, in particular, where individuals are asylum-seekers.

*Exceptions to protection offered by the Refugee Convention:* The scope of protection offered by article 1(A)(2) is very broad. Undoubtedly it covers deportation, extradition or any other form of transfer, as emphatically made clear by the statement that “no State party shall expel or return ... a refugee in any manner whatsoever” where his life or freedom may be in danger. There are, however, a limited number of circumstances in which persons otherwise falling within the scope of the definition of refugee in article 1(A)(2) of the Refugee Convention are excluded from the protection afforded by the Refugee Convention.

*Security risk:* Article 33(2) of the Refugee Convention provides: “the benefit of the present provision [the prohibition on refoulement set out in article 33(1) of the Convention] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country”. Article 33 (2) applies specifically in relation to decisions regarding the application of the principle of *non-refoulement* under the Convention. Persons falling within the scope of article 33(2) are not deprived of refugee status under the Convention nor are they deprived of its other benefits. In any event, application of the principle set out in article 33(2) must be construed restrictively and with caution. Moreover, its application is also subject to strict compliance with general principles of law, including due process of law and necessity.

*Grounds for exclusion:* Article 1(F) of the Refugee Convention sets out the circumstances in which individuals are excluded from the protection afforded by the Convention. It applies at the point at which a State determines whether an individual may benefit from the protection of the Convention. According to article 1(F) of the Refugee Convention, the provisions of the Refugee Convention “shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.



### Practical guidance

The significance of these exceptions is, in practice, diminished by the protections applicable under international human rights law, such as the prohibition on torture, inhuman and degrading treatment and the right to life, which remain applicable even when exclusion grounds under the Refugee Convention apply. This is discussed in the next section.

## 7.3.2 Protection against removal under international human rights law

International human rights law prohibits return or transfer of an individual to a jurisdiction where he or she faces a real risk of being subjected to a violation of the right to life or torture, inhuman and degrading treatment. These prohibitions are absolute and cannot be derogated from in any circumstances. They are not subject to the exceptions set out in the Refugee Convention. Moreover, the protection against expulsion in international human rights law, where there is a risk of irreparable harm, applies to everyone, and not only to those who face such a risk on grounds of race, religion, nationality or membership of a particular social group or political opinion.

### *Torture, inhuman and degrading treatment*

Article 3 of the Convention against Torture stipulates that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”. It adds that “[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”.

Article 16 (1) of the International Convention for the Protection of All Persons from Enforced Disappearance, states “[n]o State Party shall expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance”.

Other human rights treaties do not explicitly enshrine the non-refoulement principle, but it has been derived from the prohibition of torture, for instance in article 7 of ICCPR and article 3 of ECHR. In General Comment No. 20, addressing the prohibition on torture, cruel treatment or punishment under article 7 of ICCPR, the Human Rights Committee observed that “states parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”.



### The standard and burden of proof as to the risk of torture or other irreparable harm

When a person facing extradition or deportation objects to removal on the ground that he or she would be at risk of torture or other irreparable harm in the country of destination, key questions are:

- By what standard should the authorities judge whether the risk is sufficient to trigger the obligation not to remove?
- How is the burden of proof regarding this risk allocated between the authority seeking removal and the person resisting it?
- How is the risk of torture or other irreparable harm to be proved?

As to the first question, article 3 of the Convention against Torture stipulates that no one shall be removed to a country where “there are substantial grounds for believing that he would be in danger of being subjected to torture”. This same standard is contained in article 16 of CED. The standard “substantial grounds for believing that there is a real risk of irreparable harm” (General Comment No. 31, CCPR/C/21/Rev.1/Add.13, para. 12) is used also by the Human Rights Committee in non-refoulement cases. Importantly, the Human Rights Committee adds that the risk is to be assessed with regard to “either [...] the country to which removal is to be effected or [to] any country to which the person may subsequently be removed”. The Committee Against Torture adds that “the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable. [...] The person opposing removal must establish] that such danger is personal and present”. (CAT General Comment No. 1: Implementation of article 3 of the Convention in the Context of Article 22 (Refoulement and Communications), paras. 6–7).

Some governments have argued that, because of the threat a terrorism suspect poses to national security, he should be required to present stronger evidence of the risk of ill-treatment in case of removal than would be required in ordinary deportation cases. ECtHR Grand Chamber emphatically rejected this proposition. It held that “since protection against the treatment prohibited by article 3 [ECHR, the prohibition on torture, inhuman and degrading treatment] is absolute, [...] it] is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion”.<sup>a</sup>

As to the second question above, the Committee Against Torture states that “the burden is upon the [person opposing removal to another State] to present an arguable case. This means that there must be a factual basis for [his] position sufficient to require a response from the State party” (CAT General Comment No. 1, para. 5). However, “whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to [the prohibition on torture, inhuman and degrading treatment] if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged”.<sup>b</sup>

Regarding the third question, the Committee Against Torture states that “[a]ll pertinent information may be introduced by either party to bear on this matter” (CAT General Comment No. 1, para. 7). With regard to claims that there is a risk of torture, such pertinent information includes (CAT General Comment No. 1, para. 8):

- Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights? Is there a pattern of violations of the human rights of persons suspected of involvement in terrorist activities? Reports and observations of United Nations and regional human rights mechanisms are particularly authoritative sources of information with regard to these questions. However, also the reports of non-governmental organizations are regularly taken into account.
- Has the person opposing removal been tortured or maltreated 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 the past? If so, was this in the recent past? Is there medical or other independent evidence to support the torture claims?
- Has the person opposing removal engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?
- Is there any evidence as to the credibility of the person opposing removal? Are there factual inconsistencies in the claims of the person opposing removal? If so, are they relevant?

<sup>a</sup>ECtHR, *Saadi v. Italy*, Application No. 37201/06, Judgement of 28 February 2008, para. 138.

<sup>b</sup>ECtHR, *Ismoilov and others v. Russian Federation*, Application No. 2947/06, Judgement of 24 April 2008, para. 126.



### Case studies on non-refoulement

*The Ismoilov case:*<sup>23</sup> Mr. Ismoilov and other Uzbek businessmen were arrested in June 2005 in the Russian Federation based on an extradition request from the government of Uzbekistan, which claimed that they had financed the May 2005 unrest in the Uzbek city of Andijan. They were held in detention with a view to extradition until March 2007, when they were released. In 2006 the United Nations High Commissioner for Refugees granted them refugee status determining that they each had a well-founded fear of being persecuted and tortured if returned to Uzbekistan. The Russian authorities, however, refused to give them refugee status or asylum. Instead, a deputy prosecutor general ordered their extradition to Uzbekistan after noting that they had committed acts of terrorism and other criminal offences. The Russian authorities also noted that they had received diplomatic assurances from the Uzbek government that Mr. Ismoilov and the others would not be tortured or sentenced to death upon their return. The extradition orders were upheld by the Russian courts.

Mr. Ismoilov applied to ECtHR, which issued an interim measure asking the Russian authorities to put the extradition on hold until it had considered the case. In its decision on the merits of the case, ECtHR set out to establish whether there existed a real risk of ill-treatment in the event of Mr. Ismoilov's and the other applicants' extradition to Uzbekistan. It considered the following factors:

- Past ill-treatment of the individuals opposing removal: ECtHR found that most of the applicants had left Uzbekistan in order to flee persecution on account of their religious beliefs or of successful businesses. Some of them had experienced earlier ill-treatment at the hands of the Uzbek authorities, others had seen their relatives or business partners arrested and charged with participation in illegal extremist organizations.
- General situation in the requesting country regarding the treatment of terrorism suspects: ECtHR reviewed reports by United Nations human rights mechanisms and non-governmental organizations, regarding both safeguards against torture in general and specifically the treatment of persons suspected of involvement in the unrest in Andijan.
- Measures taken by the State requesting extradition to combat torture: The Russian Federation argued that Uzbekistan had adopted certain measures designed to combat the practice of torture. ECtHR recognized that such measures had been adopted, but found that there was no proof that those measures had returned any positive results and any fundamental improvement in the protection against torture.
- Assurances given by the Uzbek authorities to their Russian counterparts: ECtHR reiterated that where the practice of torture or inhuman and degrading treatment is widespread or systematic, diplomatic assurances do not offer a reliable guarantee against the risk of ill-treatment.

Finally, ECtHR observed (para. 126) that it was "not convinced by the Government' argument that they had an obligation under international law to cooperate in fighting terrorism and had a duty to extradite the applicants who were accused of terrorist activities, irrespective of a threat of ill-treatment in the receiving country. [...] 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. The prohibition provided by article 3 [ECHR] against ill-treatment is equally absolute in expulsion and extradition 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 or extradition. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration".



The cases of *Othman (Abu Qatada)* and *Al-Moayad* (discussed in the next sections) also deal with aspects of the non-refoulement principle in terrorism cases.

<sup>122</sup>ECtHR, *Ismoilov and others v. Russian Federation*, Application No. 2947/06, Judgement of 24 April 2008.

### *Other risks to which the principle of non-refoulement applies*

In General Comment 31 (para. 12) the Human Rights Committee made clear that the obligation of non-refoulement applies not only where there is a real risk of torture, but also “where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant [e.g. violation of the right to life or torture, inhuman and degrading treatment], either in the country to which removal is to be effected or in any country to which the person may subsequently be removed”.

### *Capital punishment*

Under ICCPR, “countries that have abolished the death penalty ... may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out”.<sup>122</sup> Similarly, because capital punishment is now regarded as impermissible under ECHR, Council of Europe member States will refuse the extradition of an individual to a country where there are substantial grounds for believing that he or she faces a real risk of receiving the death penalty. Some countries will also refuse mutual legal assistance where the proceedings in the requesting country could result in the imposition of capital punishment. This very serious obstacle to international cooperation in criminal matters, including in terrorism cases, can in many instances be overcome through the use of diplomatic assurances, as explained below (section 7.4).

### *Arbitrary detention and denial of fair trial*

The United Nations Working Group on Arbitrary Detention has issued a “Legal Opinion on Preventing Arbitrary Detention in the Context of International Transfer of Detainees, Particularly in Countering Terrorism”. The Working Group states that Governments should (in addition to the risk of torture) “include the risk of arbitrary detention in the receiving State per se among the elements to be taken into consideration when asked to extradite, deport, expel or otherwise hand a person over to the authorities of another State, particularly in the context of efforts to counter terrorism. To remove a person to a State where there is a genuine risk that the person will be detained without legal basis, or without charges over a prolonged time, or tried before a court that manifestly follows orders from the executive branch”<sup>123</sup> would be incompatible with international human rights obligations.

Similarly, ECtHR has ruled that the non-refoulement principle may prevent States from extraditing a terrorism suspect to a country where he would risk a “flagrant denial of a fair trial”. ECtHR has found that a “flagrant denial of a fair trial, and thereby a denial of justice, undoubtedly occurs”:<sup>124</sup>

<sup>122</sup> Human Rights Committee, *Judge v. Canada*, Communication No. 829/1998 (CCPR/C/78/D/829/1998), 20 October 2003, para. 10.4.

<sup>123</sup> Report of the Working Group on Arbitrary Detention, A/HRC/4/40, para. 49.

<sup>124</sup> ECtHR, *Al-Moayad v. Germany*, Admissibility, Application No. 35865/03, Judgement of 20 February 2007, para. 101.

- “Where a person is detained because of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release”.<sup>125</sup>
- If there is “a deliberate and systematic refusal of access to a lawyer to defend oneself”.<sup>126</sup>
- Where evidence obtained under torture may be admitted.<sup>127</sup>

The cases of *Othman (Abu Qatada)* and *Al-Moayad* (the latter discussed in the next section, 7.4) were cases of extradition or deportation of terrorism suspects in which the issue of an alleged risk of a “flagrant denial of justice” in the receiving State arose.



### Case study. Extradition, deportation and the prohibition on torture, inhuman and degrading treatment

*The Abu Qatada case:*<sup>a</sup> Mr. Othman (aka “Abu Qatada”), a Jordanian national, obtained asylum in the United Kingdom on grounds that he had been tortured in detention in Jordan and the risk, if he was returned, that such treatment might reoccur. While in the United Kingdom, Mr. Othman was a co-defendant in two terrorism trials in Jordan (the charges related to conspiracies to carry out bombings in Jordan) and was convicted in absentia in both cases. The statements implicating Mr. Othman were made by co-defendants during interrogation before the trial. At trial, these co-defendants retracted their statements claiming that they had been made under torture, but in both instances the court found the pretrial statements credible and relied on them in convicting Mr. Othman. Jordan sought the extradition of Mr. Othman from the United Kingdom, but subsequently abandoned its extradition request.

In 2001, authorities in the United Kingdom became concerned that Mr. Othman was allegedly regarded by many terrorists as a spiritual adviser whose views legitimized acts of violence and began proceedings to deport him to Jordan. Before the United Kingdom courts and before ECtHR, Mr. Othman objected to his deportation on two grounds: first, that he would be at risk of torture if removed to Jordan; and, second, that he would be retried and convicted on the basis of statements obtained under torture.

To counter the first of the two objections, the United Kingdom Government negotiated a memorandum of understanding with Jordan, which is discussed below in the section on “diplomatic assurances” (section 7.4).

Regarding the second ground for opposing deportation, ECtHR found that Mr. Othman’s deportation would breach the right to a fair trial. It found that there was a real risk that evidence that had been obtained by torture may be used in trying him for terrorist offences and that the use of such evidence would amount to a flagrant denial of justice. This rendered his deportation contrary to the right to a fair trial. The Court held that where there was a real risk of torture evidence being admitted in evidence against a defendant, extradition would constitute a violation of the right to a fair trial by the requested State.

<sup>a</sup>ECtHR, *Othman v. the United Kingdom*, Application No. 8139/09, Judgement of 17 January 2012.

<sup>125</sup> *Ibid.*, para 101.

<sup>126</sup> *Ibid.*, para 101.

<sup>127</sup> ECtHR, *Othman v. the United Kingdom*, Application No. 8139/09, Judgement of 17 January 2012.



### Activities

- Is the non-refoulement principle reflected in your country's legislation and in bilateral or multilateral extradition treaties your country is party to? If so, in what terms? Compare your country's legislation to international law as explained above.
- Have administrative authorities and/or courts in your country applied the non-refoulement principle? Compare such case law to international law as explained above.
- How do the administrative authorities and courts in your country, in extradition or deportation cases, determine whether there is risk of torture or other irreparable harm in the receiving country?

### 7.3.3 The non-discrimination clause in the universal counter-terrorism instruments

Universal counter-terrorism instruments contain a clause that allows States to refuse international cooperation in criminal matters in terrorism cases where they have reason to believe that the prosecution in the requesting State may be motivated by discriminatory motives. Article 15 of the 1999 Convention for the Suppression of the Financing of Terrorism, e.g., provides:

“Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.”

Note that this non-discrimination clause in the universal counter-terrorism instruments provides an optional ground to refuse extradition and mutual legal assistance. It does not create an obligation to refuse cooperation. The obligation (under refugee and human rights law) not to extradite, expel or otherwise remove a person to another State where that person faces a real risk of arbitrary killing, torture or other irreparable harm, however, remains unchanged.

The universal counter-terrorism instruments also stress that terrorist acts cannot be considered “political offences”. For instance, article 11 of the 1997 Convention for the Suppression of Terrorist Bombings provides that “[n]one of the offences set forth in article 2 [of the Convention, i.e. participation in acts of terrorist bombing,] shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives”. It is very important to keep this principle in mind when applying both the non-discrimination clause in the universal counter-terrorism instruments and the grounds of exclusion in article 1(F) of the Refugee Convention (see section 7.2.1 above). In other words, while the principle of non-refoulement protects refugees against extradition or other forms of removal to a country where they would be subject to detention and trial on grounds of their political opinion, purported political motives of a terrorist act cannot be a reason to refuse extradition.



## Tools

- For further information about the separate but directly linked areas of law concerning extradition and asylum see the UNHCR publication on the *Interface between Extradition and Asylum*, available at the following address: [www.unhcr.org/refworld/docid/3fe846da4.html](http://www.unhcr.org/refworld/docid/3fe846da4.html).
- Further guidance as to the scope and content of the principle of non-refoulement in international refugee law is available here: <http://www.unhcr.org/refworld/docid/470a33af0.html>.
- The UNHCR Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of article 1F of the 1951 Convention relating to the Status of Refugees are available here: <http://www.unhcr.org/refworld/docid/43f48c0b4l.html> and further UNHCR guidance, in the specific context of counter-terrorism, is available here: <http://www.unhcr.org/refworld/docid/440ff6944l.html>.
- The UNODC publication *Frequently Asked Questions on International Law Aspects of Countering Terrorism* explains the relationship between counter-terrorism and international refugee law (chapter 4): <http://www.unodc.org/documents/terrorism/Publications/FAQ/English.pdf> .
- A report by the United Nations Special Rapporteur on human rights while countering terrorism dealing with refugee protection and counter-terrorism is available here: <http://www.refworld.org/pdfid/472850e92.pdf> .
- The Committee Against Torture General Comment No. 1: Implementation of article 3 of the Convention in the Context of article 22 (Refoulement and Communications) is available here: <http://www.refworld.org/docid/453882365.html>.

## 7.4 Diplomatic assurances

Diplomatic assurances are commitments given by the State to which the deportee or extraditee is to be transferred as to the treatment that he or she will receive upon transfer to the receiving State. These commitments may simply amount to written or verbal undertakings given by diplomats or other State representatives that an individual will be tried by a civilian court and not a military court, or that the prosecution will not seek the death penalty, or they can take the form of a formal memorandum of understanding between the States in question containing detailed arrangements for supervision or oversight.

Diplomatic assurances can be a very important mechanism to enable international cooperation in criminal matters in terrorism cases, and particularly the transfer of terrorism suspects from one jurisdiction to another. Assurances that the death penalty will not be sought or imposed are now given as a matter of course (in particular between the United States and the member States of the Council of Europe), and ECtHR has been prepared to uphold such assurances on a number of occasions.<sup>128</sup> Diplomatic assurances can also be requested and given regarding fair trial guarantees. For example, before approving an extradition the requested government might seek assurances that the individual concerned will be tried by a regular civilian court. This was the case in the *Al-Moayad* case.

<sup>128</sup> ECtHR, *Babar Ahmad v. the United Kingdom*, Application No. 24027/07, Judgement of 10 April 2012.



### Case study on diplomatic assurances: the *Al-Moayad* case<sup>a</sup>

Mr. Al-Moayad, a Yemeni national, was arrested in Germany in January 2003 on the basis of an arrest warrant issued by the United States of America, where he was charged with providing money, weapons and equipment to terrorist groups. The United States then made an extradition request pursuant to the extradition treaty between Germany and the United States. Mr. Al-Moayad, supported by his lawyers, opposed the extradition and asked to be repatriated to Yemen.

The extradition treaty provided that where a person is extradited from Germany to the United States, the United States prosecuting authorities would not seek the death penalty. Additionally, in the course of the extradition proceedings, the United States Embassy in Germany gave an assurance to the German authorities that Mr. Al-Moayad would not be prosecuted by a military tribunal or an extraordinary court, and would not be detained outside the United States (i.e. he would not be detained at Guantanamo or Bagram airfield in Afghanistan).

Before the German courts, and then before ECtHR, Mr. Al-Moayad claimed that in case of extradition to the United States he would, like other terrorism suspects, be detained at the detention facilities in Guantanamo Bay indefinitely without access to a court and a lawyer, be subjected to interrogation techniques violating the prohibition against torture or inhuman or degrading treatment, and be tried before a military commission. He supported his allegations with references to reports by non-governmental organizations and newspapers.

ECtHR noted that all the reports referred to by Mr. al-Moayad related to the situation of persons detained at Guantanamo Bay or other United States detention facilities outside United States territory. In light of the assurances that Mr. Al-Moayad would be detained in the United States and tried by a civilian court, ECtHR found that the assurances obtained by Germany were sufficient to avert the risks alleged by Mr. Al-Moayad. In this regard, ECtHR also accepted that the German government was justified in relying on these assurances, as the experience showed that assurances given in extradition proceedings between Germany and the United States had always been respected in the past. ECtHR concluded that Germany would not violate Mr. Al-Moayad's human rights by extraditing him to the United States.

Mr. Al-Moayad was extradited to the United States and tried, convicted and sentenced to a prison term in a civilian court.

<sup>a</sup>ECtHR, *Al-Moayad v. Germany*, Application No. 35865/03, Decision on Admissibility of 20 February 2007.

While diplomatic assurances regarding capital punishment and fair trial guarantees are used regularly and accepted as compatible with human rights obligations, the situation is quite different with regard to diplomatic assurances regarding torture. The question whether diplomatic assurances can provide an adequate protection against torture and ill-treatment in the receiving State following extradition or deportation is highly contentious. The Special Rapporteur on Torture has stated that “diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and refoulement, and [States should] refrain from seeking and adopting such assurances with States with a proven record of torture”.<sup>129</sup> Also the United Nations High Commissioner for Human Rights expressed her concern about the use of diplomatic assurances to justify the transfer of individuals to countries where they may face a real risk of torture.<sup>130</sup>

<sup>129</sup> Report of the Special Rapporteur on the Question of Torture (E/CN.4/2006/6), 23 December 2005.

<sup>130</sup> A/HRC/4/88, paras. 8–12.

Diplomatic assurances regarding torture and inhuman and degrading treatment have serious inherent weaknesses: as a matter of international law, torture and inhuman and degrading treatment are already prohibited in absolute terms in all States. Diplomatic assurances therefore provide little in terms of additional protection. On the contrary, where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment. On a practical level, such assurances will be very difficult to verify, and if a violation is found, the torture victim and the State that requested and obtained assurances will generally have few effective remedies. “Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains.”<sup>131</sup>

In its case law, ECtHR has “cautioned against reliance on diplomatic assurances against torture from a State where torture is endemic or persistent” (*Ismoilov* judgement, para. 127), and has generally found such assurances to be inadequate as protection against torture and ill-treatment in the receiving State following extradition or deportation. In the *Abu Qatada* case, however, ECtHR found the memorandum of understanding negotiated between the United Kingdom and the Kingdom of Jordan to be sufficient to remove the risk that Abu Qatada be subjected to torture in case of transfer to Jordan.<sup>132</sup> ECtHR noted that the assurances were very specific, that they had been given by an official who could bind the State, and that compliance with the assurances could be objectively verified through diplomatic or other monitoring mechanisms, including unfettered access to Abu Qatada by his lawyers. ECtHR took the position that diplomatic assurances can, if very stringent conditions are met, be sufficient to remove any real risk of ill-treatment and thus justify the transfer of a person that would otherwise be incompatible with the non-refoulement principle. As mentioned above, ECtHR nonetheless asked the United Kingdom not to deport Abu Qatada to Jordan because of the risk that statements obtained under torture might be used as evidence against him.

The Working Group on Arbitrary Detention Legal Opinion on Preventing Arbitrary Detention in the Context of International Transfer of Detainees, Particularly in Countering Terrorism discusses what it calls “reverse diplomatic assurances”, i.e. assurances to detain the transferee even in the absence of a legal basis: “[w]hereas in the case of diplomatic assurances a sending Government seeks from the receiving Government a (however ineffective) guarantee that the person extradited, deported or expelled will not be subjected to treatment contrary to human rights norms, in the case of ‘reverse diplomatic assurances’ the sending Government seeks precisely assurances that the person handed over will be deprived of liberty, although there are no criminal charges against him and no other legal basis for detention. ... The Working Group underlines that Governments cannot accept a detainee under such conditions without incurring serious violations of their obligations under international human rights law.”<sup>133</sup>



### Activities

- Has your government sought or received diplomatic assurances from another State as to the treatment a deportee or extraditee will receive if sent to that State? What form have these assurances taken?
- If a receiving State offering assurances has a poor record of complying with fundamental human rights obligations, how does this affect the assessment of the weight or reliance that can be placed on these assurances?

<sup>131</sup> Report by Mr. Alvaro Gil-Robles, (Council of Europe) Commissioner for Human Rights, on his visit to Sweden (21–23 April 2004), Comm DH (2004) 13, para. 19.

<sup>132</sup> ECtHR, *Othman v. the United Kingdom*, Application No. 8139/09, Judgement of 17 January 2012, paras. 183 and following.

<sup>133</sup> A/HRC/4/40, para. 57.



### Further reading

- The position of the High Commissioner for Human Rights on diplomatic assurances is set forth in this report: <http://www.statewatch.org/terrorlists/UNHRC-mar07.pdf>.
- The United Nations High Commissioner for Refugees has published a *Note on Diplomatic Assurances and International Refugee Protection*: <http://www.refworld.org/pdfid/44dc81164.pdf>.
- The European Court of Human Rights has set forth its elaborate test regarding the sufficiency of assurances in the *Abu Qatada* case (ECtHR, *Othman v. the United Kingdom*, Application No. 8139/09, Judgement of 17 January 2012, para. 189): [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108629#{"itemid":\["001-108629"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108629#{).

## 7.5 Obtaining custody of terrorism suspects abroad by lure or trickery

There are instances in which a State prosecuting a terrorism suspect or seeking to obtain custody of a person convicted of terrorist offences will find it impossible to obtain custody through extradition proceedings or through deportation by the State on whose territory the wanted person is found (the “host State”). This may be because extradition proceedings have been pursued but have failed, or because the host State does not, as matter of its constitutional law, extradite its own citizens, or because the host State is providing de facto a safe haven to terrorism suspects. The universal counter-terrorism instruments establish that, in such cases, the State refusing extradition is under an obligation to “submit the case without undue delay to its competent authorities for the purpose of prosecution” (e.g. article 8 of the 1997 Terrorist Bombing Convention).

In spite of the “extradite or prosecute” principle, some States have had recourse to lures to trick suspects to a territory where he can be arrested and from where he can subsequently be extradited. States have also occasionally resorted to abducting the suspect across borders by the use of force.

Such practices most often create diplomatic tensions. They raise complex legal problems, which have not received a univocal and clear-cut answer in the practice of governments affected and the case law of international and domestic courts. Where a State acts extraterritorially in seizing or detaining a suspect in a manner inconsistent with the sovereignty of the suspect’s host State, this will generally involve a violation of the rights of the host State under international law. An arrest made by the authorities of one State on the territory of another State, without the consent of the latter, also affects the person’s individual rights to liberty and security of person.<sup>134</sup>

<sup>134</sup> For example, *Öcalan v Turkey*, Application No. 46221/99, Judgement of 12 May 2005, para. 85.



### Case study. The *Celiberti de Casariego* case<sup>a</sup>

Ms. Lilian Celiberti de Casariego was a left-wing activist from Uruguay. To escape persecution by the Uruguayan regime, since 1974 she was living in Italy. In 1978 she travelled to Porto Alegre, Brazil, purportedly to contact Uruguayan exiles living there. In Porto Alegre, Uruguayan agents arrested her with the connivance of two Brazilian police officials (who were not, however, acting in a formal capacity). For seven days she was detained at her apartment in Porto Alegre and then driven to the Uruguayan border. She was forcibly brought into Uruguay and, once there, detained incommunicado for four months, before she was charged with “subversive association”, “violation of the Constitution by conspiracy and preparatory acts thereto”, and with other violations of the Military Penal Code in conjunction with the ordinary Penal Code. The Human Rights Committee found that the way she was deprived of her liberty in Brazil and taken to Uruguay constituted an “act of abduction into Uruguayan territory” and therefore “an arbitrary arrest and detention” (art. 11).

<sup>a</sup>Human Rights Committee, *Celiberti de Casariego v. Uruguay*, Communication No. 56/1979, 29 July 1981

National and international courts have, however, distinguished between extraterritorial abductions and other coercive action to secure custody of a suspect, and cases in which custody of a suspect abroad is obtained by trickery. The *Dokmanović* and *Al Moqayad* cases discussed below illustrate that international courts have found that luring a suspect into another jurisdiction in order to effect his arrest is not an abuse of the suspect’s rights or an abuse of process, as long as no violence is involved. In some national jurisdictions, however, courts will also view cases in which the authorities have obtained custody of a suspect abroad by lures or other trickery as “abuse of process”.



### Case studies regarding the use of lures

*Dokmanović* case:<sup>a</sup> Mr. Dokmanović was charged with crimes against humanity and war crimes in a “sealed”, i.e. secret, indictment issued by the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the aftermath of the war between Serbia and Croatia, Mr. Dokmanović was lured by the ICTY Prosecution from Serbia into a part of Croatia at the time under United Nations transitional administration by the prospect of compensation for real estate he owned in Croatia. Once in United Nations-administered territory, he was arrested at a United Nations base and taken to The Hague, Netherlands, to face trial before the international tribunal. The arrest was recorded on video, which was subsequently shown to the ICTY judges, who found that no force had been used. Mr. Dokmanović argued that the circumstances of his arrest violated his human rights and that he should be released.

The Trial Chamber reviewed case law from several jurisdictions and reached the conclusion that “there is strong support ... for the notion that luring a suspect into another jurisdiction in order to effect his arrest is not an abuse of the suspect’s rights or an abuse of process.” [art. 68] ... “There are, however, cases in national jurisdictions where courts have frowned upon the notion of luring an individual into a jurisdiction in order to effectuate his arrest. However, in all the national or international cases with which we are familiar, which found luring to be a violation of some international law principle or a suspect’s rights, there existed an established extradition treaty that was, in each case, circumvented, or there was unjustified violence used against the suspect.” [art. 74]



The ICTY Trial Chamber noted that in the case of Mr. Dokmanović no force was used, and there was “no inhumane or outrageous conduct”, “nothing about the arrest to shock the conscience” [art. 75]. On this basis, it decided that the circumstances of the arrest did not warrant Mr. Dokmanović’s release and were not an obstacle to the prosecution going ahead in his case.

*Al-Moayad case:*<sup>b</sup> The human rights aspects of the extradition of Mr. Al-Moayad from Germany to the United States of America have been examined above. His arrest in Germany was preceded by the following circumstances, which also gave rise to human rights litigation before the German courts and ECtHR. In considering this case, it is important to keep in mind that Yemen’s constitution prohibits the extradition of Yemeni nationals.

Mr. Al-Moayad was a national of Yemen working as an adviser to the Minister for Religious Foundations. An undercover agent approached Mr. Al-Moayad stating that he could connect him with a wealthy man who was willing to make a major financial contribution. The purpose of this donation was disputed, but was alleged by the United States to be for financing al-Qaeda activities. Mr. Al-Moayad was interested in this prospect and willingly travelled to Germany for the purposes of meeting the donor. There he was arrested by the German police based on an arrest warrant issued by the United States authorities, which was then followed by an extradition request. The Government of Yemen demanded that Mr. Al-Moayad be returned to his home country. Mr. Al-Moayad himself complained that Germany had violated the prohibition of torture, his right to liberty and security, and his right to a fair trial by luring him into their territory through trickery and subsequently arresting him and agreeing to extradition to the United States.

With regards to the use of luring by trickery for the purposes of circumventing a ban on extradition in the suspect’s State of origin (in this case, Yemen), ECtHR (as before it the German Federal Constitutional Court) found that “there was no general rule of public international law, at any rate not in cases like the present one, to prevent the extradition of a person who had been lured, by trickery, from his State of origin to the requested State in order to circumvent a ban on extradition that was valid in the State of origin.” [para. 84]. As noted by the Constitutional Court, the applicant in this case “travelled to [Germany] on the basis of an independent decision in order to pursue his own specific interests” [para. 20]. ECtHR warned, however, that the situation would have been different if Mr. Al-Moayad had been subjected to “direct force aimed at bending his will” or was “threatened with the use of force” [para. 19].

<sup>a</sup>International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Mrksić and others* (IT95-13a-PT), Decision on the Motion for Release by the Accused Slavko Dokmanović, 22 October 1997.

<sup>b</sup>ECtHR, *Al-Moayad v. Germany*, Application No. 35865/03, Decision on Admissibility of 20 February 2007.

## 7.6 “Extraordinary rendition”



### What is “extraordinary rendition”?

The terms “rendition” and “extraordinary rendition” are frequently used in the public debate to refer to irregular transfer and detention of persons suspected of terrorism from one country to another. The *United Nations Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism* (A/HRC/13/42, art. 36) refers to “extraordinary rendition” as the transfer of a person from one State to another “outside the realm of any international or national legal procedure”. It is in this sense that “extraordinary rendition” is used here.

The Council of Europe's Venice Commission made the following observations regarding the terms "rendition" and "extraordinary rendition":

"30. As regards the terminology used, [...] "rendition" [...] is not a term used in international law. The term refers to one State obtaining custody over a person suspected of involvement in serious crime (e.g. terrorism) in the territory of another State and/or the transfer of such a person to custody in the first State's territory, or a place subject to its jurisdiction, or to a third State. "Rendition" is thus a general term referring more to the result—obtaining of custody over a suspected person—rather than the means. Whether a particular "rendition" is lawful will depend upon the laws of the States concerned and on the applicable rules of international law, in particular human rights law. Thus, even if a particular "rendition" is in accordance with the national law of one of the States involved (which may not forbid or even regulate extraterritorial activities of state organs), it may still be unlawful under the national law of the other State(s). Moreover, a "rendition" may be contrary to customary international law and treaty or customary obligations undertaken by the participating State(s) under human rights law and/or international humanitarian law.

31. The term "extraordinary rendition" appears to be used when there is little or no doubt that the obtaining of custody over a person is not in accordance with the existing legal procedures applying in the State where the person was situated at the time."

*Source: European Commission for Democracy through Law, Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners (Opinion 363/2005), paras. 30–31.*

In the *United Nations Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism* (A/HRC/13/42, art. 59), four Special Procedures reporting to the Human Rights Council (see section 1.4.1.2 above) note the strong relationship that exists in practice between, on the one hand, the unlawful transfer of terrorism suspects from one State to another outside the legal frameworks of extradition and deportation, and, on the other hand, serious human rights violations, such as secret detention, disappearances, torture, and unfair trials before military and special courts. They observe (art. 36) that extraordinary rendition tends to have the inherent consequence of placing the person outside the protection of the law.

Moreover, extraordinary rendition inherently nullifies the safeguards in place to uphold the principle of non-refoulement. As observed by the United Nations Working Group on Arbitrary Detention, "what distinguishes deportation or expulsion from the practice of renditions ... is that they have a basis in national law and are preceded by an administrative process resulting in a decision which is notified to the person to be expelled or deported and can be challenged before a court. This opportunity to challenge the removal from the territory of the State is essential to uphold the principle of non-refoulement".<sup>135</sup>

Extraordinary rendition may render the transferring State co-responsible under international law for the human rights violations committed in the receiving State. The *Joint Study* states in this regard (para. 159 (c)) that "when a State has actively participated in the arrest and/or transfer of a person when it knew, or ought to have known, that the person would disappear in a secret detention facility or otherwise be detained outside the legally regulated detention system" it becomes complicit in that person's secret detention. Domestic and

<sup>135</sup> A/HRC/4/40, para. 43.

international courts dealing with extraordinary rendition cases have issued substantial compensation awards in favour of victims of extraordinary rendition and against the States that handed them over.<sup>136</sup>



### Activities

- Assume that a terrorism suspect sought for prosecution by your country's authorities was a fugitive abroad and has been apprehended and brought to your country by the use of trickery. Would the courts in your country object to putting him on trial? What elements would they take into consideration in reaching their decision?
- Have the courts or other authorities in your country dealt with allegations of extraordinary rendition in terrorism cases?



### Further reading

- The *United Nations Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism* (A/HRC/13/42) is available here: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>.
- The European Commission for Democracy through Law—better known as the Venice Commission—is the Council of Europe's advisory body on constitutional matters. Its role is to provide legal advice to Council of Europe member states. Upon request of the Parliamentary Assembly of the Council of Europe, the Venice Commission issued an *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners* (Opinion 363/2005): [http://www.venice.coe.int/webforms/documents/CDL-AD\(2006\)009.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2006)009.aspx).
- The Parliamentary Assembly of the Council of Europe carried out an investigation into Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States in combating terrorism. The First Report (of 12 June 2006) is available at: [http://assembly.coe.int/ASP/Doc/XrefDocDetails\\_E.asp?FileID=11527](http://assembly.coe.int/ASP/Doc/XrefDocDetails_E.asp?FileID=11527), and the Second Report (of 11 June 2007) is available at: [http://assembly.coe.int/ASP/Doc/XrefDocDetails\\_E.asp?FileID=11555](http://assembly.coe.int/ASP/Doc/XrefDocDetails_E.asp?FileID=11555).
- Several judgements by national and international courts and decisions by other human rights bodies dealing with extraordinary rendition cases are available online. They include the views of the Human Rights Committee in *Alzery v. Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006 (<http://www.refworld.org/docid/47975afa21.html>), the judgement of ECtHR in the case of *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgement of 13 December 2012 ([http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621#{"itemid":\["001-115621"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621#{)), and the judgement of the High Court of Kenya in the case of *Salim Awadh Salim and 10 others v. Commissioner of Police and 3 others*, Petition 822 of 2008, Judgement of 31 July 2013 (<http://kenyalaw.org/caselaw/cases/view/89752/>).

<sup>136</sup> See, for example, the judgement of ECtHR in the Case of *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgement of 13 December 2012, and the judgement of the High Court of Kenya in the case of *Salim Awadh Salim and 10 others v. Commissioner of Police and 3 others*, Petition 822 of 2008, Judgement of 31 July 2013.



### Assessment questions

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- Is an asylum seeker who is under investigation in his country of origin on terrorism-related charges always excluded from the protection of the 1951 Refugee Convention?
- Describe the difference between the principle of non-refoulement in article 33(2) of the Refugee Convention and article 3 of the Convention against Torture.
- Identify the kinds of harm which give rise to an obligation not to deport, extradite or otherwise remove an individual to a State in which those risks exist. Is it relevant, in assessing those risks, whether extradition is requested on terrorism-related charges or on charges related to lesser, ordinary criminality?
- When a person whose extradition is sought on terrorism charges objects to extradition on the ground that he or she would be at risk of torture in the receiving country, frequently a dispute arises as to whether there actually is such a risk, how to prove it, and how the burden of proof is allocated in this dispute. Explain the answers to these questions based on the practice of international courts and other international human rights bodies.
- Why is extradition the preferred way of transferring terrorism suspects or convicts from one jurisdiction to another under the international counter-terrorism legal instruments?
- Explain the position of international law regarding the apprehension of fugitive terrorism suspects abroad by the use of force, lures or other trickery. Does it make a difference whether the States concerned are parties to multilateral or bilateral extradition treaties?
- What is “extraordinary rendition”? Why does international law condemn “extraordinary rendition” of terrorism suspects?





# UNODC

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