



Assessing Damage, Urging Action

Report of the Eminent Jurists Panel
on Terrorism, Counter-terrorism
and Human Rights

An initiative of the
International Commission of Jurists



This report of the Eminent Jurists Panel, based on one of the most comprehensive surveys on counter-terrorism and human rights to date, illustrates the extent to which the responses to the events of 11 September 2001 have changed the legal landscape in countries around the world.

Terrorism sows terror, and many States have fallen into a trap set by the terrorists. Ignoring lessons from the past, they have allowed themselves to be rushed into hasty responses, introducing an array of measures which undermine cherished values as well as the international legal framework carefully developed since the Second World War. These measures have resulted in human rights violations, including torture, enforced disappearances, secret and arbitrary detentions, and unfair trials. There has been little accountability for these abuses or justice for their victims.

The Panel addresses the consequences of pursuing counter-terrorism within a war paradigm, the increasing importance of intelligence, the use of preventive mechanisms and the role of the criminal justice system in counter-terrorism. Seven years after 9/11, and sixty years after the adoption of the Universal Declaration of Human Rights, it is time for the international community to re-group, take remedial action, and reassert core values and principles of international law. Those values and principles were intended to withstand crises, and they provide a robust and effective framework from within which to tackle terrorism. It is clear that the threat from terrorism is likely to be a long-term one, and solid long-term responses are now needed.

The Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, composed of eight distinguished jurists from different parts of the world, is an independent panel commissioned by the ICJ to report on the global impact of terrorism on human rights. The present report is based on a process of sixteen Hearings around the world covering more than forty countries in different parts of the world.



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International Commission of Jurists

The International Commission of Jurists (ICJ) is a non-governmental organisation devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world. It is headquartered in Geneva, Switzerland, and has many national sections and affiliated organisations. It enjoys consultative status in the United Nations Economic and Social Council, UNESCO, the Council of Europe and the African Union. The ICJ maintains cooperative relations with various bodies of the Organization of American States.

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INTERNATIONAL
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OF JURISTS

The Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights is an independent Panel convened by the International Commission of Jurists.

The Global Security and Rule of Law Programme of the ICJ provided support to the Panel. Those included Gerald Staberock, Yayoi Yamaguchi, Isabelle Heyer, Marie-Laure Bazerolle, Stephen Coakley and Róisín Pillay. The ICJ wishes to thank Richard Carver for providing drafts and to Maggie Beirne for the editing of the report. Priyamvada Yarnell assisted in the production of the publication. Thanks also to the many interns who provided research and support to the Panel process. The ICJ wishes to thank all those who at various points have contributed to the report in various ways at different stages, in particular to all organisations and individuals that contributed to the Hearing process of the Eminent Jurists Panel.

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Foreword

Since 11 September 2001, countering terrorism has become one of the biggest priorities for many governments and for the international community. Terrorism is a real threat in many parts of the world and States must address terrorism robustly and effectively. However it is no less imperative that they do so through methods that do not undermine the fundamental values at the heart of the international legal system. It is regrettable that during the last eight years many States have responded to terrorism in a manner that threatens the very core of the international human rights framework, that represents perhaps one of the most serious challenges ever posed to the integrity of a system carefully constructed after the Second World War.

In order to respond to this alarming trend, in 2004 the International Commission of Jurists (ICJ) adopted the *Berlin Declaration on Upholding Human Rights while Combating Terrorism* and called for the establishment of a high level panel mandated to conduct a detailed study on the global impact of counter-terrorism measures on human rights. In 2005 the *Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* was convened. This initiative follows in the footsteps of the ICJ's long tradition of critical work on human rights in times of crisis, reflected for example in its 1983 study on "States of Emergency: Their Impact on Human Rights," that was carried out in response to the prevalence of states of emergencies during the 1970's and 1980's.

The Panel, which is composed of eight distinguished jurists from all regions of the world, is an independent body, supported by ICJ Secretariat staff. The Panel's report represents the culmination of an intense and in-depth inquiry over a period of three years. The sixteen Hearings which the Panel held in different countries throughout the world, and on which many of the report's findings are based, have been at the heart of this inquiry, and constitute one of the most comprehensive surveys on counter-terrorism and human rights ever undertaken. Our gratitude to the civil society organisations, human rights defenders and members of the legal community worldwide that engaged in this process, and whose collaboration made it possible, cannot be overstated. Our admiration for their unwavering commitment to the protection of human rights, in the difficult environment that has prevailed since 2001, is immense.

This report does not mark the end of ICJ work on this issue. Rather it represents the beginning of a new chapter. As a global network of jurists the ICJ will now initiate a programme of work intended to build on the Panel's findings and recommendations. As the Panel highlights, cycles of terrorism and counter-terrorism invariably continue over time. In this context it is vital that governments and the international community now engage in a stock-taking process designed to ensure that respect for human rights and the rule of law is integrated into every aspect of counter-terrorism work. Several of the concerns identified by the Panel require urgent attention. These include the expansion of intelligence agency powers and international cooperation

among such agencies without appropriate safeguards and accountability mechanisms; the use of preventative measures such as administrative detention, and the need to re-establish the primacy of the criminal justice system in the context of responding to terrorism.

On behalf of the ICJ, I would like to thank the Panel members for their extraordinary commitment and engagement throughout the last three years. Theirs will be an enduring contribution to the work of the ICJ, and more importantly, to the protection and advancement of the rule of law and human rights. In particular I would like to express my gratitude to the Panel's Chair, Justice Arthur Chaskalson, for his relentless leadership at every stage of this process.

Wilder Tayler
Acting Secretary General

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Preface

The Panel began work on this project in October 2005 when we met in Geneva to discuss how we should carry out the mandate given to us by the International Commission of Jurists (ICJ) to examine the compatibility of laws, policies and practices, which are justified expressly or implicitly as necessary to counter terrorism, with international human rights law and, where applicable, with international humanitarian law.

After a study taking approximately three years, with sixteen national and regional Hearings, involving some forty countries we now publish our report.

Wherever we went we encountered two themes. There is a need for action to combat terrorism, but a concern about the harm being done by the methods used for this purpose. The first came as no surprise to us because of the rise of terrorism as a method of political action during the past decade. We anticipated the second, because of our knowledge of some of the counter-terrorism methods that had attracted public concern and debate. That, after all, was the reason why the ICJ had asked us to conduct the inquiry. What we did not anticipate is how extensive the harm has been. The report details what we heard and the reasons for our concern.

In the introduction to the report there is an account of the methodology adopted by the Panel, the Hearings it conducted, the people who gave evidence and made written submissions to the Panel, and persons with whom the Panel held private meetings. There are too many, and their contributions too vast, to allow for them to be acknowledged in detail in this preface. Their names are recorded in annexes to the report. They represent a diverse cross-section of well-informed, concerned people, drawn from communities affected by terrorism and counter-terrorism. We are extremely grateful to all of them for their willingness to meet and speak to us about their experience. It is from the information they provided that this report has been prepared.

The ICJ, at whose initiative the Panel was appointed, has provided logistic and technical support to the Panel members. The project was the brainchild of Nicholas Howen the ICJ Secretary General. He took an active interest in the work of the Panel, offering valuable advice as we went along. Unfortunately he has been incapacitated by serious illness and has not been able to offer advice during the latter stages of the project. We wish him well and hope that he makes a full recovery.

The ICJ Secretariat, in association with partner organisations in the different countries in which Hearings took place, organised the Hearings and briefed Panel members with relevant background information concerning legislation, policies, and practices. The team at the ICJ was led by Gerald Staberock, Director of its Global Security and the Rule of Law Programme. Over the past three years he has devoted an enormous amount of time and effort to researching legal and factual issues brought to the

attention of the Panel, to organising Hearings and meetings, contributing to the drafting of the report and to the verification of its contents. In the initial stages he was supported in particular by Isabelle Heyer and later by Yayoi Yamaguchi. At different times and in different ways assistance has also been provided by Marie-Laure Bazerolle, Stephen Coakley, Róisín Pillay and Massimo Frigo. Ian Seiderman, who recently returned to the ICJ as a Senior Legal Advisor, took part in the final preparation of the report. To all of them we offer our appreciation and gratitude. Without their assistance the project would not have been viable.

In addition to the ICJ staff at the Secretariat, various interns provided assistance to the Panel. We also wish to acknowledge their assistance and to thank them. Those who helped were Mathias Vermeulen, Matias Pellado, Shushan Khachyan, Stephanie Motz, Georg Huber-Grabenwaerter, Karel De Meester, Ida Soeholm, Anthony Guerbidjian, Jurabek Ruziev, Emerlynne Gil and Sophie Clavet. It is encouraging to see young people taking an interest in international law and human rights, and we hope that their experience at the ICJ, working on the project and other issues, will inspire them to continue being concerned about these matters as they pursue their careers in the years ahead.

Wilder Tayler, the Acting Secretary General of the ICJ has overseen the work done by the Secretariat since Nicholas Howen took ill, and has mobilised support for the project, offering valuable advice to us.

The Hearings depended on the cooperation of partner organisations of the ICJ, and in some instances, venues for the Hearings were provided by friendly institutions. We thank them all.

- The Colombia National Hearing was held in Bogotá, co-organised with the Colombian Commission of Jurists, and hosted by Santo Tomás University;
- the East Africa Sub-regional Hearing (Kenya, Tanzania and Uganda) was held in Nairobi and co-organised with the Kenyan Section of the ICJ with assistance of the East African Law Society;
- the Australia National Hearing was held in Sydney and organised by the Australian Section of the ICJ;
- the Northern Ireland Hearing was held in Belfast and co-organised with the Committee on the Administration of Justice (CAJ);
- the United Kingdom National Hearing was held in London, co-organised with JUSTICE, the British Section of the ICJ and hosted by the solicitors, Freshfields Bruckhaus Deringer;
- the North Africa sub-regional Hearing (Morocco, Tunisia and Algeria) was held in Rabat and co-organised with the ICJ affiliate, the Moroccan Organisation for Human Rights (OMDH);

- the USA National Hearing was held in Washington DC and hosted by the American University Washington College of Law; a reception was hosted by the American Association for the International Commission of Jurists;
- the Southern Cone sub-regional Hearing (Argentina, Brazil, Chile, Paraguay and Uruguay) was held in Buenos Aires, co-organised with the ICJ affiliate, the Centre for Legal and Social Studies and hosted by the Law School of the University of Buenos Aires;
- the South East Asia sub-regional Hearing (Indonesia, Malaysia, Thailand and the Philippines) was held in Jakarta and co-organised with the human rights NGO, Imparsial;
- the Russian Federation National Hearing was held in Moscow and co-organised with the ad hoc Steering Committee of Russian NGOs, including the Independent Council for Legal Expertise, Centre for the Development of Democracy and Human Rights, “Memorial” Human Rights Centre, Centre “Demos”, Nizhny Novgorod Committee against Torture, and Moscow Helsinki Group;
- the South Asia sub-regional Hearing (Bangladesh, India, the Maldives, Nepal and Sri Lanka) was held in Delhi and co-organised with the Institute for Social Sciences;
- the Pakistan National Hearing was held in Islamabad and co-organised with the ICJ affiliate, the Human Rights Commission of Pakistan;
- the Canada National Hearing was held in Toronto and Ottawa and Co-organised with the Canadian Section of the ICJ;
- the Middle East sub-regional Hearing (Egypt, Jordan, Syria and Yemen) was held in and co-organised with the ICJ affiliate, the Arab Centre for the Independence of Judges and the Legal Profession (ACIJLP);
- the mission to Israel and the Occupied Palestinian Territory (as part of the Middle East sub-regional Hearing) was held in Jerusalem, co-organised with the Association for the Civil Rights in Israel (ACRI) with the support of ADALAH; and in Gaza City and Ramallah, co-organised by the ICJ affiliate Al Haq and the Palestinian Centre for Human Rights;
- the EU sub-regional Hearing was held in Brussels, in co-operation with the European Policy Center and hosted by solicitors, Freshfields Bruckhaus Deringer and with the support of the Dutch Section of the ICJ;

ICJ staff employed in regional programmes also provided assistance in connection with Hearings: Jumana Abo-Oxa, Associate Programme Officer, Middle East and North Africa assisted with the Israel/OPT Hearings; Said Benarbia, Legal Officer,

Middle East and North Africa (assisted with the Middle East Hearing); José Zeitune, Legal Officer for Latin America (assisted with the Southern Cone Hearing); Lenka Koutnakova, a consultant with the ICJ, organised the Russia Hearing; and staff at the regional ICJ offices in Thailand and Nepal assisted in the South Asia and South East Asia Hearings.

The preparation of the report has been a difficult task. The notes and records of the Hearings, and the written submissions received run to many thousands of pages. It is not possible to record all that we heard or to comment on all the oral and written submissions made to us. The report focuses on common themes that were brought to our attention, amplified by footnotes referring to sources, and brief summaries of the evidence given at each of the Hearings, prepared by the Secretariat of the ICJ, which will be placed on the ICJ website from where they can be sourced.

Richard Carver took responsibility for writing early drafts of the report, assisted by Gerald Staberock and his team, and we thank him for that. During this process Professor Robert Goldman, Professor Georges Abi-Saab and I, served as a subcommittee of the Panel, commenting on and writing sections of the draft. I would like to express my appreciation to Professor Goldman and Professor Abi-Saab for taking on this additional responsibility which required them to spend time in Geneva when they were under pressure to meet other commitments. Later the report was brought to final form by Maggie Beirne who attended the final plenary meeting of the Panel at which direction was given for the final preparation of the report. The Panel is particularly grateful to her for her contribution to the report.

Implementing the mandate has been a long, educative and at times exhausting process, which Panel members had to fit in to the busy programmes they all have. The Panel, though assisted by the ICJ in the many respects I have indicated, has at all times acted as an independent unit. The views expressed in the report are the views of the Panel members for which we take responsibility. I would like to express my appreciation to all the members of the Panel for their contribution to the report. It has been a great pleasure to get to know them and to work with them.

Arthur Chaskalson
Chair, Eminent Jurists Panel
December 2008

Introduction: Setting the context

September 11th

In the wake of the 11 September 2001 attacks in the United States, many States, responding to United Nations Security Council resolutions and public anxiety, began to adopt an increased array of counter-terrorism measures. While the Security Council failed to immediately refer to States' duty to respect human rights in their responses to terrorism, it subsequently made it clear in a 2003 declaration that *"States must ensure that any measures taken to combat terrorism must comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law."*¹

Despite this guidance, some government officials and policy-makers – most notably in some liberal democracies – began claiming that the rules had changed and even dismissed as unrealistic the observance of certain basic human rights in confronting the new global threat. Human rights treaty bodies and non-governmental organisations soon began documenting the fact that States were violating human rights in the name of countering terrorism.

The ICJ Berlin Declaration

Alarmed by these developments, in August 2004 the International Commission of Jurists (ICJ) convened 160 jurists from all regions of the world in Berlin to discuss the impact of counter-terrorism on human rights and the rule of law. Delegates spoke about serious breaches of human rights and of the rule of law allegedly committed in the name of countering terrorism. Concern was expressed at the conference about the cumulative impact of emerging counter-terrorism measures, and the risk of unravelling the international human rights standards that had been painstakingly developed over the second half of the last century.

As a result, the participants adopted the *ICJ Declaration On Upholding Human Rights and the Rule of Law in Combating Terrorism* (the ICJ Berlin Declaration).² The Declaration sets out eleven fundamental principles of human rights and the rule of law, *"which give governments a reasonable margin of flexibility to combat terrorism without contravening human rights and humanitarian legal obligations"*.³

1 UN Security Council Resolution 1456 (2003) adopted on 20 January 2003, UN Doc. S/RES/1456 (2003); see also UN Security Council Resolution 1373 (2001), adopted on 28 September 2001, UN Doc S/RES/1373 (2001).

2 See text in Annex 1. The ICJ has since published a Legal Commentary to the Declaration which elaborates on the international jurisprudence upon which it is founded, ICJ, *Legal Commentary to the ICJ Berlin Declaration: Counter-terrorism, Human Rights and the Rule of Law* (hereinafter: *Legal Commentary to the ICJ Berlin Declaration*), Geneva, 2008.

3 ICJ, *Legal Commentary to the ICJ Berlin Declaration*, p. ix.

The conference recognised that a much more detailed study about the impact of terrorism and counter-terrorism on human rights and the rule of law was needed. To undertake this study, the ICJ established the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights (hereinafter: the Panel).

The Eminent Jurists Panel

The Panel is composed of eight distinguished judges, lawyers and academics from all regions of the world.

- Justice Arthur Chaskalson (South Africa) former Chief Justice and first President of South Africa's Constitutional Court (Panel Chair);
- Georges Abi-Saab (Egypt), Emeritus Professor of International Law at Graduate Institute of International and Development Studies, Geneva, former appeals judge at the International Criminal Tribunals for the former Yugoslavia and Rwanda, and member of the World Trade Organization Appellate Body;
- Robert K. Goldman (USA), Professor of Law at American University Washington College of Law, former President of the Inter-American Commission on Human Rights, and former UN Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism;
- Hina Jilani (Pakistan), lawyer before the Supreme Court of Pakistan and former UN Secretary General's Special Representative on the situation of human rights defenders;
- Vitit Muntarbhorn (Thailand), Professor of Law at Chulalongkorn University, Bangkok, and UN Human Rights Council's Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea;
- Mary Robinson (Ireland), President of Realizing Rights: the Ethical Globalization Initiative, former UN High Commissioner for Human Rights and former President of Ireland;
- Stefan Trechsel (Switzerland), judge *ad litem* at the International Criminal Tribunal for the former Yugoslavia, former President of the European Commission on Human Rights and Emeritus Professor of Law at University of Zurich; and
- Justice Raúl Zaffaroni (Argentina), judge at the Supreme Court of Argentina, Emeritus Professor at the University of Buenos Aires, and former Director of the UN's Latin American Institute for the Prevention of Crime and the Treatment of Offenders.

The Mandate of the Panel

The Panel was mandated to examine the compatibility of laws, policies and practices adopted to counter terrorism, with basic principles of the rule of law, international human rights law and, where applicable, with international humanitarian law.

The definition of terrorism

There is no agreed universal legal definition of terrorism. A proposed draft UN Comprehensive Convention on International Terrorism⁴ has stalled, leaving a patchwork of national, regional and international law defining the phenomenon, or various aspects of it. However, it is not correct to infer from this that international law provides no guidance on the nature of terrorism. There are thirteen thematic international conventions addressing different aspects of the phenomenon, such as aircraft hijacking, hijacking of sea vessels and financing of terrorism.⁵ Cumulatively, these documents have identified a number of acts commonly considered as terrorist acts. In practice, there is already a high degree of political consensus internationally on the core description of terrorism.

These elements are set out in the *International Convention for the Suppression of the Financing of Terrorism*⁶ and Security Council Resolution 1566 (2004), which described terrorism in the following terms:

“...criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act...”⁷

The Panel does not seek to offer any new definition of terrorism, but considers that, in describing terrorism, it is important to focus on the act itself, not the actor.

In principle, anyone can commit terrorist acts. Many of the obstacles to reaching an agreed comprehensive definition of terrorism have related to this point, with various governments disputing that either State actors or national liberation movements can

4 In 1996, the UN General Assembly established an Ad Hoc Committee with a mandate to draft a comprehensive international convention on terrorism and a convention on the suppression of acts of nuclear terrorism. A broad agreement on 27 articles had been reached in 2002, but disagreements continue on articles dealing with the scope of application of the Convention, in particular in relation to liberation movements and the activities of military forces of a State. See Report of the Ad Hoc Committee, Twelfth session (25 and 26 February and 6 March 2008), General Assembly, Official Records, Sixty-third Session, Supplement No. 37 (A/63/37).

5 See for further references <http://www.un.org/terrorism/instruments.shtml>.

6 International Convention for the Suppression of the Financing of Terrorism, adopted by the UN General Assembly Resolution 54/109 of 9 December 1999.

7 UN Security Council Resolution 1566 (2004), adopted on 8 October 2004, UN Doc. S/RES/1566 (2004).

commit terrorist acts. Yet it is apparent, from the definition provided in Resolution 1566, that no one need be excluded. If a State official were to commit an act of this nature, State responsibility would be engaged, but also individual criminal responsibility. The Panel heard ample testimony from Latin America, for example, to lead it to the conclusion that “State terrorism” is something more than mere rhetoric. Similarly, the legitimacy of an aim, such as national liberation (or counter-terrorism, for that matter), can under no circumstances, justify the use of methods that are in violation of international law.

Methodology

With the support of the ICJ Secretariat and the network of its partner organisations, the Panel engaged in a broad-based consultative process to learn about the impact of terrorism and counter-terrorism measures on human rights and the rule of law around the world. Over a period of more than two years, the Panel undertook an extensive process of consultation through sixteen national and sub-regional Hearings, covering more than forty countries. Most of these countries had experienced a significant threat from terrorism, either in the past or in the present.

a. Public Hearings

Public Hearings were conducted by sub-committees of the Panel in: Australia, Canada, Colombia, East Africa (Kenya, Tanzania and Uganda), the European Union and its Member States, Israel and the Occupied Palestinian Territory, the Middle East (Egypt, Jordan, Syria and Yemen), North Africa (Algeria, Morocco and Tunisia), Pakistan, the Russian Federation, South Asia (Bangladesh, India, the Maldives, Nepal and Sri Lanka), South-East Asia (Indonesia, Malaysia, the Philippines and Thailand), the Southern Cone countries of Latin America (Argentina, Brazil, Chile, Paraguay and Uruguay), the United Kingdom (one Hearing in London on current counter-terrorism policies, and a Hearing on the lessons from the past in Belfast), and in the United States of America.

b. Questions Asked

In each country or region visited, the Panel provided a template for submissions and asked the following key questions in the course of their Hearings:

- What special laws, policies or practices has the government adopted, since 2001, or in the past, which it has justified expressly or implicitly as necessary to counter terrorism?
- Have these counter-terrorism measures had an impact on the rule of law and on the rights guaranteed to all persons by international

human rights or international humanitarian law? If so, what has been the impact?

- How has the government justified such counter-terrorism measures and do you consider that past or current terrorist threats have justified these measures?
- What has been the impact of the “war on terror” in your country?
- What lessons should today’s policy-makers learn from any experiences your country has had in the past with terrorism and counter-terrorism?

In some Hearings, a more extensive questionnaire and list of issues gave guidance to contributors about issues of particular interest to the Panel.⁸

c. Persons Who Gave Evidence

It was an explicit policy of the Panel to invite both governmental and non-governmental participants to engage with the public Hearings. In the course of the Hearings, oral evidence and written representations were submitted to the Panel by various persons, including representatives of Bar Councils and Law Societies; leading lawyers in private practice; representatives of national human rights institutions, human rights organisations and civil society; journalists; academics; and members of the public, including both victims of terrorist violence and of counter-terrorism measures, and often from government representatives as well.⁹

d. Private meetings and written representations

Recognising the benefit of detailed exchanges in bilateral meetings, and appreciating that some people may not have wanted to give evidence in public, arrangements were also made for private meetings to be held in each of the countries that the Panel visited. In the course of these meetings, members of the Panel had the opportunity to hold discussions on relevant issues with high ranking officials, including ministers, national security advisors, inspector generals of intelligence services, senior judges, attorney generals and directors of public prosecutions. Members of the Panel also had private meetings with the International Committee of the Red Cross (specifically in relation to international humanitarian law principles), and with senior representatives of the United Nations and the European Union. The Panel also received written and oral evidence from representatives

⁸ See, for more information, <http://www.icj.org>.

⁹ See Annex 3 for those who gave oral evidence to the Panel, and Annex 5 for those who provided written submissions.

of regional organisations, including the Council of Europe and the Inter-American Commission on Human Rights.¹⁰

The Panel would like to place on its record its appreciation for the hundreds of contributions received. The fact that so many people engaged shows the level of interest in the topic, and the Hearings highlighted the value of encouraging thoughtful debate on these sometimes highly contentious issues. All of the material, and particularly the fact that it came from such a wide array of countries, from a whole variety of legal and other disciplines, and from very many different perspectives, has deeply enriched and informed the Panel's deliberations.

What the Panel heard

The Panel was struck by the similarity of the testimony provided at the Hearings. From New York to Nairobi, from Brussels to Bogotá, and from Moscow to the Maghreb, the voices heard by the Panel spoke with disturbing consistency and regularity that well-established principles of international law are being ignored. Witnesses testified to the fact that:

- In many countries, legal and human rights protections are regularly side-stepped. Individuals are abducted; held in secret prisons; and often tortured or ill-treated. The effect is to place individual terrorist suspects beyond the protections afforded by human rights standards, international humanitarian law, or domestic constitutional guarantees;
- Many counter-terrorist mechanisms lack the normal guarantees of oversight and accountability. This means that when violations occur those responsible enjoy impunity for their behaviour. Victims of such violations often find themselves with no avenue for redress;
- New counter-terrorist laws have been enacted (with minimal examination of the adequacy of existing laws), and they often contain over-broad definitions of terrorism or terrorist acts, and provide for new offences that risk penalising political opinion or social dissent;
- Terrorist suspects are often held *incommunicado* for extended periods before they are charged, and before they have access to lawyers, courts or the outside world;
- Individuals charged with terrorism are regularly tried in a number of countries before special or military courts that are neither independent nor impartial, and do not offer basic fair trial guarantees;

¹⁰ See Annex 4 for a list of private meetings.

- Human rights violations are often supposedly justified by the search for intelligence, and the need to prevent terrorist acts. Intelligence, sometimes unsubstantiated and in the absence of judicial control, provides grounds for detention, house arrest, deportation and other measures;
- Even some of the countries which have not themselves engaged directly in serious human rights violations have been complacent about, or complicit in, violations committed by others;
- A number of these practices – ill-treatment, extended detention, special judicial procedures and prosecutions based on unsubstantiated intelligence – have begun to seep into the normal functioning of the State, and its criminal justice system. Any such degeneration clearly poses potentially long-term consequences for the rule of law and respect for human rights;
- Societies have suffered a range of negative consequences – restrictions on the media, limitations on freedom of speech and association, and the isolation or targeting of minority communities. Over time, there is a fear that the cumulative impact of counter-terrorist measures will undermine accountability and encourage impunity.

The issues highlighted above emerged in many Hearings. What became increasingly apparent, as the Hearings progressed, was the extent of repetition, and the risk posed globally by many of the measures taken supposedly in the name of counter-terrorism.

Human rights violations arising from the struggle to counter terrorism should not, however, obscure the threat posed by terrorism itself. The Panel heard evidence at the Hearings, and in private discussions with senior government officials, in different parts of the world, to the effect that terrorism not only poses a serious threat, but that civilian populations suffer grievous human rights abuses at the hands of terrorists. The Panel heard from many victims of terrorism, and organisations representing them, and was left in no doubt that terrorism has caused dreadful loss and pain, instilled great fear, and continues to pose a serious current and future threat. Witnesses also frequently reminded the Panel of the positive duty on States to protect people in their jurisdiction against real and substantial threats from terrorism. There was no hesitation expressed about the need to counter terrorism effectively. The challenge is for States to find ways of protecting society that fully respect the human rights of all.

The findings of the Panel

The Panel studied the extensive material submitted: the oral and written evidence submitted to the Hearings; the information provided in private discussions with senior government officials; and desk-based research carried out by Panel members and the ICJ Secretariat. The information was carefully assessed by the panellists,

all of whom have had to confront issues relevant to this report in the course of their professional careers.

The Panel was concerned at many of the specific details of violations, but was particularly impressed by the similarity of experiences recounted. The commonality of experience, and its global reach, provided evidence of a far more serious erosion of respect for human rights and the rule of law than the Panel had expected.

It was notable that some governments allegedly responsible for serious human rights violations did not deny the allegations made. Indeed some openly defended practices such as indefinite detention without charge or trial, citing the unprecedented nature of the contemporary terrorist threat to justify their departure from previously accepted legal norms. Others suggested that key human rights principles have to be read differently in light of the exceptional threat. The Panel was particularly struck by the fact that it was often liberal democratic societies – States that previously lauded the importance of the rule of law and human rights protections – that are now at the forefront of undermining those protections. In departing from previously accepted norms of behaviour, such governments also give succour to others that have routinely violated the human rights of their citizens. Some government policies imply and, in some cases, government representatives openly discussed the possibility that individuals suspected of involvement in terrorist acts fall outside certain basic human rights protections (perhaps because of their statelessness or their supposed status as “enemy combatants”). The logic of this stance is that certain governments want to reserve for themselves the power to designate a class of people who are not entitled to the same rights as other human beings. The Panel came to the inevitable conclusion that the very foundations of the human rights culture, developed over the past sixty years, is being undermined.

The Panel concluded that the need to protect human rights, and to maintain strong legal safeguards and remedies, is often perceived as running counter to what States need to do to address terrorism, rather than as an inherent component of any long-term strategy to tackle terrorism. The Hearings and, most importantly, the private discussions with governments and security officials illustrated to the Panel that the world, seven years after the events of 9/11, is still searching for guidance in finding the proper response to terrorism.

Clearly it would be improper to underestimate the fact that many governments are grappling sincerely with difficult problems. States have a legal duty to protect society against terrorist attacks, and some of them are trying to adapt their legal and policy frameworks to meet this threat effectively. The Panel concludes, however, that in their attempts to respond to the threats posed by terrorism many States have ignored or under-estimated the implications of tampering with the foundations of the human rights system.

Accordingly, the Panel came to the inexorable conclusion that there must be a halt to the trends set in motion or, in some countries, exacerbated by the events of 9/11.

The international community must agree about what constitutes an appropriate response to such threats and must work together to give effect to that response. At the moment, there is a lack of accountability, and human rights are not effectively integrated into the counter-terrorist strategy. Human rights can no longer remain merely a rhetorical “add-on” to counter-terrorist thinking, but must become a central plank in the global response to terrorism. The Panel has no hesitation, having taken testimony from around the globe, in asserting that everyone’s security is guaranteed most effectively by upholding the principle of human dignity. Human dignity – a moral and legal imperative – is only assured by respecting international human rights and humanitarian law. Human dignity and respect for the rule of law must therefore be centre-stage in the forging of a new international consensus about the response to terrorism in the years to come.

More detailed findings about the elements to be built into this new international consensus about the response to terrorism are found in the body of this report, which addresses the following issues:

- the role of human rights in the fight against terrorism (Chapter One). Do human rights need to be balanced against security issues? Can human rights law properly accommodate the threats posed by modern terrorism? What role might human rights play in effective counter-terrorism?
- lessons from the past (Chapter Two). Many of the jurisdictions visited by the Panel have experienced serious and long-running periods of political violence and terrorism: are there any interesting parallels with contemporary debates? This chapter explores what learning from the past, if any, is applicable to the current terrorist threat;
- the “war” on terror (Chapter Three) examining when and why the term “war on terror” came into common usage; the problematic conflation of legal regimes underlying this war paradigm; whether the “war on terror” has a credible legal basis; and the adverse consequences that have arisen in applying a war paradigm;
- the increasing use of secret intelligence in counter-terrorism (Chapter Four). The chapter looks at the distinctive role played by intelligence in modern counter-terrorist measures: the powers of intelligence agencies are extending, is this appropriate? What accountability can and should be built in? How does a State protect human rights *and* the secrecy required for effective intelligence gathering and sharing?
- the preventive measures (Chapter Five) being introduced by States in the expectation that they may prevent terrorist acts before they occur. How can States act to protect everyone from terrorist acts and at the same time ensure the fullest respect for due process? Preventive measures (such as expulsions,

administrative detention, control orders, listing) must comply with human rights standards: how is this best done?

- the impact of counter-terrorist measures on the criminal justice system more generally (Chapter Six). The Panel received extensive testimony about the impact of counter-terrorism measures on the criminal justice system around the world. Some argued that the tried-and-tested principles evolved to deal with criminality were inadequate to address terrorism; the Panel unanimously concluded the opposite. This chapter reports both substantive and procedural changes to the criminal justice system and discusses if, and if so how, the criminal justice system can adapt to the current challenges?

In the final concluding chapter, the Panel sums up its findings as follows:

- Terrorism is a reality and States have a duty to counter the threat posed, but many current counter-terrorist measures are illegal and even counter-productive;
- The legal framework that existed prior to 9/11 is extremely robust and effective: international human rights and international humanitarian law were elaborated precisely to guarantee people's security. The Panel concluded that this legal framework is sufficiently adaptable to meet the current threats;
- However, the Panel found that the framework of international law is being actively undermined, and many States are reneging on their treaty or customary law obligations. The failure of States to comply with their legal duties is creating a dangerous situation wherein terrorism, and the fear of terrorism, are undermining basic principles of international human rights law;
- The Panel was particularly concerned at the evidence worldwide showing that the erosion of international law principles is being led by some of those liberal democratic States that in the past have loudly proclaimed the importance of human rights;
- Specifically, the Panel rejects the claim that any "war" on terror excuses States from abiding by international human rights law and, in armed conflict situations, international humanitarian law, or allows them to tinker with the rules that these frameworks provide;
- Intelligence agencies around the world have acquired new powers and resources, but legal and political accountability have often not kept pace;

- Criminal law is the primary vehicle to be used to address terrorism; preventive measures and adaptations of the legal framework that are not in conflict with international human rights principles are acceptable, and may indeed be required if States are to comply with their duty to protect life and the security of persons.

Chapter One: Human Rights versus Security?

1. Introduction

Human rights law places the dignity of the human person at the centre of its concerns. Inflicting harm on civilians is clearly a breach of the core values that human rights are designed to uphold. Yet, if one were to judge from the public debates, and the stance taken by many governments, there is a tension between upholding human rights *or* ensuring people's security in the face of the terrorist threat. It is a basic tenet of this report that any implied dichotomy between securing people's rights and people's security is wrong. Upholding human rights is not a matter of being "soft" on terrorism. On the contrary, countering terrorism is itself a human rights objective, since States have a positive obligation to protect people under their jurisdiction against terrorist acts. This positive duty on States requires them to prevent, punish, investigate, and redress the harm caused by such acts. At the same time, States must accept that this positive duty to protect applies both to those who may be at risk from terrorism and to those who may be suspected of terrorism. The State has no authority in law to determine that some people do not qualify to have their rights respected.

The simplest way of explaining the inter-relationship between human rights and security is to reflect on the genesis of the modern-day human rights framework. The *Universal Declaration of Human Rights* (hereinafter: UDHR) was adopted and proclaimed in 1948, in the wake of the genocidal horrors of the Second World War. The nations of the world recognised that "*disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.*"¹¹ This recognition of the depths to which depraved human beings can sink, led the world community to conclude that the only way to avoid or at least temper such horrors in the future was to commit to respecting the principle that "*all human beings are born free and equal in dignity and rights.*"¹² The international consensus, reflected in the *Universal Declaration of Human Rights* and the *Charter of the United Nations*, was that no one in the future would ever again fall outside the protection of the law.

In other words, the modern framework of international law, which was set in motion by the *Charter of the United Nations*, was established *because of*, and not *despite*, the need for security. The Panel believes that States tamper with this framework at their peril.

Throughout the second half of the twentieth century, there was an international consensus about the inter-relationship of human rights and security. In the 1960's,

11 Preamble of the Universal Declaration of Human Rights (UDHR), 10 December 1948.

12 Article 1, UDHR.

'70's, '80's, and '90's, the framework of international humanitarian and human rights law¹³ was built upon. Oversight bodies were established and strengthened. Inter-governmental regional bodies and courts deepened this shared understanding; increasingly sophisticated jurisprudential analysis assisted States to comply with their commitments to uphold human rights and provide security to all. The assumption was that this international consensus would survive any and all threats.

Initially, in the wake of the 9/11 attack, and the call for concerted action to defeat terrorism, there appears to have been some uncertainty about how the international community should best respond. However, resolutions adopted by the Security Council and the General Assembly of the United Nations, soon reasserted the linkage between security and human rights. Member States were required to take action against terrorist threats within a framework of protecting human rights and fundamental freedoms. States were reminded that they must take appropriate counter-terrorist measures whilst complying with their obligations under international law, including in particular, human rights law, refugee law and international humanitarian law.¹⁴ Regional organisations, such as the Organization of American States and the Council of Europe, adopted resolutions reaffirming the importance of protecting human rights in the struggle against terrorism.¹⁵

However, in practice, in many countries around the world, the fear of terrorism has been allowed to override the need to uphold human rights. For some States that routinely abused human rights in the past, counter-terrorism is simply the newest excuse behind which to hide; for other States, counter-terrorism is claimed to be the justification for departing from long-cherished norms. The Panel believes that it is difficult to exaggerate the risk to society as a whole when governments depart from their obligations in this way.

The Panel examines below the ability of the current international order to respond to crisis and to genuine emergencies. The Panel also explores the extent to which the contemporary terrorist threat is truly an extraordinary and exceptional threat.

13 For a fuller discussion on the complementarity between human rights and humanitarian law, see Chapter Three.

14 See for instance, UN Security Council Resolution 1456 (2003) adopted on 20 January 2003, UN Doc. S/RES/1456 (2003); UN General Assembly Resolution 60/158 (2005), adopted on 8 September 2005; UN Doc. A/Res/60/158 (2005); See in particular, UN Global Counter-Terrorism Strategy adopted by the General Assembly on 8 September 2006, Resolution 60/288, UN Doc. A/RES/60/288.

15 See Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 51; Council of Europe, Parliamentary Assembly Resolution 1271 (2002), adopted on 24 January 2002; Council of Europe, Committee of Ministers, *Guidelines on Human Rights and the fight against terrorism*, adopted on 11 July 2002 and *Guidelines on the Protection of Victims of Terrorism*, adopted on 2 March 2005.

2. Can the human rights system accommodate emergencies?

One of the arguments made by some States for having to sideline human rights in the face of the terrorist threat is that rights are a luxury that, unfortunately, must be dispensed with (normally only on a temporary basis) at times of extreme crisis. Yet this claim ignores why the modern framework of international human rights and humanitarian law came into being. The 1948 *Universal Declaration of Human Rights*, and the many mechanisms and treaties that flowed from it thereafter, had their genesis in cataclysmic war and genocide. States adopted a comprehensive human rights system and a new codification of international humanitarian law (the laws of war) in order to prevent a recurrence of the nightmare that saw millions die. Over the years, procedures and mechanisms have been established to ensure effective accountability for international crimes, violations of human rights and international humanitarian law, and for ensuring reparation for victims.

Speaking of the laws of war, Jakob Kellenberger (President of the International Committee of the Red Cross) responded as follows to specific attempts to undermine the integrity of Common Article 3 of the *Geneva Conventions of 1949*:

“It should be remembered that common Article 3, like the Geneva Conventions as a whole, was drafted by experts who had just come out of the darkest chapter of the twentieth century, and probably of all human history. It would be presumptuous to think that they lacked awareness of the potential for abuses that can be caused by war. The totality of the provisions of common Article 3 were crafted to prevent them.”¹⁶

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

Some argue, nevertheless, that the current threat posed by terrorism was not, and could not have been, envisaged before, and therefore that the current legal framework will not suffice. The claim is that the threat of terrorism is so unprecedented and exceptional that the world is facing a genuine emergency, and that in the face of such an emergency, the rules must change, and individuals must forego many of their liberties for the greater good. Leaving aside temporarily the question of the exceptional and unprecedented nature of the threat, it is certainly right to examine whether the current legal framework provides enough flexibility to respond to genuine emergencies.

¹⁶ ICRC, “*Developments in US policy and legislation towards detainees: the ICRC position*” interview with ICRC President Jakob Kellenberger, 19 October 2006, available at www.icrc.org.

Those who devised the modern human rights system were idealists, no doubt, but they were also pragmatic. From the outset, those involved recognised that the enjoyment of most rights might need to be limited from time to time for different reasons, not least on occasion to respect the rights and freedoms of others. However, those who developed the modern human rights system went further and recognised that some rights might need to be suspended in situations of genuine emergency.

The international legal framework recognises firstly that few rights are absolute. Even outside of emergency situations, democratic societies accept that fundamental principles such as the freedom of movement, of expression, of association, must be protected by law, but also are subject to daily accommodation between individuals with competing interests. Conflicts of rights between individuals and groups are eventually a matter for adjudication by the courts. These rights, the restrictions on them, and the criteria to be applied in determining how rights can be restricted, are all laid down clearly in international law. For example, Article 29 of the UDHR declares that individuals have duties to the wider community and that limitations to individual rights must be “*determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order and the general welfare*”. Since the passage of the *1948 Universal Declaration of Human Rights*, further texts (most specifically the two universal covenants¹⁷) and extensive jurisprudence at national, regional and international levels has interpreted the proper meaning to be accorded to the concepts of legality, necessity, and proportionality that are implicit in this standard.

Furthermore, the human rights framework explicitly recognises that there may be emergencies, and that States must have the necessary freedom of manoeuvre so that, in the face of extreme danger, they can act promptly and effectively in the best interests of society as a whole. Human rights treaties envisage the possibility that some rights may be formally suspended in times of a legitimate emergency.

Yet the framers of these treaties also determined that there could be no *carte blanche* for States. If they could individually determine what constituted an emergency, how long the emergency lasted, which rights could be suspended indefinitely, and whose rights could be infringed, then the other protections on offer would be nugatory. Accordingly, when an emergency arises, States may register their intention to derogate from particular human rights provisions. To derogate, the State in question must formally explain to the international community the exceptional nature of the emergency; the derogation must be of a temporary nature; and specific legal measures, safeguards, and reporting systems come into play.¹⁸

17 United Nations International Covenant on Civil and Political Rights (ICCPR) and the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR).

18 See *Report of the Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2005/103, 17 February 2005, para. 12, stating that: “*The jurisprudence of the Human Rights Committee and regional supervisory bodies indicates that derogations are always*

For the avoidance of doubt, two important clarifications should be noted. First, there are certain core rights, such as the right to life and the prohibition on torture and other cruel, inhuman and degrading treatment, that are non-derogable.¹⁹ In other words, regardless of the nature or the severity of the threat, there are some human rights that are considered to be non-negotiable. For example, in no circumstances whatsoever, can States ever engage in torture, or arbitrarily deprive people of their right to life. It is clearly significant that the world community has determined that there is no conceivable circumstance in which their infringement is considered acceptable.

Second, frequent reference has been made in this section to the intentions of the “framers” of the international human rights and humanitarian law system. It is worth emphasising that the “framers” of these laws are States themselves. The legal parameters by which States are to be judged, by their peers, and by their citizens, have been negotiated long and hard by sovereign States. States know, or ought to know, that the international legal framework has evolved in such a way as to allow States to respond to serious crises and emergency situations.

This is the human rights framework which the Panel has relied upon in carrying out its global study. States have agreed to be bound by international law and they have steadily built upon the *1948 Universal Declaration of Human Rights* by way of subsequent treaties and jurisprudence, looking *inter alia* at the issue of the relationships between terrorism, security and human rights. The testimony gathered by the Panel confirmed that human rights law provides sufficient flexibility for States to adjust to security needs; States should rely upon this framework rather than seek to re-write the rule book.

exceptional and temporary measures. Accordingly, such measures should be lifted as soon as the emergency which justified their imposition no longer exists or can be managed by less intrusive means under the relevant instrument. This jurisprudence also suggests that as the underlying purpose of such measures is to permit States to protect democratic institutions, the rule of law and the enjoyment of basic freedoms, such measures cannot lawfully be undertaken to weaken or destroy them”.

19 The following rights are identified as non-derogable in Article 4 (2) ICCPR: the right to life, the prohibition on torture and other cruel, inhuman or degrading treatment or punishment, the prohibition of slavery, the prohibition of imprisonment because of inability to fulfil a contractual debt, the prohibition of retroactive laws, the recognition of everyone as a person before the law, and freedom of thought, conscience and religion. In addition, the UN Human Rights Committee, in *General Comment No. 29: States of emergency (Article 4)* (hereinafter: *General Comment No. 29*), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, identified the following provisions of the ICCPR as not being lawfully derogable: the humane treatment of all persons deprived of liberty; the prohibition of hostage-taking, abductions or unacknowledged detentions; the protection of persons belonging to minorities; the prohibition of unlawful deportation or transfer of populations; propaganda for war, or advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence, the right to an effective remedy and to challenge the lawfulness of detention. Equally, the right to be tried by an independent and impartial court and most components of the right to a fair trial are recognised as non-derogable, see Legal Commentary to the ICJ Berlin Declaration, Principle 4, p. 27 *et seq.*

3. Can respect for human rights actually assist counter-terrorist efforts?

There is no inherent contradiction between, on the one hand, upholding human rights and the rule of law and, on the other, ensuring people's safety by countering terrorism. The Panel does not accept the characterisation of "human rights" and "security from terrorism" as being somehow at opposing poles, and the duty imposed on States as one of balancing these antithetical demands. Instead, the Panel shares the belief enunciated in the ICJ Berlin Declaration that: "*safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the State.*"²⁰

In other words, it is not enough to say that human rights need not hinder counter-terrorism; more positively, it can be argued that human rights are an effective weapon in the defence of democratic societies. There are several reasons why this is so.

First, defending human rights, especially in the face of violent terrorism, is to privilege the fundamental notion of human dignity. Asserting everyone's inherent humanity is to refute the claim of others that human beings may be instrumentalised, and to evade the terrorist trap in which violent actions and reactions come to be seen as necessary or justifiable. States that seriously violate human rights, albeit supposedly in the name of the greater good of protecting society, are engaged in a self-contradictory exercise. Rights are inalienable and States cannot selectively choose to protect certain rights, or the rights of certain people. A counter-terrorist policy aimed at protecting all equally is rooted in the application of law and respect for human rights. Such a policy will reinforce a State's credibility and legitimacy when responding to any violence directed at it.

Second, human rights protection requires an independent judiciary, and the establishment and maintenance of an independent judiciary, even in the face of violent attack, ensures, in its turn, fairness and accountability in the behaviour of other branches of government. If counter-terrorist measures are to be effective in the long term, they must be seen to be legitimate, and an independent judiciary can contribute to providing that legitimacy. A well-operating criminal justice system will deter terrorists, disrupt terrorist networks, catch and punish those who commit crimes, and ensure that any innocent suspects mistakenly caught up in the law enforcement process are rapidly released.

Third, and contrary to populist debate, human rights speak directly to the needs and rights of the victims of terrorism. Members of the Panel were aware of this from their own professional activities, but were interested to hear the point made in person by many of the victims of terrorism and counter-terrorism met in the course

²⁰ Preamble of the ICJ Berlin Declaration, see Annex 1.

of their Hearings around the world.²¹ States have a duty to investigate and prosecute perpetrators of terrorist acts. In addition, when States themselves are responsible for terrorist acts, whether through their agents or proxies, they are required to provide remedies, including reparation. In those instances where terrorist acts are committed in the context of armed conflict, international humanitarian law will also apply. States can only fully respect the rights of victims if they comply with their legal obligations.

Fourth, human rights can address and remedy any genuine injustices that may give succour to terrorism. Sometimes violent conflict is caused by genuine grievances; sometimes genuine, pre-existing, grievances are exploited by terrorists for their own ends; sometimes grievances may be perceived rather than real. Yet again, grievances can arise from the measures introduced to counter the terrorist threat: many examples were provided to the Panel (by security officials as well as victims) of States engaging in human rights violations, and thereby feeding and fuelling the very violence they are meant to be curtailing. A commitment to respect human rights on the part of a State could bring to an end any real or alleged grievances; at the very least, such a commitment will secure greater legitimacy for its counter-terrorism efforts.

4. Does the contemporary terrorist threat require exceptional responses?

The framework of international law, established from 1948 onwards, was intended to give States sufficient flexibility to respond to genuine threats. Since 2001, however, many assert that the contemporary threat from terrorism is of an unprecedented and exceptional nature.²² Several reasons are proffered for this claim. For example, it has been argued that groups like al-Qaeda are international in character; have access to more dangerous technologies of killing (*e.g.* “dirty” bombs *etc.*); utilise highly sophisticated communication technologies to carry out attacks and thwart law enforcement measures; have individuals who employ tactics, such as suicide bombing, which require different tactics on the part of law enforcement personnel; and/or have ill-defined, existential, or unrealisable demands, making negotiation difficult.

21 The Panel received evidence directly from victims of terrorism and counter-terrorism in many Hearings – see particularly the Hearings in Northern Africa, Northern Ireland, the Russian Federation (where the Panel heard from victims of the Beslan school and the Moscow north-east theatre sieges), and the US – nearly all seeking truth and accountability. See summary of the EJP Hearings in the Russian Federation, Northern Africa and written submissions by Donald W Goodrich, Families of September 11, and by Adele Welty, September 11th Families for Peaceful Tomorrows, EJP United States Hearing.

22 See, for example, written submission by the Government of the United Kingdom and Home Office, Background briefing papers on the 2005 Prevention of Terrorism Bill submitted to the Panel, EJP United Kingdom Hearing.

On the assumption that the contemporary terrorist threat is exceptional, some argue that exceptional responses are required, and that the current legal framework, not having envisaged such a global and dangerous threat, is essentially inadequate.

The Panel had the unparalleled opportunity to meet and discuss the contemporary threat with senior political, police, military, and intelligence personnel, from many countries around the world. The Panel also visited places where it could see directly for itself the profound impact that terrorist violence has had on people's lives. The panellists are jurists, they do not have the wide range of technological, military, and political expertise that would be required to sit in judgment about the detailed nature of the threat country by country, and how, or even, if it can be differentiated from earlier, or indeed future, threats. Whilst some of the exceptionalism claimed for the current terrorist threat was far from self-evident, some conclusions can be drawn from the extensive testimony received.

The Panel, for example, was left in no doubt that:

- terrorism is a reality and it poses a serious threat to many people;
- the threat posed by terrorism is likely to be long-term;
- terrorist operations can be international in character and are often trans-frontier in impact;
- the nature of the threat posed varies from place to place, can also vary over time, and that the threat is sometimes highly localised and sometimes part of a wider agenda created by groups operating in different parts of the world, with different aims;
- a recognition of the contemporary threat, or threats, should not in any sense minimise the human suffering inflicted by terrorism in the past;²³
- terrorist and counter-terrorist strategies can access advanced technologies, especially communication technologies, which create new challenges for the prevention and the punishment of crime;
- in some situations, genuine efforts to address the contemporary threats from terrorism have led to serious human rights abuses; and that, elsewhere, human rights violations occur because counter-terrorism is being used as an excuse by governments to exploit the situation for their own political ends.²⁴

23 Victims of other earlier phases of terrorism expressed concern at the exceptionalism being applied to the current situation which might lead observers to think that atrocities such as those that occurred in the past (Algeria in the 1990's was one example given) were somehow less serious than current attacks.

24 The Panel was given many credible examples of situations where governments have portrayed long-standing conflicts as part of a global response to terrorism, apparently with a view to securing international approval

Whilst some witnesses to the Panel emphasised the truly unprecedented nature of the current terrorist threat, others spoke of important parallels between current and past terrorist and counter-terrorist experiences. Whether the threat is exceptional or not, the Panel heard no persuasive evidence that the tried-and-tested framework of international law was inadequate. In other words, it is irrelevant for immediate purposes to determine if there is one terrorist threat or multiple threats, or if this threat is quantitatively or qualitatively different to past threats. Suffice to say that in different parts of the world terrorism poses a real and substantial threat needing to be effectively countered in accordance with international law.

The Panel is worried, however, that some of the counter-terrorist responses do not accord with international law and themselves also pose a threat to individuals, communities, and to a number of deeply-held values. Some governments seem to have decided that the threat of terrorism justifies exceptional responses that are at risk of seriously undermining the rule of law. The legal framework explicitly negotiated to ensure international, national, and personal security is under attack. The Panel is unanimous that no adequate justification was provided to them for this roll-back in protection. Moreover, the Panel believes that the discourse on terrorism has led, in some instances, to stoking a climate of fear in which minority groups and human rights defenders, in particular, are marginalised. The space for public dialogue should be extended, but instead is being restricted. When governments insist on being trusted, and rely upon this trust to introduce ever-more invasive measures to counter terrorism without providing a sober and proportionate assessment of the threat, they unwittingly reinforce the very goal of terrorism, and instil fear in the public.

The report looks at these counter-terrorism responses in more detail. Separate chapters examine lessons from the past; attempts to apply a war paradigm to the current terrorist threat; changes to the role of intelligence in countering terrorism; preventive measures and the potential of the criminal justice system to respond effectively to terrorism. The unanimous conclusion of the Panel, having examined all the material submitted to it, is that the international legal framework that existed prior to 9/11 is extremely robust and effective.

5. Conclusions: human rights

The Panel concludes that international human rights law was elaborated precisely to guarantee people's safety, and that this framework allows those concerns to be accommodated by way of a system of limitation clauses and by making provision, in genuine emergencies, for the temporary suspension of some rights. The current legal framework is sufficiently adaptable to counter any current threats or future threats.

for their counter measures.

The Panel received extensive evidence to the effect that the justification of “unprecedented” threats have frequently been called on in the past to justify human rights violations; that temporary measures often become permanent; and that it is extremely difficult to re-institute human rights protections once lost.

Victims of terrorist and State abuses, non-governmental organisations, practising lawyers, senior officials all testified to the reality of terrorism and the need to counter any such threats. It is not, however, acceptable that the horrors of 9/11, and other major terrorist acts that were the subject of testimony to the Panel in the course of its Hearings, should lead to further horrors, with some States condoning kidnapping and torture by way of response. The Panel was shocked to find some State officials who fail to counter serious allegations of human rights violations, but rather argue that such tactics (albeit with sanitised and euphemistic labels), are legitimate instruments of State security policy, and are essential to counter the terrorist threat. Even when States foreswore such tactics themselves, they were at times actively complicit in the wrongdoing of others, or at the very least fell silent and failed to mobilise the international community in expressing its outrage.

At the turn of the millennium, there was a clear international consensus on the nature of human dignity, the rights that flowed from that central premise, and the total illegality and unacceptability of practices such as torture. Seven years on from the tragedy of 9/11, it is time to take stock and re-affirm those basic principles. Much damage has been done to the international legal framework in these few short years. Priority must be given to actively undoing the grave harm that has been caused.

It is time for change.

Chapter Two: Learning from the Past

1. Introduction

The Panel decided to explore how terrorism was tackled in the past. Even if certain aspects of the contemporary threat may be new, the use of terror tactics has long been a method of political and social struggle; is there any learning to be derived from those experiences?

To hear directly about past efforts of counter-terrorism and their effect on society, the Panel held a Hearing in Northern Ireland,²⁵ and a sub-regional Hearing in the Southern Cone,²⁶ which covered the experiences of Argentina, Brazil, Chile, Paraguay, and Uruguay in the 1970's and 1980's. Other country and sub-regional Hearings also provided relevant evidence to the Panel concerning the impact of past counter-terrorism measures on human rights and the rule of law. In addition, the Panel has commented in this chapter on some countries which it did not visit, such as Peru, but which offer interesting insights into past experiences.

The sessions surprised the Panel in two ways. First, there appeared to be a large number of parallels between past and contemporary concerns regarding both terrorism and counter-terrorism. There were continual resonances heard in the testimony received from these “backward-looking” Hearings, and from the testimony received about current dilemmas and experiences. Second, the Panel found it remarkable that these past lessons seem to have been largely ignored by governments in shaping their responses to terrorism since the September 11 attacks. Ignoring the past is, in the view of the Panel, misguided.

This chapter will explore a series of issues:

Are past experiences relevant to today's counter-terrorism efforts?

- Military responses to past terrorist campaigns;
- Special counter-terrorism laws;
- The longevity of emergency powers;
- The impact on society of past counter-terrorist efforts;
- Conclusions by the Panel.

25 EJP Northern Ireland Hearing, see Committee on the Administration of Justice (CAJ), *The “war on terror”: lessons from Northern Ireland*, January 2008, final submission to the EJP, www.caj.org.uk (hereinafter: CAJ final submission).

26 See summary of the EJP Southern Cone Hearing for more references.

2. Are past experiences relevant to today's counter-terrorism efforts?

The Panel recognises the need to avoid simplistic analogies: each situation needs to be understood in a specific historical, legal and social context. Nevertheless, having listened to extensive testimony, the Panel is convinced that past experiences can provide useful lessons in a number of ways.

2.1 The exceptionalism argument

The Panel heard extensive evidence to the effect that most, if not all, past terrorist threats have been portrayed as exceptional and unprecedented. As is the case nowadays (see Chapter One), authorities frequently argued in the past that the threat was unparalleled, and that “exceptional” responses were therefore required.

Whether or not this was genuine, the exceptional character of the threat was almost always cited as justifying a departure from the normal legal processes. On the basis of the exceptional threat, special laws were introduced and/or the authorities resorted to extra-legal means. The evidence all tended towards the conclusion that the past notion of an exceptional and unprecedented threat, apparently necessitating special measures, had a negative impact on the protection of human rights and the rule of law. Human rights violations in many countries around the world seemed to stem directly from the argument that exceptional responses were needed. More positively, witnesses also testified to successful strategies evolving from failed policies in the past.²⁷ However, a doctrine of exceptionalism logically leads one to dismiss or side-step such successful strategies, as supposedly irrelevant in the “new” environment.

So the exceptionalism doctrine is problematic in that it risks justifying the introduction of unacceptable counter measures *and* it risks blinding governments to positive measures that have worked in the past, and might work again.

2.2 Back to the future?

In some Hearings the fear was expressed that this tendency to ignore the past was having a deleterious effect nowadays. Governments in countries that had relatively recently emerged from authoritarian rule were coming under international pressure to introduce security legislation similar to laws that had led to human rights violations previously.

The risk of regression was a point made, for example, by numerous participants at the Southern Cone Hearing (in Argentina). Witnesses argued that new terrorist

²⁷ Experiences of successful policing strategies and police reforms from Northern Ireland for example could be directly relevant for current discussions about policing and minority communities.

legislation risked replicating the serious human rights violations of the past and that the existing criminal law was sufficient to address new terrorist threats. In Kenya too, the Panel was told that counter-terrorist laws, supported by western governments, may reverse important safeguards. In Northern Ireland, concerns were expressed that new UK-wide anti-terrorism legislation might hurt the process of political normalisation underway. The Panel also received reports indicating that pressure from EU Member States on Turkey to make changes to its anti-terrorism law could reverse some of the country's legal reforms over recent years.²⁸

2.3 Past threats of terrorism were also very serious

However substantial the current threat, past threats were far from negligible. For example, the Panel considered testimony relating to the dangerous, ruthless and brutal methods used by groups such as the *Groupe Islamique Armé* (GIA) in Algeria. From 1992 in Algeria, the GIA was responsible for the deaths of thousands of people, often in large-scale massacres in which entire villages were destroyed. The organisation targeted anyone regarded as “collaborating” with the authorities, including teachers and other public employees. The Panel heard directly from representatives of victims’ organisations about the dramatic impact of terrorism on the country.²⁹ The Panel also learnt of the horrors committed by *Sendero Luminoso* (Shining Path), thousands of miles away, during the internal armed conflict in Peru. Members of the Maoist group killed, tortured and “disappeared” thousands of innocent civilians, to intimidate the communities the group sought to control. Peru’s Truth and Reconciliation Commission highlighted the tragic nature of these terrorist acts, which flagrantly violated international humanitarian law, as well as the very serious human rights and humanitarian law violations committed by the State. Of the estimated 69,280 persons who died between 1980-1992, 54% of them are attributed to *Sendero Luminoso*.³⁰

Any suggestion that such experiences were less severe than the threat faced today is likely to sound hollow to the victims of terrorist violence and State repression in Algeria, Peru and many other countries around the world.

2.4 Past threats of terrorism were often long-lasting

Much is made of the long-term nature of the contemporary terrorist threat: no one expects that this current threat will rapidly dissipate. It is therefore relevant to look at the implications of prolonged emergency situations in the past. Places such as

28 See Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (hereinafter: Special Rapporteur on Human Rights and Terrorism), *Mission to Turkey*, UN Doc. A/HRC/4/26/Add.2, 16 November 2006, para. 73.

29 See summary of the EJP North Africa Hearing with further references and oral testimony of Mohamed Nedjem-Eddine Boujadjji on the perspective of terrorist victims in Algeria and the effects of impunity.

30 Truth and Reconciliation Commission, *Final Report*, General Conclusions No. 2 and No. 13, August 2003, see <http://www.cverdad.org.pe/ingles/ifinal/conclusiones.php>.

Algeria, Argentina, Chile, Egypt, Indonesia, Malaysia, Northern Ireland, Peru, Sri Lanka, Syria, Turkey, Uruguay, all experienced years and decades of “emergency” measures. Measures that often were presumably intended to be temporary, gradually became the norm.

Witnesses spoke directly of the risk of “sleep-walking” into a legal and political contradiction – temporary and emergency measures which become permanent and routine. Furthermore, much of the evidence suggested that these “temporary” and “emergency” responses tend to seep into other areas of law, and negatively influence the institutional culture of the police, the legal system, and the judiciary. Where there had been a separation of powers, long-lasting emergencies gradually undermined this important safeguard, and privileged the centralisation of the power with the executive and/or its military and intelligence agencies. The Panel was told that the exercise of special powers, especially the militarisation of law enforcement or of the judiciary, as seen in the Middle East, has had a long-term corrosive effect on the rule of law.

2.5 Much of the current threat is a continuation of past threats

Whilst some contemporary threats have new elements, many are a continuation of past conflicts. Sri Lanka has experienced three decades of conflict with the Liberation Tigers of Tamil Eelam (LTTE), fighting for a separate State in the North of Sri Lanka. Serious terrorist acts, including suicide attacks, remain a continuing reality. Another long-standing threat that continues to this day is the targeting of civilians in the violence that seeks the separation of the Basque country from Spain.

There is even the risk that governments explicitly re-define long-standing domestic conflicts as part of the worldwide contemporary threat from terrorism, to further their own ends, and possibly in the expectation that this will secure more external sympathy and support. For example, in Moscow, the Panel was told that the conflict in Chechnya was originally characterised as a separatist struggle; from 1999 it was described as a terrorist operation; and since 9/11 (although intermittently), the conflict has been portrayed as being part of international terrorism. In Colombia, the Government of President Alvaro Uribe now characterises the decades-old confrontation with armed groups such as the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*: FARC), as a fight against terrorism.³¹ In Nepal, armed activities by the Communist Party of Nepal (Maoist) started in 1996. Yet in November 2001, new terrorist legislation justified by the global context of counter-terrorism was passed, and the Maoists were formally designated (at home and abroad) as a terrorist organisation. Some contributors claim that the Filipino Government has selectively subsumed a complex web of long-standing local conflicts under the “counter-terrorist” label. In Uganda, the longstanding conflict in the north of the country was reclassified: the insurgent Lord’s Resistance Army

³¹ See the summary of the EJP Colombia Hearing.

(LRA) was placed on the Ugandan and US lists of terrorist organisations. New anti-terrorist legislation was also introduced, and this legislation was in time used not only in reaction to LRA acts of terror, but against opposition politicians unconnected with the LRA.

2.6 Many current counter-terrorism laws and practices are similar to those in the past

Many of the laws, policies and practices that States have adopted to confront the threat of terrorism today replicate some of those used in the past. Broadly defined criminal offences of terrorism, the creation of new criminal offences, the proscription of certain organisations, special powers limiting the rights of suspects, changes to criminal procedures to facilitate prosecution, the use of military jurisdiction over civilians, the resort to administrative detention or forms of administrative control, changed interrogation rules, the use of torture to gather intelligence, and the resort to armed force have all been tried before. There is extensive documentation about the devastating effect that these policies have had on human rights and the rule of law.

Sometimes the parallels are almost surreal. Witnesses talked of the failed detention policies used in Northern Ireland as having led to “*hundreds of young men in working class nationalist communities joining the IRA and creating one of the most efficient insurgency forces in the world*”.³² It is now generally accepted that this policy of interning detainees alienated whole communities. One must wonder, 30 years later, what impact the sight of the treatment of detainees held at Guantánamo Bay or Abu Ghraib is having on young Muslims (in Britain and elsewhere).

The Panel concluded that there was a great value to current debates in examining past responses to violent conflict.

3. Military responses to terrorism

Some governments characterised terrorism as a military threat, and one therefore that required primarily a military response. The violence may or may not have amounted to the level of an armed conflict,³³ but the authorities chose often to treat the threat on an existential level: the armed forces were required to “defeat” or “eradicate” the terrorists if society itself were to survive.

It may of course be necessary, from time to time, to have resort to a military response, but it was made clear to the Panel that reliance on military force (both within and beyond recognised situations of armed conflict), has often resulted in

32 Evidence received at the EJP Northern Ireland Hearing; Citation taken from the CAJ final submission.

33 For a discussion of the legal problems of considering terrorism and counter-terrorism as forms of armed conflict see Chapter Three.

serious violations of international human rights and/or humanitarian law, and in a general climate of impunity. The clearest examples of the negative impact of the military response to terrorism were supplied to the Panel at the Hearings in Latin America, especially in relation to the Southern Cone, but examples were provided of similar problems arising in countries such as India, Turkey, and Sri Lanka.

In Peru, the military's tactics to defeat *Sendero Luminoso*, and other armed terrorist groups, resulted in serious violations of human rights and humanitarian law, including extra-judicial executions, enforced disappearances, torture and other cruel, inhuman or degrading treatment. The subsequent Truth and Reconciliation Commission confirmed these findings and considered that the armed forces were responsible for crimes against humanity in the course of the armed conflict.³⁴

Part of the problem of entrusting the armed forces with primary responsibility for countering terrorism is that this often leads to the privileging of purely military concerns at the expense of seeking alternative options and even solutions. The Panel was told that when military forces were entrusted with the responsibility of defeating terrorism, this often delayed the pursuit of other political, social or economic remedies. Moreover, military involvement meant that civilian and judicial scrutiny became severely limited, *de jure* or *de facto*. This inadequate scrutiny often resulted in impunity for gross human rights violations.

This risk of impunity for military personnel was raised at the South Asia Hearing.³⁵ For example, in India, the Armed Forces Special Powers Act (AFSPA), which applies to certain States such as Jammu and Kashmir, requires that cases against members of the military only be prosecuted before military courts, and are subject to authorisation by the Central Government.³⁶ The Panel was told that such authorisation was rarely granted on the grounds that prosecution might damage the morale of the military. Participants from India argued that, in practice, the AFSPA had long facilitated the military to carry out extrajudicial killings (staged as “encounter killings”), and other serious human rights violations, with impunity.

3.1 The “national security doctrine”

In the 1970s and 1980s, the military in a number of Latin American States adopted what came to be known as the “national security doctrine”.³⁷ They were not the first

34 Truth and Reconciliation Commission, *op. cit.*, General Conclusions, No. 55.

35 See the summary of the EJP South Asia Hearing; See also the regional overview provided in the written submission to the EJP by the Commonwealth Human Rights Initiative.

36 Section 6 of the Armed Forces Special Powers Act (AFSPA), India.

37 During its Southern Cone Hearing, the Panel heard that the national security doctrine incorporated French counter-insurgency concepts (used in Algeria and Indochina in the 1950s), was spread by the US through the training of Latin American armies in “the School of the Americas” in Panama, and implemented in Latin America progressively from the 1960s.

to adopt this doctrine, but the Southern Cone Hearing provided a useful insight for the Panel into what this meant in practice, and its modern-day parallels.

The Southern Cone military saw the Cold War era not as a metaphor, but a real war. Indeed, for some, it was the “third” world war, taking place between two irreconcilable blocs – the Christian West and the expansionist Communist East. This “war” was both global and local in nature. The Southern Cone military saw violent leftist groups as malignant agents of international communism who were the “enemy within”. In this existential conflict, it was the duty of the armed forces – by whatever means – to defeat the enemy militarily, and to obliterate any manifestation of the enemy’s ideology, culture and traditions.

The Argentinean military government and its supporters often referred to the “dirty war” waged against its supposed enemies, one where all the usual rules no longer applied. Likewise, General Augusto Pinochet of Chile, who seized power on 11 September 1973, declared the country in a “state of war”. These governments, and other Southern Cone neighbours, came to regard all those who were not active supporters of their regimes as supporters of the “enemy”. One Argentinean General is reported to have said: “*First we will kill all the terrorists; then we will kill all who helped them, and then we will kill all who did not help us.*”³⁸ There was a high degree of cooperation between military governments in the war on communism, where values, including human rights and the rule of law, were subordinated to the war, and the strategy and tactics of the “national security doctrine”. Tens of thousands were killed, “disappeared”, or tortured, and societies remain deeply divided to this day.

The “war” on communism was not confined within the boundaries of the countries concerned. Testimony to the Panel explained how the security forces and intelligence services of the different countries carried out joint operations in each other’s territory, and sometimes abroad, against suspected subversives. Operation Condor, as it was known, operated through an exchange of intelligence information between States, identification of “subversive” or “terrorist” persons, as well as torture, execution, detention and/or clandestine transfer of political opponents to their countries of origin.

In its Hearing in Argentina, the Panel was told how a military junta seized power in March 1976, and initiated the “Process of National Reorganisation”, by dissolving Congress, purging the judiciary, and enacting repressive laws. The junta prohibited all political, trade union and other social and professional organisations. The notions of terrorism and subversion were defined in the broadest terms so as to include anyone who recommends by any means, to alter or suppress the institutional order and social peace of the Nation, by ways not established by the National Constitution

38 Tom J. Farer, “The two faces of terror”, in *American Journal of International Law*, Volume 101, Issue 1, 2007, pp. 363-38, citing Lindsey Gruson “6 Priests killed in a campus raid in San Salvador”, *New York Times*, 17 November 1989.

or the legal dispositions that organise political, economical and social life of the Nation.³⁹ The definition of terrorism was not limited to threats or acts of violence but also criminalised anyone who, in any manner whatsoever, disseminates, divulges or propagates communications, or images, emanating from, or attributed to unlawful associations, or persons or groups known to be devoted to subversive or terrorist activities.⁴⁰ The presumption of innocence was removed from those accused of “subversive crimes”, and civilian “subversives” were given over to military jurisdiction for trial (or worse).

Violent groups in Argentina were quickly marginalised, leaving the military to intensify its campaign against the “internal enemy”, namely innocent civilians suspected of having subversive ideas. In parallel to the repression pursued through formal legal routes, the national security doctrine also facilitated the secret practices of enforced disappearances, secret detentions and torture. The notion of fighting a “war” (albeit against one’s own citizens) justified repression. Initially, it seems that extreme measures were used against members of armed groups and political dissidents; but the practice of torture quickly became endemic, as a useful tool for intimidating and terrorising society as a whole. It is clear, particularly in retrospect, that the most serious human rights violations, such as torture and disappearances, became routine, and even to some extent, legitimised by the fact that suspects were increasingly seen and portrayed as an implacable and dehumanised enemy. In short, in the name of countering terrorism, the State itself became a terrorist.

Many participants at the Hearing pointedly drew parallels between the measures taken by some States since the 11 September 2001 attacks, and those employed in the past by these Southern Cone military regimes. Contributors drew comparisons between now and then with reference to clandestine detention centres, the use of torture to extract information, the extension of military jurisdiction to try suspected terrorists, and Operation Condor and the current policy of “extraordinary renditions”. For some, the US administration’s “war on terror” essentially reprises the national security doctrine mentality.

The experiences in Argentina and other countries of the Southern Cone are a forceful reminder of :

- the dangers of an existential war against a “demonised” enemy in which the end justifies the means;
- the dangers of an approach that gives the military unfettered powers in internal security matters;

39 Article 1 of Law No. 20.840, *Penalidades para las actividades subversivas en todas sus manifestaciones* (“Penalties for subversive activities in all their forms”) – translation by the ICJ, promulgated on 30 September 1974.

40 *Ibid*; Article 2 of Law No. 20.840.

- the dangers of combating an ideology rather than clearly prescribed criminalised behaviour; and, it illustrates;
- how easily human rights protections can become subordinated to an all-encompassing notion of national security.

People may disagree about the short-term consequences of the “dirty war” in Argentina; presumably there are still military personnel or others who believe that such a response was necessary at the time. In the long term, however, this sad period of history has left a legacy of thousands of victims, many of whom continue to fight against impunity; it has entailed a long struggle to re-establish the rule of law; and it has left serious societal divisions.

3.2 Military and special courts

The militarised response to terrorism in the past has led to the adoption of parallel justice systems – for example, the creation of military or special courts to try those accused of terrorist offences. In most instances, this approach led to serious violations of the right to a fair trial, and departed from accepted legal procedures and safeguards. Typically, such courts lacked independence and impartiality, as well as exhibiting other shortcomings, such as limits on access to lawyers and witnesses.⁴¹

The long-standing State security and military courts in many countries of the Middle East illustrate the problems special courts can create.⁴² The State Security Court in Turkey (abolished in May 2004) also had many procedural shortcomings criticised in various rulings of the European Court of Human Rights, most notably in the case of Abdullah Öcalan, the leader of the Kurdistan Workers Party (PKK).⁴³ As their name suggests, such courts tend to see their role as enforcing “State security” rather than adjudicating impartially between State and citizens. In many countries, pre-existing regimes of martial law, or states of siege, provided for the trial of civilians by military courts. In other countries, emergency laws transferred jurisdiction to try certain terrorist or subversive offences from civilian to military courts. In yet other countries, to allow for looser evidentiary rules and the curtailing of defence rights, the laws established specialised civilian or *ad hoc* courts to try suspected “subversives”.

The case of Peru is an interesting case-study of turning the court system into an arm of a repressive State. President Alberto Fujimori instituted a “self-coup” in 1992 and governed with military support. Anti-terrorism decrees were issued and in military courts (prosecuting crimes such as “treason against the fatherland” – *i.e.*, an aggravated form of terrorism), and civilian courts (prosecuting the offence of terrorism), judges, prosecutors and witnesses were “faceless,” and could be heard only via a

41 International Commission of Jurists, *States of Emergency: Their Impact on Human Rights*, Geneva, 1983.

42 See summary of the EJP Middle East Hearing.

43 ECtHR, Grand Chamber Judgment of 12 May 2005, *Öcalan v. Turkey*, Application No. 46221/99.

distorted voice recorder. The accused was severely impaired in his/her ability to mount an effective defence, often suffering from prolonged *incommunicado* detention, and limited access to evidence and counsel. Many defendants were convicted on the basis of evidence obtained as a result of coercion, or unsubstantiated statements of individuals seeking to take advantage of a law offering amnesty in return for “repentance”.⁴⁴ These grossly unfair trials, mounted against those suspected of terrorism (defined very loosely), resulted in the conviction of hundreds of innocent persons.⁴⁵ The Government installed provisional judges and prosecutors, effectively using the justice system as an arm of government in defeating the “enemy”. The same role was required of the judiciary in the 1970s and 1980s in the Southern Cone.

The results of these limitations on due process rights were well documented by the Peruvian Truth and Reconciliation Commission, which noted:

*“The TRC has established that strict and uncritical application of the 1992 anti-terrorist legislation undermined the guarantee of impartiality and accuracy in trials of detainees. Not only did hundreds of innocent persons have to endure long sentences, but due process violations cast a heavy shadow of doubt over the trials that took place. The discredit suffered by the Peruvian judicial system during the Fujimori regime proved to be a boon for the true subversives when, years later, the State had to retry them on the basis of scant evidence. Additionally, those sentenced for terrorism suffered prison conditions that were degrading to human dignity, and that in no way led to their rehabilitation.”*⁴⁶

It has been argued, in Peru and elsewhere, that resort to the excessive use of force and special criminal courts and procedures were necessary to suppress the serious threat of terrorism. However, the Truth and Reconciliation Commission suggests that the success in defeating *Sendero Luminoso*⁴⁷ was in part due to a changed strategy in the armed forces that promoted better relations with the local population,⁴⁸ and the capture of its charismatic leader Abimael Guzman Reinoso. The capture

44 Truth and Reconciliation Commission, *op. cit.*, General Conclusions No.126 “*The situation worsened after the 1992 coup because of characteristics of the new anti-terror legislation, which included over-criminalisation of terrorism by making the concept flexible and creating new crimes that were tried in different forums and imposed different sentences for the same conduct; lack of proportionality in sentencing, serious limitation on the ability of detainees to mount a defence; and the attribution of jurisdictions to military tribunals.*”

45 See Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OAS Doc. OEA/Ser.L/V/II.106, 2 June 2000, paras. 102-120.

46 Truth and Reconciliation Commission, *op cit.*, General Conclusions, No.130.

47 *Sendero Luminoso* (Shining Path) was an insurgent group notably more brutal than other violent left wing groups in the Southern Cone. Following an extreme brand of Maoism, the group was highly intolerant of dissent and established a base of support among the Andean peasantry through extreme terror, but the increasingly militarised government response to *Sendero Luminoso* was also considered counter-productive, see Truth and Reconciliation Commission, *op cit.*, General Conclusion No. 59.

48 Truth and Reconciliation Commission, *op cit.*, General Conclusions, No. 60.

itself, which was so seminal to the defeat of the group, was secured as a result of traditional intelligence and law enforcement work.⁴⁹

In 1998, the special procedures created to try terrorist offences were extended to cover organised crime. The Inter-American Court of Human Rights later found these special procedures to be in violation of the *American Convention on Human Rights*.⁵⁰ In 2003, Peru's Constitutional Court found the use of "faceless" military courts unconstitutional.⁵¹ As a result, more than 700 persons, who had been tried under the 1992 Decree Law, had their sentences annulled and were retried by civilian courts.

No one disputes that the success in reducing the threat of *Sendero Luminoso* came at a tremendously high human and institutional price. Fujimori's measures distorted the rule of law and damaged the integrity of democratic institutions, including the judiciary. The legacy of this period is a society that is still deeply divided. The lesson from Peru, and Southern Cone countries, is that a reliance on military or special courts to deal with terrorism can pose more problems than it seeks to resolve.

4. Special counter-terrorism laws

Past experience suggests that governments often respond speedily to acts of terrorism (or the threat of such acts) with special counter-terrorism legislation. It is not always clear what prompts this response, whether an attempt to pre-empt or respond to public concerns, or possibly to further a government's distinct political ends. In the current phase of terrorism and counter-terrorism efforts, governments (especially in liberal democratic countries) may feel under pressure to act and be seen to act speedily in the face of any such threat. The risk is that such legislation is drafted quickly, without consideration of other non-legislative measures, and at such speed that inadequate scrutiny occurs and problems subsequently arise.

49 Louise Richardson, *What Terrorists Want: Understanding the Enemy, Containing the Threat*, Random House, 2006; David Scott Palmer, "Terror in the Name of Mao", in Robert J Art and Louise Richardson (eds.), *Democracy and counter-terrorism; Lessons from the Past*, US Institute for Peace, Washington D.C., 2007, pp. 86, 104.

50 Inter-American Court of Human Rights, Judgments of 17 September 1997 and 8 March 1998, Case No. 33 and 47, *Loayza-Tamayo v. Peru*; Judgment of 18 August 2000, Case No. 69, *Cantoral-Benavides v. Peru*; Judgment of 30 May 1999, Case No. 52, *Castillo-Petruzzi et al. v. Peru*; Judgments of 6 February 2001 and 4 September 2001, Cases No. 74 and 84, *Ivcher-Bronstein v. Peru*; Judgment of 8 July 2004, Case No. 110, *Gómez-Paquiyaqui Brothers v. Peru*; Judgment of 18 November 2004, Case No. 115, *De la Cruz-Flores v. Peru*; Judgments of 25 November 2006 and 2 August 2008, Case No. 160 and 181, *The Miguel Castro-Castro Prison v. Peru*; Judgment of 6 April 2006, Case No. 147, *Baldeón-García v. Peru*; Judgment of 22 November 2005, Case No. 136, *Gómez-Palomino*; Judgment of 29 November 2006, Case No. 162, *La Cantuta v. Peru*.

51 In *Marcelino Tineo Silva y más de 5,000 ciudadanos*, TC [No. 8231] D.O. 236530, Judgment of 3 January 2003, the Constitutional Court of Peru recognised its jurisdiction over challenges to the constitutionality of Peruvian laws and decrees. It reviewed several provisions of the 1992 anti-terrorism laws decreed by President Fujimori and the Peruvian Congress in light of the 1993 Constitution. The Court declared sections of the laws unconstitutional or in violation of the American Convention on Human Rights, including the principle of legality.

4.1 Defining terrorist offences

States wishing to introduce special counter-terrorism legislation quickly face the problem of defining concepts such as “terrorism”, “terrorists” and “terrorist offences”. In the past there are many examples of States seeking to stifle dissent by defining terrorist offences in law in overly broad terms. For example, Article 8 of Turkey’s now repealed Anti-Terrorism Act⁵² was used to this end. The law defined terrorism to include “*written and oral propaganda and assemblies, meetings and demonstrations aimed at damaging the indivisible unity of the State of the Turkish Republic*”. In reality, the law provided the grounds for indicting intellectuals, human rights advocates and lawyers so as to repress criticism of State policies. Broadly defined terrorist offences led to the suppression of legitimate dissent, and prevented an open debate about such issues as the underlying causes of violence concerning the status and treatment of the Kurdish minority in Turkey.⁵³

A common complaint was that counter-terrorism laws have in the past been abused for political reasons, or have been extended to apply beyond the original stated purpose of combating terrorism. The problematic elements of such legislation usually include – vaguely defined offences, wide discretionary powers to law-enforcement agencies, and a reduction of safeguards, such as access to lawyers and/or diminished judicial oversight. Some offences need to be newly regulated by law, but if such laws are not narrowly drawn, they can become a tool for repression.

The Panel looked, for example, at the situation in India. Serious and persistent conflict over the status of Kashmir and Punjab; two prime ministerial assassinations; and a number of lower level conflicts in the north east have been part of the background to a succession of emergency or counter-terrorism laws. India’s extensive array of special counter-terrorism laws included the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA). The scope of offences triggering the Act was so broadly crafted that arbitrariness was almost inevitable. Statistics show, for example, that some States, such as Jharkhand, used these laws frequently, though terrorist incidents were much rarer there as compared to states such as Jammu, Kashmir or Punjab. Statistics also show that TADA, and its successor, the Prevention of Terrorism Act (POTA) – both now no longer in force – were applied in a discriminatory manner against Dalits, members of lower castes, tribal communities, and religious minorities.⁵⁴

52 Anti-Terrorism Act No. 3713, adopted on 12 April 1991.

53 See J. Rodney Madgwick, *et al.*, *The Independence of Judges and Lawyers in the Republic of Turkey: Report of a Mission (14-25 November, 1999)*, Centre for the Independence of Judges and Lawyers, Geneva, 1999, pp. 125 and 141; and ECtHR, *inter alia*: Judgment of 8 July 1999, *Sürek and Özdemir v. Turkey*, Application No. 23927/94, 24277/94; Grand Chamber Judgment of 8 July 1999, *Gerger v. Turkey*, Application No. 24919/94; Judgment of 15 June 2000, *Erdogdu v. Turkey*, Application No. 25723/94.

54 See the written submission by Mr Rohit Prajapati, Documentation & Study Centre for Action, EJP South Asia Hearing.

Moreover, large numbers of people were arrested and deprived of their liberty under this legislation, but few were tried, and even fewer were convicted. The Panel was informed that out of a total of 77,550 persons arrested under TADA throughout India, only 8,000 were tried, and only 725 (0.81 %) convicted.⁵⁵ This low conviction rate (reported from other jurisdictions also) confirms that many individuals arrested under counter-terrorist legislation may have had no real connection with terrorism. The primary purpose of arrest may not have been for the purposes of criminal investigation, but rather as a method of information-gathering, a *de facto* form of administrative detention, or a method of intimidation of a suspect population.

The Panel was told that there is an understandable temptation for law-enforcement agencies to rely on “special” or simplified procedures in cases not foreseen by those who originally drafted anti-terrorism laws. The Indian example shows that, arrests in states like Punjab, Kashmir, Rajasthan, Haryana, Gujarat, Maharashtra, Tamil Nadu, Assam, Andhra Pradesh and elsewhere were increasingly made under the provisions of TADA. This happened even when the cases fell more properly within the ambit of the normal provisions of the Code of Criminal Procedure, or the Indian Penal Code. The anti-terrorist law was seen as having numerous procedural advantages in comparison to the normal law; for example, if the authorities wanted to benefit from more stringent bail provisions, there was a clear incentive to apply the anti-terrorism law, rather than the ordinary criminal law provisions.

4.2 Lower safeguards and standards

Counter-terrorism laws have frequently in the past (and still today as will be seen) reduced legal safeguards relating to arrest, detention, treatment, and trial in order to provide a supposedly more effective framework to combat terrorism. Historically, such measures, in particular, the exclusion or limitation of access to courts, have encouraged prolonged arbitrary and *incommunicado* detention, and created an environment prone to abuse. The implementation of such laws in countries including Turkey, South Africa, and India illustrates the point.

A particularly telling example is that of Sri Lanka, which still faces a long-standing internal armed conflict with the Liberation Tigers of Tamil Eelam (LTTE or Tamil Tigers). The Sri Lanka Prevention of Terrorism Act (PTA) was adopted, first as a temporary measure in 1979, and then as permanent legislation in 1983. The PTA contains far-reaching powers to detain, arrest, hold *incommunicado*, and to limit access to courts. Torture and other gross violations have resulted from the undermining of these important safeguards. One commentator predicted in advance that

55 *Ibid.*, citing statistics by the Union Home Ministry of India.

the legislation would inevitably lead to serious human rights violations, noting at the time of the enactment of the PTA:

“A power to detain suspects for long periods, without the opportunity for access by friends, family, or lawyers, or for regular judicial review, notoriously carries the danger that the detainees will be maltreated while in custody: it provides an open invitation for deprivation, assault, and worse – especially if the suspects may be detained by their interrogators in police stations or army camps – and more especially still, if no real control is exercised over the periods for which that they are detained.”⁵⁶

If it is widely known, and predicted in advance, that a reduction in basic safeguards will lead to serious human rights violations, the question arises as to the real intention of the authors of special counter-terrorist legislation. Does counter-terrorism legislation really aim at upholding security and reducing levels of violence, or rather at giving a license to the security forces to respond as they think fit? A prominent human rights scholar suggested:

“Sri Lanka’s experience with emergency powers, and the Prevention of Terrorism Act (PTA) illuminates the complex interaction between violence and repression by the state, and violence and terror by non-state actors. Many commentators maintain that the draconian measures taken by Sri Lanka have only enhanced the cycle of violence, leading to the destruction of the social and political fabric of a democratic society. The use of unbridled power by state authorities in both the north and south of the island, has led to many deaths, mounting disillusionment, and violent backlash by aggrieved communities [...]. The use of these powers has also helped develop a culture of repression and impunity among members of the security establishment. The lack of a reasonable and effective response to terrorist activity committed by non-state actors has led to more social unrest and the dominance of military considerations in the resolution of essentially political dilemmas.”⁵⁷

The information presented to the Panel suggests that changes to the normal criminal justice system have frequently created institutional incentives to torture or ill-treat prisoners and inflict other serious human rights violations. There is also the risk that counter-terrorist measures are built up over time, and it is the cumulative impact

56 Paul Sieghart, *Sri Lanka, A Mounting Tragedy of Errors, Report of a Mission to Sri Lanka in January 1984 on behalf of the International Commission of Jurists and its British Section*, JUSTICE, International Commission of Jurists, London, 1984, p. 37-38.

57 Radhika Coomaraswamy and Charmaine de los Reyes, “Rule by Emergency: Sri Lanka’s Post Colonial Constitutional Experience”, in *International Journal of Constitutional Law*, Vol.2, No. 2, April 2004, p. 272.

rather than any single measure which causes problems. An international human rights lawyer testifying to the Panel in Northern Ireland to this effect:

*“The idea of prolonged detention without access to a lawyer was a recipe for abuse of detainees, and gave an incentive to the security forces to try to obtain confessions through coercion, rather than rely on forensic evidence or testimonial evidence. The admissibility of confessions was much easier in the emergency law framework than it was in the ordinary criminal justice framework. The use of a single judge, rather than a jury, contributed to an overwhelmingly high conviction rate based on confessions only. Then none of the remedies were adequate – whether it was inquests, tort remedies, or effective oversight of the police [...] the institutional incentives to cut corners were overwhelming...”*⁵⁸

The same trend was noted repeatedly to the Panel. Counter-terrorism laws reduce safeguards; the lack of safeguards facilitates a range of human rights violations; and that limitations on remedies, most particularly judicial remedies, creates impunity for human rights violators. This impunity, particularly over time, can give cover for extra-legal practices, such as disappearances, secret detention and torture. A culture of lawlessness can take hold, and feeds and fuels the very conflict, and terrorism, that the legislation was intended to end.

5. The “permanence” of “emergency” laws and departure from ordinary procedures

In 1983, the International Commission of Jurists (ICJ) conducted a major study on states of emergency around the world. Many of these states of emergency were triggered by, or coincided with, terrorist violence.⁵⁹ The study documented the corrosive effect of long-term emergencies on the rule of law in various regions. Twenty-five years later, the Panel is able to confirm the continuing accuracy of the ICJ’s findings. The Hearings in the Middle East, Latin America, South Asia and Northern Ireland all underlined the long-term negative effect of prolonged emergencies. A prolonged emergency is characterised by the assumption of greater executive powers, legal frameworks that create an environment prone to human rights violations (including torture and ill-treatment), limitations on accountability mechanisms, and eventually a detrimental effect on the wider criminal justice system.

International law respects the fact that emergency powers may be legitimate and necessary when States have to protect their populations and respond to extraordinary threats (see Chapter One). International law regulates in some detail when and how such emergency powers may be called in aid. However, it is equally clear in practice that such powers, once introduced, have often been abused, and have

58 Evidence given at the Northern Ireland Hearing by Martin Flaherty, Chair of the Committee on International Human Rights of the Association of the Bar of the City of New York, USA.

59 ICJ, *States of Emergency: Their Impact on Human Rights*, *op. cit.*

undermined basic principles of democracy and the rule of law. Often, powers introduced to deal with an emergency, or temporary crisis, have become permanent.

The case of Northern Ireland is relevant and may provide a particularly salutary example, with parallels to current challenges, since many of the crucial aspects of a democratic society were maintained throughout the “Troubles”.⁶⁰ Despite serious levels of political violence, basic legal guarantees, a free media, a strong civil society, and political pluralism were all maintained. International oversight mechanisms, including the United Nations, and most importantly the European Court of Human Rights provided external safeguards. However, the Panel was told that, despite these safeguards, there were significant violations of human rights. Special legislation was introduced in 1922, and remained a constant feature; Northern Ireland has never since that time experienced a decade without “special” or “emergency” powers.⁶¹ The prolonged nature of the emergency and special powers inevitably influenced the institutional culture of the police, military and the legal system. In the early years of the conflict, the military response was privileged, and the “five techniques”⁶² used by the army on internees led to the UK being found responsible by the European Court of Human Rights for violating the absolute prohibition of cruel, inhuman or degrading treatment.⁶³

The Panel heard testimony about specific human rights violations, but also about the negative impact of prolonged emergency law on public confidence in State institutions and the administration of justice. There was, with the benefit of hindsight, extensive agreement amongst witnesses appearing before the Panel, including Northern Ireland’s most senior police officers, that many emergency powers were

60 The “Troubles” in Northern Ireland, in its most recent phase, lasted for more than thirty years, with the loss of more than 3,600 lives (approximately 60% killed by Republicans, 30% by Loyalists, and 10% by Official Government Agents; of these, nearly 55% of the deaths were of civilians). Peace negotiations led to the Good Friday Agreement in 1998 (www.cain.ulst.ac.uk).

61 The Government of Ireland Act 1920 brought into being the Northern Ireland parliament; in 1922, the parliament introduced the Civil Authorities (Special Powers) Act (NI); this legislation lasted until it was replaced five decades later by the Northern Ireland (Emergency Provisions) Act, enacted in 1973, amended in 1975, and re-enacted in 1978, 1987, 1991 and 1998. The EPA applied only in Northern Ireland and, after an IRA bombing campaign in Britain, was complemented by UK-wide Prevention of Terrorism Acts (enacted in 1974, and renewed in 1976, 1989), amended by the Criminal Justice and Public Order Act 1994 (re-enacted in 1996, and amended and maintained in 1998). The Omagh bombing in 1998 led to the passage of the Criminal Justice (Terrorism and Conspiracy) Act. In 2000, the Terrorism Act was introduced on a UK-wide level, albeit with specific arrangements for Northern Ireland (updated in 2006). Years after a peace agreement had been negotiated, the emergency legislation was consolidated into one permanent Act to address domestic and international terrorism, see CAJ final submission, EJP Northern Ireland Hearing.

62 The “five techniques” included wall-standing, hooding, noise, sleep deprivation, and food and drink deprivation. Given the publicity surrounding the recent use of similar “enhanced interrogation” techniques (used by the US amongst others against so-called ‘high-level detainees’ and also in Abu Ghraib), it may be worth noting the fact that the British Attorney General, in proceedings before the European Court of Human Rights in 1977, stated that “*the government of the UK have considered the question of the use of the ‘five techniques’ with very great care and with particular regard to Article 3 of the (European) Convention. They now give this unqualified undertaking that the ‘five techniques’ will not in any circumstances be reintroduced as an aid to interrogation*” (cited in CA, final submission, EJP Northern Ireland Hearing).

63 ECtHR, Plenary Judgment of 18 January 1978, *Ireland v. the United Kingdom*, Application No. 5310/71.

a failure from a security, political and human rights perspective. The charge that the emergency legislation failed, even in its own terms, holds true, in particular, for the policy of internment. Terrorist suspects were interned between 1972 and 1975 (though internment remained on the statute book until 1998), but senior army officers and government ministers have since described it as an “unmitigated disaster”.⁶⁴ Community tensions were fuelled; hopes for peaceful change through reform and dialogue were crushed; and recruitment to armed groups (Republican and Loyalist) increased. Northern Ireland’s experience shows the importance of insisting upon international standards regarding the time-limiting of emergency or special measures.

6. The impact on society

As jurists, the members of the Panel are primarily concerned with examining the impact on the domestic and international legal framework of the current terrorist and counter-terrorist measures. However, it would be remiss to fail to report on the moving testimony received about the impact on society more broadly of past terrorist and counter-campaigns. In evidence from Argentina, victims’ organisations spoke of torture, kidnappings and enforced disappearances and said “*Throughout the continent, armed and security forces carried out atrocities and violations against unarmed and defenceless populations. The 1970’s and ‘80’s have left terrible memories in Latin America...*”⁶⁵

Counter-terrorism measures in the past were said to be counter-productive even in their own terms since they often alienated the very people who might assist in the task of gathering intelligence, preventing terrorist acts, and providing evidence for the arrest and trial and punishment of terrorists. Of course, it is easy to make these observations with the wisdom of hindsight. The disappointing aspect of the present situation is how little governments appear to be using hindsight to analyse the choices to be made when responding to contemporary threats from terrorism.

Experience suggests that neither counter-terrorism laws nor operations, nor indeed military might alone, can prevent or resolve the problems created by terrorism. Comprehensive solutions, including political, social and economic approaches, are necessary. This message was repeatedly stressed to the Panel, particularly in those Hearings where the people concerned had lived through long periods of political violence. The Panel found evidence that a security perspective, which needs to be part of the search for a solution, rapidly became so dominant that human rights and political approaches were neglected, or even contradicted.⁶⁶ Several witnesses in the

64 Cited in CAJ, preliminary submission to the EJP, April 2006, p. 21.

65 See amongst others, oral testimony by Marta Ocampo de Vazquez, Mothers of Plaza de Mayo – Línea Fundadora, EJP Southern Cone Hearing.

66 This issue was raised notably in the Panel’s Hearings on Northern Ireland and South Asia (in relation to India, Sri Lanka and Nepal), but was also discussed in the report of the Truth and Reconciliation Commission in

Hearings said that the very notions of “terrorist” and “terrorism” obfuscated, rather than helped. The use of such language tended to hinder rather than facilitate the search for solutions, since it often failed to do justice to the underlying complexity of the situation, including grievances and political dimensions.⁶⁷ Indeed, attaching such labels to the tactics, strategies and objectives of the protagonists was often deliberately intended to alienate and demonise them. As a short-term solution, this may seem attractive; over the longer term, experience showed that such labelling makes dialogue, negotiation and resolution of conflict extremely difficult.

Examples from the past show that human rights are at particular risk when States allow national security considerations to take precedence over the rule of law. One of the most serious shortcomings, reported from many jurisdictions, was the tendency of the authorities to broaden discretionary powers, without ensuring corresponding forms of accountability. States have often used the seriousness of risk – and the heightened level of fear in the general populace – to accrue more powers. Sometimes this increase in power might be objectively justified, but even in such cases, there is no obvious excuse for not increasing the role of oversight and accountability structures in monitoring the new situation. All the experience of the past is that, when the risk from terrorism is at its greatest, accountability is at its most necessary. In the words of the then Argentinean Minister of Justice, Alberto Iribarne, his country has learnt, at great human cost that “*security, without respect for human rights, does not exist.*”⁶⁸

Only effective accountability can ensure that counter-terrorism measures stay within the rule of law, and of all the accountability options (and there are many), access to an independent judiciary is absolutely essential.

Suspect communities

Past experience suggests that States target particular communities with counter-terrorism laws and other measures. Discriminatory measures are particularly likely in situations where the terrorist threat is perceived to result from within a particular minority community, or where terrorist acts are committed as part of an underlying ethnic or national conflict. The discriminatory targeting or marginalising of certain groups is both legally wrong (discrimination is outlawed in all major international human rights treaties), and has often proved counter-productive. Measures perceived to target members of particular communities risk implicating innocent individuals,

Peru, *op. cit.*

67 See in particular the information received in the EJP South Asia Hearing in relation to Sri Lanka. Witnesses explained that condemning as terrorists those who support similar political goals to the LTTE, rather than the terrorist tactics and strategies themselves, inhibits public debate, silences dissent within the affected community, and even promotes solidarity with those who are engaged in terrorist activities.

68 See Press Release of the Ministry of Justice, “Security and Human Rights”, 13 November 2006, issued at the conclusion of the EJP Southern Cone Hearing.

stigmatising whole groups, and even impeding the ability of the authorities to gather crucial intelligence information and to secure cooperation.

An academic, credited with coining the phrase of “suspect communities” when examining the experience of Irish communities living in Britain in the early years of the IRA campaign, has written: “*Good intelligence is essential to prevent acts of political violence, yet the authorities still appear to lack an understanding of the crucial role of good police community relations in this endeavour.*”⁶⁹ Similar lessons have been drawn in South Asia. At its Hearing in India, a former Director of the National Police Academy, said: “*...the success of counter-terrorist operations lies in how much support, how much help, you can get from the public. If there is alienation from the public, you are not going to get proper information from them. [...] High handedness of security forces invariably has been found to alienate the public and hamper counter-terrorist operations.*”⁷⁰

When police or military forces act, or are perceived to be acting, in a discriminatory manner, they “*add fuel to an already inflammatory situation*” in the words of one witness.⁷¹ The reality, or even the perception, of minority communities being targeted makes it more difficult for moderate and alternative voices in the affected communities to speak out and to be heard. A number of these issues were directly raised with the Panel, especially in relation to India, Northern Ireland and Sri Lanka.⁷² In Sri Lanka, for example, it is widely believed that the use of the armed forces and the enactment of the Prevention of Terrorism Act (PTA) and the Emergency Regulations fuelled tension at a time when political dialogue would have been arguably easier:

“Tougher laws and regulations were enacted to arrest and detain persons for prolonged periods without committing to trial [...]. These laws which ostensibly meant to be for the eradication of violent forms of agitation in fact helped to fuel the unrest and the existing dissatisfaction against the state. The number of persons joining rebel groups vastly increased from the sections of the people who suffered at the hands of the Sri Lankan Forces. A rag-tag group developed into a formidable and most feared military outfit, holding substantial areas of land under its control, and operating a parallel government not answerable to

69 See Paddy Hillyard, *Suspect Community: People’s experiences of the Prevention of Terrorism Acts in Britain*, Pluto Press, in association with the National Council for Civil Liberties, December 1993; quote taken from his written speech at the 2005 international conference held at London Metropolitan University entitled “Suspect Communities: The Real ‘War on Terror’ in Europe.”

70 Evidence given at the EJP South Asia Hearing by Senkar Sen, Institute for Social Science, former Director of the SVP National Police Academy, former Director General, National Human Rights Commission, India.

71 See EJP Belfast Hearing: oral testimony by Michael Finucane, solicitor, Executive Board Member of the Irish Council for Civil Liberties; son of Patrick Finucane (human rights lawyer murdered in Belfast in 1989).

72 See also – Peru, Truth and Reconciliation Commission, *op cit.*, General Conclusions, No. 59: “*Worse still, the strategy turned out to be counter-productive, as the indiscriminate repression in the rural areas postponed the rupture between the Shining Path and the poorer sectors of the peasantry, and failed to stop the expansion of armed forces to other areas of the country.*”

the central authorities. Repressive laws that were hawked as counter-terrorist legislation played no minor part in strengthening the resistance and fuelling disaffection against the state in the face of mass arrests, detention, abduction and extra-judicial killings and disappearances.”⁷³

Witnesses to the Hearings also, on occasion, gave constructive guidance as to how to avoid or limit the counter-productive effects of counter-terrorism measures. A consistent message to the Panel was that effective accountability over the police and other security agencies would have minimised the adverse effects of the counter-terrorist effort. At the Hearing in Northern Ireland, for example, the Panel was informed that the transition to peace was in part mediated by the introduction of an array of human rights safeguards, for example:

- an independent complaints body vested with extensive legal powers to effectively oversee civilian complaints against the police (replacing a weak predecessor which, despite its name, was not genuinely independent);
- strong civic oversight of the police and a range of measures to ensure recruitment from across different communities;
- new legislation, codes of conduct, and training for the police;
- audio and video recording of all police interrogations;
- changes to the human rights legal framework (incorporation into domestic law of the European Convention of Human Rights, and discussion of a Bill of Rights for Northern Ireland to “constitutionalise” human rights);
- stronger equality legislation;
- reforms to the judiciary and prosecution service;
- creation of domestic bodies to oversee and guide government on human rights and equality measures;
- integration of human rights and equality considerations into all government policies (including youth provision, economic programmes and police use of informers, to give three very different examples).⁷⁴

Witnesses averred that if some or all of these safeguards had existed earlier, a lot of the violations might have been avoided. In commenting on the belated introduction of audio and video recording of police interrogations, a submission to the Panel noted “*their earlier introduction would have meant that detainees were not subject*

73 Written submission by Advocate K.S. Ratnavale, Governor, Centre for Human Rights and Development, Sri Lanka, EJP South Asia Hearing.

74 See CAJ, final submission, p. 10.

to coercive treatment, protected the police against false allegations of ill-treatment, and maintained confidence in the criminal justice system as a whole.”⁷⁵

7. Conclusions & Recommendations: learning from the past

What the Panel learned in its Hearings confirmed the findings of many previous reports on the impact of emergency measures on respect for human rights, including the ICJ’s own earlier work on this issue.⁷⁶ Earlier studies meticulously examined the pathology of emergencies and their effects on the division of powers within the States concerned. The studies identified human rights violations stemming from these counter-terrorism and emergency measures.

Twenty five years on from the ICJ report on the impact of emergency law, it is remarkable how many of the same criticisms were heard by the Panel. One finding in 1983, for example, was that human rights are at heightened risk of abuse, even in democratic States, when emergency powers are concentrated in the executive branch. In civil law countries, this phenomenon occurred with classic state of siege clauses which, when triggered, enabled the executive to govern by decree. In common law jurisdictions, the problem arose when the legislature delegated expansive regulatory powers to the executive. The effect in both scenarios was to weaken, marginalise or sometimes displace the legislative branch from exercising its normal functions, much less act as a check on the executive. During a crisis, particularly a crisis entailing terrorist violence, the executive, was often able to rely on a supine legislature to enact its proposals, defining new terrorist offences that were frequently over-broad, or so vaguely worded as to violate the principle of legal certainty.

The study also noted that prolonged administrative detention of terrorist suspects at the behest of the executive was subject to little or no judicial control. Moreover, judicial independence was often compromised by the executive, whether because of the wholesale removal of judges; by suspending tenure and placing judges on probation; or by making judges subject to removal, at any time, and without cause. In other cases, the judges undermined their own authority in a variety of ways.⁷⁷ The report records that even when the threat supposedly justifying exceptional measures subsided, or the formal emergency was lifted, many of these measures became permanently incorporated into the ordinary law.

The Panel concluded on the basis of all of this rich material that:

- a. There is much to learn from past experiences of counter-terrorism measures. Simple analogies cannot be made across different decades and different

⁷⁵ See CAJ final submission, p. 8.

⁷⁶ ICJ, *States of Emergency: Their Impact on Human Rights*, *op. cit.*

⁷⁷ ICJ, *States of Emergency: Their Impact on Human Rights*, p. 12 (Argentina), p. 185 (India), p. 238 (Northern Ireland) and p. 284 (Syria).

regions, but neither should there be a simplistic claim of exceptionalism, since this blinds governments to both negative and positive learning from the past.

- b. A military response to terrorism may seem to offer a short-term solution, but often creates long-term problems: a security perspective alone can become so dominant that other approaches are neglected, and human rights and the rule of law are undermined. The Panel recommends that States rely in principle on police and civilian law enforcement in countering terrorism. In exceptional circumstances, when it is determined that the armed forces be involved, those forces should be made subject to civilian control, and they should be held accountable by way of an independent civilian judiciary.
- c. Civilians should not in principle be brought before military or special courts.
- d. The introduction of counter-terrorism laws should be considered very carefully. Care should be exercised in deciding to introduce any new laws at all – often changes are needed in the policy arena rather than legislation, and sometimes the existing legislation is quite adequate. If new laws are thought necessary, the legislature should be given its proper role in scrutinising proposals closely, rather than being required to rush through a range of discretionary powers in an ill-considered manner. Any new legislation should avoid vaguely defined offences, and should meet the international tests of necessity, legality and proportionality. Most importantly of all, all counter-terrorist measures should include appropriate safeguards and oversight mechanisms.
- e. Institutional safeguards become more, not less, important at times of crisis. The experience from the past would suggest that the greater the danger to society, the clearer should be the lines of accountability. The legislature and judiciary each have a special responsibility to ensure that the executive respects the rule of law in its counter-terrorist response. Most particularly, the civilian judiciary should retain its jurisdiction to review the provisions, and supervise the application, of all counter-terrorism measures, without interference from the political branches of government.
- f. All legislation intended to deal with terrorism should be regularly reviewed to ensure that the tests initially met still prevail, and to ensure that no unintended consequences have arisen. In line with international law, emergency laws can only be lawful for the duration of a genuine emergency, and therefore must be time-limited, and subject to independent review. The international community has a particular role to play in responding to serious human rights violations committed in the context of counter-terrorism, and the UN (and regional bodies as appropriate) should also ensure that derogations from international law do not become “normalised”.

- g. Counter-terrorist policies can only prove successful over the longer term with the active support of an informed public. A plan of action that addresses any genuine or perceived grievances that might give succour to terrorists should be developed. Human rights and equality concerns should inform a government's legislative and policy programme.

Chapter Three: The legality and consequences of a “war on terror”

1. Introduction

The previous chapter discussed the many parallels between current and past counter-terrorist efforts. The contemporary era of counter-terrorism does, however, differ from all past experiences in at least one way: that is, the legal characterisation of this phase as a “war on terror”. If this characterisation were merely rhetorical – akin to the “war on drugs”, “war on crime”, “war on poverty” – there would be little point in the Panel devoting much attention to it. This is not however the case. The outgoing US administration uses the war analogy in its formal legal sense, and having proclaimed a “war” on terror, argues that international humanitarian law (the laws of war) be applied. The Panel takes the view that the “war paradigm” is misconceived, and has been applied in ways that have violated core principles of international humanitarian and human rights law.

It is hoped that the incoming US administration will immediately, and publicly, renounce this characterisation.

Whilst the outgoing US administration was understandably aggrieved at the horrendous attack of 9/11, it is possible to see, especially with hindsight, that many of its responses to the terrible tragedy were ill-advised. Accordingly, the Panel decided that it was important to set out its view as to why the conflation of acts of terrorism with acts of war was legally and conceptually flawed. The war paradigm has done immense damage in the last seven years to a previously shared international consensus on the legal framework underlying both human rights and humanitarian law. This consensus needs to be re-created and reasserted. Moreover, the use of the war paradigm has given a spurious justification to a range of serious human rights and humanitarian law violations, and remedies and reparation should follow.

The following chapter will in turn examine: when and why the term “war on terror” came into common usage; the conflation of two legal regimes; why the war paradigm lacks a credible legal basis; and the adverse human rights consequences that have arisen in applying the war paradigm – both for the law and the persons affected.

2. When and why a “war” on terror was proclaimed

Immediately following the attacks on the United States in September 2001, the US administration announced that it was at war. President George Bush declared: *“On September the 11th, enemies of freedom committed an act of war against our country [...]. Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and*

defeated.”⁷⁸ The nature and legal framework of this “war” has since been refined.⁷⁹ In the Panel’s meetings with key Pentagon officials, including the legal adviser to the Secretary of State, John B. Bellinger III, the administration’s position was enunciated consistent with the following: “[t]he United States is engaged in an armed conflict with al Qaeda, the Taliban and associated forces...”⁸⁰

So it was that the US opted, in implementing its post-September 11 counter-terrorism strategy, to downgrade the law enforcement framework as the primary means to tackle terrorism, at least terrorism of a transnational character. Traditional law enforcement methods were seen as not offering the necessary flexibility or preventive capacity to address the threat posed by these transnational terrorist groups. In order to prevent future catastrophic attacks, what was supposedly needed was an intelligence-based approach grounded in a military strategy; hence, the “war on terror”. While maintaining a law enforcement dimension,⁸¹ the “war on terror” would be governed by the laws of war (international humanitarian law or IHL), but only to the extent the US considered such law to apply.

For the US administration, it seems that this was a new kind of war, against a new kind of enemy, which was not contemplated by the 1949 Geneva Conventions. As non-state actors engaged in self-proclaimed warfare against the US and its allies, members of al-Qaeda and its affiliates, by virtue of their terrorist acts and links, would be treated as “illegal or unlawful enemy combatants”, who were, in the view of the US, not entitled to protection under the Geneva Conventions. In this war – whose battlefield was the world at large – the US could claim for itself all of the rights and privileges of a belligerent party under the laws of war, but could deny its adversaries equivalent rights or privileges under the laws of war. Thus, the US could claim the right to target these “enemy combatants” anywhere, but, their adversaries, even if participating in a recognised situation of armed conflict, would be denied the right to engage in permissible acts of violence against US military personnel and

78 According to legal advice provided at the time by then Deputy Assistant Attorney General John Yoo, the “method, timing and nature of the response” was the President’s to determine and such response did not have to be limited to “those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon”, see The President’s constitutional authority to conduct military operations against terrorists and nations supporting them, Memorandum opinion for Timothy Flanigan, The Deputy Counsel to the President from John Yoo, Deputy Assistant Attorney General, US Department of Justice, Office of the Legal Counsel, 25 September 2001 available at www.usdoj.gov/olc/warpowers925.htm.

79 See Summary of the EJP United States Hearing; see also for a view on the US administration perspective of the evolution of the paradigm, oral submission of Bradford A Berenson, Partner Sidley Austin LLP, former Associate Counsel to the US president.

80 John B Bellinger III, “Address at the London School of Economics, Legal Issues in the War on Terrorism”, 31 October 2006. See Section 1, Executive Order of President Bush, Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the CIA, 20 July 2007, determining that the US is engaged in an armed conflict with al-Qaeda, the Taliban and associated forces.

81 On the use of the ordinary justice system to counter terrorism, see statistical information provided by the US Department of Justice, Counterterrorism Section, *Counterterrorism White Paper*, 22 June 2006, available at: <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf>.

objectives and, if captured, denied the status and protections afforded to lawful combatants.

The war paradigm also posited that international human rights law does not apply extra-territorially and, most particularly, that during situations of armed conflict international humanitarian law is the *lex specialis*, to the exclusion of human rights law applicable to the treatment of captured “enemy combatants”.⁸² This interpretation meant that international human rights law, with its oversight mechanisms and remedies, would be unavailable to persons detained in this “war”. Moreover, by putting persons detained or captured in its “war on terror” in locations outside of the US, such as Guantánamo Bay, the administration sought to place them beyond the reach of the US Constitution and laws. The net effect of this war paradigm was to create a “legal black hole” in which individuals were supposedly placed beyond the protection of all law. No such black hole exists either in international human rights or humanitarian law.⁸³

The Panel found no support in its Hearings or in its meetings with senior legal and governmental officials for the US interpretation of international law. Indeed, even close allies take a different approach. In the UK, for example, the Director of Public Prosecutions, Sir Ken Macdonald (with whom the Panel met in the course of its UK Hearing) publicly stated:

“...London is not a battlefield. Those innocents who were murdered on July 7 2005 were not victims of war [...]. We need to be very clear about this. On the streets of London, there is no such thing as a “war on terror”, just as there can be no such thing as a “war on drugs”. [...] The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement.”⁸⁴

3. Conflating two legal regimes

The Panel considers that the US has conflated two distinct legal regimes by treating “acts of terrorism” as “acts of war”. The conflation has had profoundly negative consequences: in the short term for human rights violations, and in the long term for core principles of international humanitarian and human rights law.

In proclaiming its “war on terror”, the US failed to make the crucial distinction between terrorist acts which take place within a setting of armed conflict, and terrorist acts falling outside of armed conflict. Acts such as attacks against civilians

82 See, for a recent example, Opening Statement by Matthew Waxman on the Report Concerning the ICCPR to the UN Human Rights Committee, Head of US Delegation, Principal Deputy Director of Policy Planning, Department of State, 17 July 2006, see <http://www.state.gov/g/drl/rls/70392.htm>.

83 Lord Johan Steyn, “Guantánamo Bay: The legal black hole”, 27th F. A. Mann Lecture, 25 November 2003.

84 See Ken Macdonald QC, Director of Public Prosecutions, Crown Prosecution Service, “Security and Rights”, 23 January 2007, available at the CPS website at www.cps.gov.uk.

or civilian objects and the taking of hostages may take place during or in the absence of armed conflict.⁸⁵ When such conduct occurs in peacetime (even during a national emergency or during internal disturbances not amounting to armed conflict) the legal framework that applies is not international humanitarian law, but that of international human rights law and domestic criminal law. However, if similar acts trigger or occur during an armed conflict, they may well constitute war crimes, and the applicable legal framework is that of international humanitarian law, coupled with international human rights law.

One serious consequence of the US's conflation of terrorism with warfare has been to label as "enemy combatants" the perpetrators of terrorist acts and members of, or persons allegedly associated with, terrorist groups *outside* of situations of armed conflict. As noted, international humanitarian law only applies to recognised situations of armed conflict, and the term "combatant" can have legal meaning only in the context of such conflicts. Thus, when terrorist suspects are detained in the absence of warfare, they cannot under IHL be properly classified as combatants and/or tried for war crimes. Yet, this is precisely what President Bush's November 13, 2001 Military Order provides for.⁸⁶ This measure, *inter alia*, authorised the detention and military trial of "enemy combatants" for "*violation of the laws of war and other applicable laws*". "Enemy combatants" were defined to include any alien whom the President (in his sole discretion) determined had "*engaged in, aided or abetted or conspired to commit*" acts of international terrorism, *regardless* of whether the proscribed acts were committed, or such persons were captured, in a situation of armed conflict as understood by IHL.⁸⁷ Acts of terrorism committed outside of armed conflict are criminal acts. However, they are not war crimes under international law,⁸⁸ and neither the US President nor the US Congress can unilaterally make them so. Designating terrorist suspects as combatants in situations not entailing armed conflict not only has potentially draconian consequences for the persons concerned, but also utterly distorts humanitarian law's customary and treaty-based field of application.

85 See *Report of the Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2005/103, 7 February 2005, para. 17.

86 US White House, "Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism", 13 November 2001, available at www.whitehouse.gov/news/releases/2001/11.

87 See Section of the Military Order, 13 November 2001; see also subsequent definitions of "unlawful enemy combatant" contained in Section 948a of the Military Commissions Act (MCA), enacted in 2006.

88 Section 6 of the Military Commissions Instructions No. 2, 30 April 2003, includes offences such as terrorism, spying and conspiracy. Section 650v(b) of the MCA equally covers criminal conduct such as "material support to terrorism". These are not universally considered war crimes. See also report of the Special Rapporteur on Human Rights and Terrorism, *Mission to the United States of America*, UN Doc. A/HRC/6/17/Add.3, 22 November 2007, para. 20.

4. The war paradigm lacks a credible legal basis

The Bush administration's legal position also runs counter to the previously accepted international consensus concerning when and how the laws of war apply. Neither the nebulous operation of a "war" on terrorism, nor the engagement against particular groups that commit terrorist acts, such as al-Qaeda, warrant characterisation as an armed conflict within the meaning of international humanitarian law. Moreover, whilst the laws of war clearly apply to armed conflicts in places such as Afghanistan and Iraq, this fact does not justify a claim that international humanitarian law is applicable to other settings that do not constitute situations of armed conflict but in which the broader "war" on terror is being waged.

The conduct of armed conflict is governed by international humanitarian law (IHL), including the four *Geneva Conventions* of 1949, and their two *Additional Protocols* of 1977, and rules of customary international law.⁸⁹ Many violations of international humanitarian law are codified as substantive offences covered by international criminal law and are contained, *inter alia*, in the *Rome Statute of the International Criminal Court*.⁹⁰

International humanitarian law has clear boundaries delimiting the conduct that can be considered an armed conflict; the widely accepted test is that articulated by the International Criminal Tribunal for the Former Yugoslavia,⁹¹ and endorsed by the International Committee of the Red Cross.⁹² This assessment looks to (a) the identity and level of organisation of the putative parties to the conflict, and (b) the scale and intensity of the conflict. These criteria allow for "*distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.*"⁹³ The current situation (aside from the conflicts in Afghanistan and Iraq) clearly do not meet either of these criteria.

With respect to the first criterion, an armed conflict can only exist between clearly identifiable armed groups and/or State forces which are cohesively organised with a responsible and recognisable command structure, and have the capacity to sustain

89 The authoritative iteration of the IHL customary law can be found in the major ICRC study: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge [etc.], 2005.

90 See in particular Article 8 of the Rome Statute of the International Criminal Court. With respect to acts committed in an international armed conflict, the Geneva Conventions and its Additional Protocol I also criminalise acts such as wilful killing, and wilfully causing great suffering or serious injury to body or health to protected persons, as grave breaches of the Conventions or the Protocol. See Article 130 of the Third Geneva Convention, Article 147 of the Fourth Convention and Article 85 of Additional Protocol I.

91 International Criminal Tribunal for the Former Yugoslavia (ICTY), Opinion and Judgment of 7 May 1997, *Prosecutor v. Dusko Tadic*, No. IT-94-1-T, para. 562.

92 See International Committee of the Red Cross (ICRC), Opinion Paper, "How is the Term 'Armed Conflict' Defined in International Humanitarian Law", March 2008, www.icrc.org.

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

military operations. As noted, while the US no longer considers itself at war with all terrorist groups, it has identified its adversary as “al-Qaeda and associated groups”. The dominant view seems to be that al-Qaeda is a loosely connected network rather than a single transnational organisation.⁹⁴ However, even if al-Qaeda were considered to be a cohesive and well-ordered collective that shared common strategies and tactics, it is still difficult to conceive of it as a unitary armed force and, as such, a party to the conflict. The inclusion of indeterminate “associated groups” makes it even more difficult to identify the parties to the conflict and impossible to characterise them. There is little evidence to suggest that various terrorist attacks, including those in Bali, Morocco, Algeria, London, Istanbul, Madrid, Mumbai or New York were committed by a single organised armed group. As the ICRC has put it, “*much of the ongoing violence ... that is usually described as “terrorist” is perpetrated by loosely organised groups (networks), or individuals that, at best, share a common ideology...[i]t is doubtful whether these groups and network can be characterised as a ‘party’ to a conflict within the meaning of IHL.*”⁹⁵ Both practically and legally, there is no identifiable party to the conflict with which negotiation, defeat or surrender can occur.

The second criterion requires a certain scale and intensity of armed conflict which would go beyond sporadic acts with long interstices: this criterion is also not met. Apart from the armed conflicts in Afghanistan and Iraq (which the outgoing US administration claims are part of the wider “war on terror”), there has been very little “fighting” in this putative “war on terror”. The idea that there is a global conflict can only possibly be sustained, at best, by assimilating various US allies as parties to the conflict *i.e.* the UK, Spain, Indonesia and others who have been the target of attacks by al-Qaeda and “associated groups”. The Panel, however, received no information indicating that any of these States consider themselves to be engaged in an armed conflict with these groups. On the contrary, the post September 11 terrorist bombings in London, Madrid and Bali were not treated as acts of war, but as criminal acts, and the authorities applied law enforcement, not military, means to address them.

Strictly speaking, international law does not necessarily place clear temporal limitations on armed conflict. Nonetheless, war without a foreseeable end would not sit comfortably with the purposes and objectives of the *United Nations Charter*. Moreover, the notion of a “global battlefield” also cannot logically be the locus for an armed conflict. If it were, the entire world would potentially be a battlefield, with a State able to launch attacks on an armed group anywhere, in contravention of Article 2 (4) of the *United Nations Charter*.⁹⁶

94 Jason Burke, *Al-Qaeda : The True Story of Radical Islam*, Rev. edn.; London: Penguin, 2004.

95 ICRC, “International humanitarian law and terrorism: questions and answers”, 5 May 2004, available at <http://www.icrc.org/>.

96 This has, however, been the logic underlying the US programme of rendition and secret detention, in respect of which people were arrested as far afield as Bosnia and the Gambia, and designated as “enemy combatants”. The “war” analogy also was called upon to allow the authorities to arrest suspects in the USA under normal criminal law, and then to re-designate them as “unlawful enemy combatants”, thereby denying them

Insofar as the US denies any reciprocal rights to its adversaries in the “war on terror”, its war paradigm is inconsistent with a bedrock principle of humanitarian law – equality of the parties. This equality principle requires that *all* the parties to an armed conflict are equally bound by the law, irrespective of the causes or origins of the conflict. Moreover, the parties to the conflict cannot selectively apply or ignore otherwise applicable IHL rules. Similarly, the war paradigm’s assumption that international human rights law does not apply during armed conflict is at odds with settled international jurisprudence. The International Court of Justice has affirmed on three separate occasions that human rights law remains applicable in times of armed conflict.⁹⁷ In addition, there have been numerous resolutions in the UN Security Council, General Assembly and other bodies which affirm this principle.⁹⁸ The UN Human Rights Committee, in respect of the obligations under the *International Covenant on Civil and Political Rights* (ICCPR), has stated:

“... *the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.*”⁹⁹

As previously noted, the US administration also questioned the extra-territorial reach of human rights obligations. Yet it is generally recognised that human rights treaties apply wherever a State “exercises jurisdiction”. This position has been

normal constitutional protections. See for example, the case of al Marri, an individual arrested and detained as “enemy combatant” within the United States, discussed in written submission on behalf of Mr al Marri by his attorneys, EJP United States Hearing. See also the case of José Padilla, who was initially arrested and detained under material witness statute, then detained as “enemy combatant” for 3 1/2 years until brought to trial before a US federal court on charge of conspiracy to commit terrorism.

- 97 See International Court of Justice (ICJ), Advisory Opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 226, para. 25; ICJ, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, para. 106; ICJ, Judgment of 3 February 2006, *Armed Activities on the Territory of the Congo (New application 2002), (Democratic Republic of Congo v. Rwanda)*, para. 119. The Court’s opinions indicate that, in situations of armed conflict, the *lex specialis* character of international humanitarian law does not, as such, derogate human rights law; rather it must be consulted to determine whether a Covenant-based right has been breached.
- 98 See for example, UN Security Council Resolution 1674 (2006) adopted on 28 April 2006, UN Doc. S/RES/1674 (2006); Resolution 1502 (2003) adopted on 26 August 2003, UN Doc. S/RES/1502 (2003), para. 3, l; Resolution 1355 (2001) adopted on 15 June 2001, UN Doc. S/RES/1355 (2001), paras. 15, 35; Resolution 1296 (2000), adopted on 19 April 2000, UN Doc. S/RES/1296 (2000), para. 5; Resolution 237 (1967) adopted on 14 June 1967, UN Doc. S/RES/237 (1967), UN General Assembly Resolution 2444 (1978), adopted on 19 December 1968, UN Doc GA/RES/2444 (1968). See also Report of the International Commission of Inquiry on Darfur to the UN Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005.
- 99 UN Human Rights Committee, *General Comment No. 31[80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (hereinafter: *General Comment No. 31*), 26 May 2005, para. 11.

adopted by the International Court of Justice,¹⁰⁰ the UN Committee against Torture,¹⁰¹ and the UN Human Rights Committee.¹⁰² According to the latter, “*States Parties are required [...] to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.*”¹⁰³ Regional bodies, including the Inter-American Commission on Human Rights¹⁰⁴ and the European Court of Human Rights¹⁰⁵ have adopted a similar approach.

The fact that there is no credible legal basis for a “war” on terror, as defined under the laws of war, outside of situations involving actual armed conflict, does *not* however imply that there is no legal framework within which to confront al-Qaeda and associated groups. On the contrary, criminal and human rights law remain fully applicable and, in the view of the Panel, these legal regimes are amply equipped to address the challenges of terrorism.

5. Adverse human rights consequences arising from the war paradigm

The Panel received extensive testimony on the adverse human rights consequences associated with the war paradigm,¹⁰⁶ both for the law and the persons affected. There is little value in re-visiting the extensive material relating to alleged human

100 International Court of Justice, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, para. 10.

101 See UN Committee against Torture, *Conclusions and recommendations: United Kingdom of Great Britain and Northern Ireland*, UN Doc. CAT/C/CR/33/3, 10 December 2004, para. 4(b); *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, United States of America*, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 14.

102 UN Human Rights Committee, Views of 29 July 1981, *López Burgos v. Uruguay*, Communication No. 52/1979; Views of 29 July 1981, *Lilian Celiberti de Casariego v. Uruguay*, Communication No. 56/1979; Views of 31 March 1983, *Mabel Pereira Montero v. Uruguay*, Communication No. 106/1981 and *Concluding Observations on the United States of America*, UN Doc. CCPR/C/79/Add.50, A/50/40, 6 April 1995, paras. 266-304, and UN Doc. CCPR/C/USA/CO/3/Rev.1, para. 10, *Concluding observations on Israel*, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11, and CCPR/C/79/Add.93; *Concluding observations on Poland*, UN Doc. CCPR/CO/82/POL, 2 December 2004, para. 3; *Concluding observations on Belgium*, UN Doc. CCPR/CO/81/BEL, 12 August 2004, para. 6.

103 UN Human Rights Committee, *General Comment No. 31*, para. 10.

104 See, for example, Inter-American Commission on Human Rights (IACHR), Request for precautionary measures in favour of detainees being held by the United States at Guantánamo Bay, 12 March 2002, ILM, 2002, vol. 41, pp. 532-535. See also IACHR, *Report on Terrorism and Human Rights*, OAS Document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002 and IACHR, *Coard et al. v. United States*, Case 10, 951, Report No. 109/99, 29 September 1999, para. 37.

105 See ECtHR, Judgment of 23 March 1995, *Loizidou v. Turkey* (Preliminary Objections), Series A No. 310, Application No. 15318/89, paras. 60 and 61; Judgment of 10 May 2001, *Cyprus v. Turkey*, Application No 25781/94, para. 77; Grand Chamber Decision of 12 December 2001, *Bankovic and Others v. Belgium and 16 other contracting States*, Application No. 52207/99, para. 71.

106 See the summary of the EJP United States Hearing for further references.

rights violations, though it is vital that the incoming US administration conduct effective, independent and impartial investigations into those alleged violations and breaches of humanitarian law and secure remedies accordingly.

Nevertheless, the Panel believes that certain emblematic violations and practices flowing from the war paradigm merit review, and examined below are issues of arbitrary detention, denial of fair trial, and torture and ill-treatment of detainees.¹⁰⁷

5.1 Persons captured or detained: a regime of arbitrary detention

It is reliably reported that thousands of persons have been detained as enemy combatants in the “war on terror”, including the more than 800 detainees to pass through the US detention facility at Guantánamo Bay, and the nearly 250 still detained at the time of writing. Many of these persons designated enemy combatants were captured during genuine armed conflicts, while others were detained outside of any hostilities, and some of these cases were brought to the attention of the Panel directly in the course of its Hearings, both in the USA and elsewhere.¹⁰⁸ There is considerable controversy surrounding what law governed their status and/or the basis for their detention and whether the applicable law was properly applied.

For example, in the wake of its military intervention in Afghanistan in 2001, the US designated captured Taliban and al-Qaeda fighters as “unlawful” or “enemy” combatants and denied them all prisoner-of-war (POW) status under the *Convention (III) relative to the Treatment of Prisoners of War* (Third Geneva Convention), or protection as civilians under the *Convention (IV) relative to the Protection of Civilian Persons in Times of War* (Fourth Geneva Convention). Subsequent to its disqualifying these detainees from *de jure* protection under the Geneva Conventions, the US administration indicated that they, as well as Guantánamo detainees, would be treated “*humanely and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Third Geneva Convention of 1949.*”¹⁰⁹

Many legal experts, and the International Committee of the Red Cross (ICRC), disputed the legality of this action, maintaining that the Geneva Conventions’ comprehensive system of protection mandates that combatants, disqualified from POW status under the Third Geneva Convention, be accorded protection under the Fourth Geneva Convention, provided they meet the nationality criteria stipulated in

107 Other illicit practices arising from the so-called “war on terror” are addressed elsewhere in the report (see, for example, extraordinary rendition discussed in Chapter Four).

108 These include, for example, the case of German resident, Murnat Kurnaz, originally detained in Pakistan, transferred via Afghanistan to Guantánamo Bay until he was finally released in 2006 to Germany. For further details of the case, including on the cooperation of the German authorities, see oral testimony by his lawyer, Bernard Docke, EJP European Union Hearing.

109 The White House, “Fact Sheet, Detainees at Guantánamo: US policy”, 7 February 2002, available at www.whitehouse.gov/news/releases/2002/03/20020207-13.html.

Article 4 of that treaty.¹¹⁰ These critics correctly noted that these combatants, even if protected as POWs or civilians, would not enjoy any immunity from prosecution for their pre-capture offences, including terrorist acts, whether committed before or during the armed conflict.¹¹¹ The Panel would also note that there is broad international consensus that no person, however classified, who is captured or detained in any armed conflict can legally be placed beyond the fundamental protections of international humanitarian law.¹¹² All such persons, as a minimum, are entitled to the customary law standards embodied in Common Article 3 of the *Geneva Conventions* and Article 75 of the *1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I) or Articles 4 and 6 of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II).¹¹³ Importantly, these standards are non-derogable and, as such, cannot be waived or suspended for any reason, including considerations of military necessity.

It is clear that the US's decision to deny Taliban and al-Qaeda fighters protection under the *Geneva Conventions* was driven by the logic of its war paradigm. Since the paradigm is largely based on a search for intelligence, the proper application of Convention rights would have frustrated the US's apparent desire to achieve maximum flexibility in "dealing" with these detainees. Had the US held them as prisoners of war or protected civilians, its interrogators would have known that the interrogation methods in use were banned by the Conventions, and that techniques constituting "*outrages against personal dignity*" were prohibited by Common Article 3 and, until 2006, were prosecutable under US law as war crimes. Furthermore, these

110 Moreover, the US failed to apply Article 5 of the 1949 Geneva Convention III relative to the Treatment of Prisoners of War (Third Geneva Convention) which creates a presumption that a person who commits a hostile act is a prisoner of war unless a competent tribunal determines otherwise on an individualised basis.

111 The ICRC has noted that "*such persons may [...] be tried under the domestic law of the detaining state [inter alia] for any criminal acts they may have committed. They may be imprisoned until any sentence imposed has been served*". See ICRC, International humanitarian law and terrorism: questions and answers, 5 May 2004, available at <http://www.icrc.org/web/eng/siteeng.nsf/html/5YNLV>. As the ICRC President, Jacob Kellenberg, said: "*The Geneva Conventions and their Additional Protocols are not an obstacle to justice. They merely require that due process of law be applied in dealing with alleged offenders*," cited in the report of Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism, UN Doc. E/CN.4/2005/103, 7 February 2005, para. 20.

112 *Report of Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism, op cit.*, para. 20 See also report of the Special Rapporteur on Human Rights and Terrorism, *Mission to the United States of America*, UN Doc. A/HRC/6/17/Add.3, 22 November 2007, para. 11.

113 See for example IACHR, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 77. On the customary law status of provisions of Article 75 of Protocol I, see Christopher Greenwood, "Customary Law Status of the 1977 Additional Protocols", in Astrid Delissen and Gerald J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead*, Martinus Nijhoff, Doordrecht [etc.], 1991, p. 103. This has previously been considered the position of the US also, see remarks of M. Matheson cited in "The Sixth Annual American Red Cross – Washington College of Law conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to 1949 Geneva Conventions", in *American University Journal of International Law and Policy*, Volume 2, No. 2, 1987, p. 415.

detainees, unless charged with or convicted of pre-capture offences, would have been by law entitled to release at the cessation of active hostilities in Afghanistan¹¹⁴ – a result the US seemed unwilling to countenance.

Other persons classified and held by the US as enemy combatants have apparently been detained in the course of an ongoing non-international armed conflict. The legal grounds governing detention in these armed conflicts are found in domestic law and international human rights law and that governing treatment of detainees in Common Article 3 and human rights law. All such detainees were entitled under human rights law to prompt judicial review of the lawfulness of their detention and to be released if that detention is found to be unlawful. The UN Human Rights Committee has stated that in order to protect non-derogable rights, such judicial review cannot be diminished by a State's decision to derogate from the ICCPR.¹¹⁵ Additionally, the fact that the internal hostilities may be ongoing cannot justify indefinite detention without charge or trial which amounts to arbitrary detention in violation of human rights law. Regarding treatment, both human rights law and Common Article 3 absolutely prohibit the infliction of torture and other ill-treatment.¹¹⁶ While governments may try members of armed opposition groups for taking up arms and all their violent acts, Common Article 3 requires trials by “*a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples*”,¹¹⁷ a requirement amplified in Article 6 of Protocol II. As the Panel explains in another chapter, it is increasingly accepted that human rights law generally prohibits the trial of civilians, including members of armed opposition groups, by military courts.

A third category of person being held as “enemy combatants” in Guantánamo Bay and perhaps elsewhere are persons who were detained outside of situations of armed conflict. As previously noted, such person cannot in law be regarded as combatants and their detention as such is utterly arbitrary under human rights law. Such persons may be detained only if suspected of a recognisable criminal offence, and then treated as civilian criminal suspects, with the full guarantees of human rights law. Under very specific circumstances, temporary administrative detention, under judicial supervision, may be possible under a proclaimed state of emergency that threatens the life of the nation, and where such detention is strictly required to meet that threat.¹¹⁸

The fact that detainees were being held outside of the United States, in Guantánamo Bay, was relied upon by the Government to assert that their location placed them outside of the ambit of domestic courts, and the right to *habeas corpus*. The US

114 Article 118 of the Third Geneva Convention and Article 133 of the Fourth Geneva Convention.

115 See UN Human Rights Committee, *General Comment No. 29*, para. 16.

116 See Article 4 and Article 7, para. 2, ICCPR.

117 Common Article 3, para. 1 (d), Geneva Conventions of 1949.

118 Chapter Five, also *Legal Commentary to the ICJ Berlin Declaration*, Principle 6, p. 51 *et seq.*

Supreme Court ruled in 2004 that detainees held outside the United States in Guantánamo Bay had the right to challenge the lawfulness of their detention in a federal court through a petition of *habeas corpus* (*Rasul v. Bush*).¹¹⁹ However, the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 then stripped that right again, until the landmark decision of *Boumediene v. Bush*, handed down in 2008.¹²⁰ The Supreme Court restored the right to *habeas corpus*, and rejected the government claim that, as non-US nationals, held outside US territory, the detainees were beyond legal protection in the US courts. The Court rejected the administration's argument that granting *habeas corpus* in wartime would place too great a burden on the courts and would reveal secret information. The ruling was broadly consistent with the jurisprudence of human rights bodies which have found that the right to *habeas corpus* to be so fundamental that it may never be suspended.¹²¹

5.2 Right to a fair trial: military commissions

The concept of the war paradigm also underlies the adoption of the Military Commissions Act (MCA), signed into law on 17 October 2006. The legislation establishes a system to try detainees held as “alien enemy unlawful combatants” for violations of the laws of war. The Panel believes that the US military commissions do not comply with relevant international standards governing the right to a fair trial (see fuller discussion of fair trial and military courts generally in Chapter Six). The executive decides on every significant aspect of the case – whether to charge, and whether and when to release the defendant, subject to very narrow judicial review by a federal appellate court; the commissions are presided over by a military judge, who determines questions of law, and five to twelve active members of the armed forces acting as jury are named to their position by an appointee of the Secretary of Defence. A defendant's right to lawyer of his or her choosing is severely restricted, and the presumption of innocence is undermined by relaxed rules of evidence and other procedures favouring the prosecution.¹²²

Had the US accorded prisoner of war status to fighters captured in Afghanistan in 2002 and charged them with pre-capture offences, they would (in accordance with Article 102 of the Third Geneva Convention) have been tried before the same courts, and according to the same procedures, as US military personnel.¹²³ Thus, detainees would have been tried by civilian courts or courts martial operating under the United States Uniform Code of Military Justice. Moreover, the US authorities could not

119 US Supreme Court, *Rasul v. Bush*, 542 US 466 (2004).

120 US Supreme Court, *Boumediene v. Bush*, US 553 (2008).

121 See ICCPR, Article 9(4); UN Human Rights Committee, *General Comment No. 29*, para. 15; and *Legal Commentary to the ICJ Berlin Declaration*, Principle 6, at 51 *et seq.*

122 See for example, Special Rapporteur on Human Rights and Terrorism, *Mission to the United States of America*, UN Doc. A/HRC/6/17/Add.3, 22 November 2007, paras. 26-28.

123 Article 102 of the Third Geneva Convention.

have subjected detainees to punishments, or to more severe sentences, than those applicable to their own military personnel.¹²⁴

Most Guantánamo Bay detainees will have spent an inordinately prolonged period – in many cases more than seven years – in arbitrary detention, facing repeated interrogation, without having had effective assistance of legal counsel. This denial of proper legal representation is illustrated by the fact that the so-called fourteen “high value detainees” never had access to counsel until well after their transfer to Guantánamo Bay.¹²⁵ Those charged with offences under the MCA are deemed “unlawful enemy combatants”. According to the outgoing US administration, even if the accused are acquitted of the charges, or even after they have served sentences for any conviction, they may still be detained, virtually indefinitely, on the grounds that this prevents them from “returning” to the battlefield.

The Panel was disturbed to hear that two of the first persons charged before the military commissions were children at the time of their alleged offences: Omar Khadr and Mohammed Jawad. As one of Mr Khadr’s counsel affirmed to the Panel at the US Hearing, the trial of an alleged child offender for war crimes was probably unprecedented, and certainly incompatible with international human rights and humanitarian law standards.¹²⁶

5.3 Torture and ill-treatment

The prohibition of torture and other cruel, inhuman or degrading treatment and punishment is absolute under both treaty and customary law, and is a peremptory norm of international law which applies at all times and in all places. Where IHL is applicable, Common Article 3 of the *Geneva Conventions* provides for the minimum standard of treatment. Despite these clear legal prohibitions, and pursuant to the legal misconceptions about the “war” on terror, the outgoing US administration issued a number of now infamous legal memoranda.¹²⁷ In a memorandum on deten-

124 Articles 82 and 102 of the Third Geneva Convention.

125 On 6 September 2006, US President Bush announced the transfer of fourteen so-called “high value detainees” including the alleged mastermind of the 9/11 attacks, Khalid Sheikh Mohammed, from CIA custody in an undisclosed location to confinement at the Defense Department’s detention facility in Guantánamo Bay.

126 Under the Optional Protocol to the Convention on the Rights of the Child, which the US ratified in 2002, States are to provide children with “*all appropriate assistance for their physical and psychological recovery and their social reintegration.*” (Article 7, para. 1). See also written submissions by Professor Richard J Wilson, Director of the International Human Rights Law Clinic, Washington College of Law, American University, EJP United States Hearing.

127 See, for example, the memorandum of 1 August 2002 from Jay S. Bybee, then Assistant Attorney-General for the Office of Legal Council at the Department of Justice, to Alberto Gonzales, then Counsel to the President of the United States, which attempts to significantly narrow the definition of torture, and claims that the necessity of self-defence can justify violations of the law prohibiting the use of torture. The memorandum was in effect until superseded by a Department of Justice memorandum dated 30 December 2004. For a list of publicly known Government memos, see http://www.humanrightsfirst.org/us_law/etn/gov_rep/gov_memo_intlaw.html.

tion policy dated 7 February 2002 humane treatment appeared to be seen as a policy option, not a matter of law.¹²⁸

Government representatives, with whom the Panel met, categorically denied the existence of any policy condoning torture or cruel, inhuman or degrading treatment. This categorical denial is, however, undermined both by the various governmental legal memoranda authorising the use of “coercive interrogation” techniques,¹²⁹ and the fact that the authorities have argued that reservations attached to US ratification of the *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Convention against Torture) should be interpreted to mean that the US has no treaty obligation with respect to the cruel, inhuman or degrading treatment of foreign nationals held in US custody outside of US territory.¹³⁰ This interpretation of international legal obligations is rejected by the UN Committee against Torture.¹³¹

The US sought to bolster its arguments that detainees fell outside the prohibition on torture by arguing that Common Article 3 of the *Geneva Conventions* did not apply to “unlawful enemy combatants”. The Supreme Court ruled, however, that a Guantánamo detainee captured in Afghanistan in 2001 was entitled to Common Article 3’s fundamental guarantees.¹³² Common Article 3 provides, *inter alia*, that persons captured in an armed conflict not of an international character who do not take part, or no longer take an active part, in hostilities shall be protected

128 The Directive regarding “Humane treatment of al-Qaeda and Taliban Detainees”, issued by President Bush in February 2002, determined that prisoners would not qualify for rights under the Geneva Conventions. It noted: “Of course, our values as a Nation [...] call for us to treat detainees humanely, including those that are not legally entitled to such treatment...As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with principles of military necessity, in a manner consistent with the principles of Geneva.” See Memorandum from President to Vice President, *et al.*, 7 February 2002, reprinted in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib*, Cambridge University Press, Cambridge, 2005, p. 134. See also, *Report of the Senate Armed Services Committee Inquiry Into the Treatment of detainees in US Custody*, 12 December 2008. The report states in Conclusion 13 that the Secretary of Defense’s authorisation of aggressive interrogation techniques for use at Guantánamo Bay was a direct cause of detainee abuse there, and that his approval of most of the techniques influenced and contributed to the use of abusive techniques in Afghanistan and Iraq. Equally, Conclusion 19 states that the abuse of detainees at Abu Ghraib in late 2003 was not simply the result of a few soldiers acting on their own. Abusive interrogation techniques appeared in Iraq only after they had been approved for use in Afghanistan and at Guantánamo Bay. The authorisation of aggressive interrogation techniques and subsequent interrogation policies and plans approved by senior military and civilian officials conveyed the message that physical pressure and degradation were appropriate treatment for detainees in US military custody.

129 See the summary of the EJP United States Hearing with reference to submissions on interrogation techniques and the impact of torture and cruel, inhuman or degrading treatment, including psychological torture, on its victims.

130 See, for example, responses of Alberto Gonzales, at the time the nominee to be US Attorney General, to the questions of Senator Richard Durbin at the Senate Judiciary Committee’s hearings on his nomination, *New York Times*, “Transcript: Senate Judiciary Committee Confirmation Hearing,” 6 January 2005.

131 UN Committee against Torture, *Conclusions and Recommendations: United States of America*, UN Doc. CAT/C/USA/CO/2, 18 May 2006, para. 14.

132 US Supreme Court, *Hamdan v. Rumsfeld*, 548 US 557 (2006), paras. 65-68.

from violence, including murder, cruel treatment, and torture. Taking of hostages is forbidden, as are “outrages upon personal dignity” including humiliating and degrading treatment.

Legislative initiatives have also somewhat curtailed assertions of *carte blanche* executive authority in questions regarding the treatment of detainees. However, these measures have still not brought US law and policy entirely into line with the international standards governing humane treatment. The Detainee Treatment Act of 2005, for example, while prohibiting cruel, inhuman degrading treatment by US officials, does not provide for any standard governing the conduct of CIA officials and others beyond the Department of Defense.¹³³ The Act also denies victims of torture and other ill-treatment access to a remedy, and allows for broad defences to be invoked by alleged perpetrators, so promoting near impunity.¹³⁴

In September 2006 the Department of Defense issued a directive ordering the application of Common Article 3 to detainees in the custody of the military.¹³⁵ The new Army Field Manual on intelligence interrogations includes specific references to Common Article 3.¹³⁶ However, this Field Manual does not extend to action by the CIA. An Executive Order issued by President Bush in July 2007 appears to allow officials of the Central Intelligence Agency to continue using abusive interrogation techniques and secret detention, in violation of Common Article 3 and human rights law.¹³⁷ A legislative initiative aimed at applying the Army Field Manual restrictions to the CIA was vetoed by President Bush in 2008.¹³⁸

The MCA purports to incorporate the protection of Common Article 3 of the *Geneva Convention*, but fails to do so in its entirety. For example, the Act narrows the extent that violations of Common Article 3 would be punishable as a war crime under US law; it excludes “outrages upon personal dignity, including humiliating and

133 According to Section 1002 (a) of the Detainee Treatment Act (DTA) of 2005, signed into law on 30 December 2005, the prohibition on treatment or an interrogation technique not listed in the US Army Field Manual on Intelligence Interrogation is applicable only to those detainees in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility.

134 Section 1005(e)(1) of the DTA, and Section 7 of the MCA.

135 Department of Defense, Directive on detainee programme, 5 September 2006; Army Field Manual 2-22.3 (Human Intelligence Collector Operations), 6 September 2006.

136 At the EJP United States Hearing, former military officers stressed the US military tradition of the humane treatment of detainees and argued that there was no lack of clarity among the military regarding the standards of treatment to be followed. See, for example, written submissions by John D. Hutson, Dean and President, Franklin Pierce Law Center (former Judge Advocate of the US Navy) and James P. Cullen, Esq., Brigadier General, retired, U.S. Army Judge Advocate General's Corps.

137 US President, “Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency”, 20 July 2007, Section 3 (b) (iii) and 3 (c) (iv), with restrictive interpretations of torture and cruel, inhuman and degrading treatment. See also UN Special Rapporteur on Human Rights and Terrorism, Mission to the United States of America, UN Doc. A/HRC/6/17/Add.3, 22 November 2007, para. 35.

138 White House, “Message to the House of Representatives”, 8 March 2008; www.whitehouse.gov/news/releases/2008/03/20080308-1.html.

degrading treatment” from the scope of violations considered to be war crimes under the US War Crimes Act; and defines other elements of Common Article 3 (such as torture and ill-treatment) narrowly.¹³⁹ In effect, this deficiency provides immunity from prosecution to officials involved in secret detention and coercive interrogation techniques that could be considered to violate Common Article 3, but which would fall outside the scope of the amended War Crimes Act.¹⁴⁰

The fact that official policy appears to be aimed at circumventing the long established and peremptory norm prohibiting torture and cruel, inhuman or degrading treatment is one of the most deplorable consequences of the war paradigm. The legal vacuum established by the administration in this area has only partially been plugged: the executive still arrogates to itself the authority to determine the rules governing the treatment of detainees held by intelligence services (see Chapter Four). No reparations have been made to individual victims.

6. Conclusions & Recommendations: war paradigm

This Chapter differs from others in that it focuses largely on one country – the United States of America. The impetus for describing current counter-terrorist efforts as a “war”, and seeking to apply the laws of war to those efforts, has come from the US. Allies of the US have expressed concerns about the responsibility to respond effectively to terrorism, but while some have invoked the “war on terror” in a rhetorical sense, none have embraced the war paradigm, as such, in those efforts.

The US stance has caused serious damage to the protections accorded by both international human rights and humanitarian law. The war paradigm has given rise to several problems: there is *inter alia* the false implication that one of the parties to a conflict can invoke the rights and privileges of warfare without affording reciprocal rights to its enemies or accepting the corresponding legal constraints, and the mistaken claim that this can place some individuals in a “legal black hole”. The damage caused by these assertions needs to be repaired. The war paradigm has, in the view of the Panel, led to specific and serious human rights and humanitarian law violations: there should be independent and impartial investigations into the alleged human rights violations and breaches of humanitarian law, and remedies should be provided.

139 Section 6(b) of the MCA.

140 In addition, according to Section 1004 of the DTA, in any civil action or criminal prosecution against US personnel who engaged in practices involving detention and interrogation of terrorism suspects which were “officially authorized and determined to be lawful at the time”, defendants may use it as a defence that they “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful”. Good faith reliance on advice of counsel should be “an important factor” in determining whether a person of ordinary sense and understanding would not know the practices were unlawful. Section 8 (b) of the MCA made this defence available to US personnel accused of violating Common Article 3 between 11 September 2001 and 30 December 2005, when the DTA was enacted.

It is particularly urgent to re-assert the absolute prohibition on the use of torture and cruel, inhuman or degrading treatment, a principle that long went unquestioned but one which now needs renewed affirmation. The Panel was made aware at numerous Hearings that torture and cruel, inhuman or degrading treatment flourishes all too easily when key safeguards such as access to lawyers, the courts, and the outside world are denied. Perhaps the most emblematic example of this occurred in the treatment of detainees in Abu Ghraib, but participants at the Hearings in Pakistan and in the Russian Federation also expressed serious concern about the fact that people suffer serious human rights violations when they are placed beyond all basic protection.¹⁴¹ The testimony gathered about such violations in the past in Northern Ireland and in the Southern Cone is a further reminder that States must take adequate precautions if they are not to permit or indeed encourage ill-treatment.

The US has a major role to play in rolling back the damage done by its treatment of detainees in Abu Ghraib and Guantánamo Bay, but it is clearly not alone. It was particularly disturbing to learn in many Hearings that governments in other parts of the world are relativising or justifying their own wrongdoing by comparisons with the US. There is also the risk that countries opportunistically re-define long-standing internal armed conflicts as part of the worldwide contemporary threat from terrorism, and the Panel was given several examples of this in its Hearings, particularly in Colombia.¹⁴² Elsewhere, the Panel learnt of the impact of international cooperation for the purposes of intelligence-gathering and sharing, and of the alleged complicity of numerous States in practices such as extraordinary renditions. The war paradigm has had a global impact, and needs to be repudiated by all.

The Panel shares the view expressed by the ICRC and others that existing humanitarian law adequately takes account of issues of terrorism in armed conflicts. It has been, in our view, rightly emphasised that new legal rules are not needed, but better respect for, and strict compliance with, existing law. The Panel concurs with the view of the International Bar Association's Task Force on International Terrorism that, *"Suggestions that international humanitarian law is no longer relevant to situations involving terrorists, together with a failure to abide by its principles, only serves to undermine the binding force of international humanitarian law."*¹⁴³

Others also argued that we ignore history at our peril. This Chapter addressed a "new" phenomenon, the characterisation of the counter-terrorist strategy as a "war" on terror and the flawed argument that the laws of war applied. In many other regards, however, the war paradigm is little more than a resurgence of past (failed)

141 See for example serious allegations of secret detention, enforced disappearances and torture were encountered in other Hearings, in particular in the Russian Federation (in respect of Chechnya) and Pakistan.

142 See summary of the EJP Colombia Hearing.

143 See International Bar Association's Task Force on International Terrorism, "International Terrorism: Legal Challenges and Responses", Hotei Publishing, Washington D.C., 2004, p. 93.

policies. In the Hearings in the Southern Cone and elsewhere, which reflected on learning from the past (see Chapter Two), witnesses frequently drew stark parallels between the ideology and techniques promoted in the past and contemporary practices. The Panel was led to the conclusion that the militarisation of the counter-terrorism strategy, within the framework of a distorted interpretation of the laws of war, has served in the past to undermine the rule of law, and is doing so again today. Terrorism, outside situations of genuine armed conflict, is best addressed by a strong, well-resourced, and human rights compliant system of law enforcement (see Chapter Six).

Chapter Four: The role of intelligence: intelligent counter-terrorism?

1. Introduction

One of the most striking developments brought to the attention of the Panel is the increasingly central role that intelligence plays in modern counter-terrorist efforts.

Intelligence plays an indispensable role in identifying, understanding and analysing terrorist threats, in providing important hints and leads for criminal investigations and in developing effective strategies to counter terrorism. Good intelligence has always been crucial to preventing, disrupting, or subsequently punishing, criminal activity. What is new is the fact that the work of the intelligence agencies has moved centre-stage in the panoply of counter-terrorist measures available to governments. This centrality is reflected in expanded powers of intelligence agencies, increasing international cooperation, and greater information sharing. A new significance has been accorded to the potential of intelligence to counter terrorism, and the Panel learnt that intelligence is now acted upon and used in an increasing variety of legal and administrative proceedings (see Chapters Five and Six).

Government ministers and officials stressed the vital importance of sharing intelligence between countries, and the role of intelligence in identifying and disrupting possible terrorist acts before they are committed. The centrality of intelligence operations was prominently discussed at the Hearings in Australia, Canada, the European Union, the Middle East, South Asia, South East Asia, the United Kingdom and the United States. The Panel also had the benefit of meeting privately with a number of senior government representatives where the importance of intelligence was a common theme.

States have a duty to protect all persons subject to their jurisdiction, and no one could deny that good and reliable intelligence is an important tool for discharging that responsibility. Equally, no one could deny that transnational threats need to be countered by close cooperation between intelligence agencies. At the same time, no one could deny that the kind of secrecy required for effective intelligence carries with it risks.

Even if the threat from terrorism changes in level and nature in future, it is unlikely that the primacy given to the role of intelligence will change. Advances in technology,

and increased multi-lateral cooperation on counter-terrorism issues, mean that intelligence will remain a key tool in domestic and international counter-terrorism efforts for the foreseeable future. As such, it is vital that States take stock and ensure that the new significance accorded to intelligence does not lead to a transfer of power to unaccountable bodies, that it does not undermine the separation of powers and rule of law, and that appropriate safeguards are built in to avoid such eventualities. This chapter will explore the practical implications of the centrality given to intelligence, the human rights violations that have arisen, and the safeguards required to ensure that effective and accountable intelligence bodies keep everyone safer in future.

The risk of abuse

Intelligence, by its very nature, poses potential risks to human rights and the rule of law. Nevertheless, it is worth considering briefly how and under what conditions these risks could become more imminent.

First, there is the question of secrecy. It is both necessary and legitimate for intelligence operations to be secret, and for intelligence agencies to protect sources. Granted this need for secrecy, there is no reason, in principle, why intelligence agencies should not be answerable for their actions. The rule of law requires transparency, not necessarily in terms of detailed operations and operational methods, but in terms of who makes decisions, how those decisions are made, and what safeguards exist to prevent, or subsequently punish, corruption, misuse, or illegality. Arrangements for accountability must therefore be essential features of intelligence structures, if the risk of secrecy is to be mitigated.

A second potential for abuse arises with the accretion of power by the executive. Intelligence bodies routinely report to the executive of the day, often with limited or no lines of accountability to the legislature, or judicial scrutiny. Post 9/11, this study confirms that intelligence agencies around the world have acquired new resources and new powers allowing for increased surveillance, and law enforcement measures (e.g. powers of arrest, detention and interrogation).¹⁴⁴ Executives may act expediently, at least in the short term, by accruing power and privileging intelligence over law enforcement approaches, precisely *because of* the lack of accountability to others.

Last but not least, the risk of abuse increases with greater cooperation among intelligence agencies. The level of domestic safeguards and human rights compliance varies considerably, and effective international oversight is limited. The Security Council and regional bodies have rightly encouraged the exchange of information; the same resolutions demand that such cooperation respect international human rights and, where applicable, international humanitarian law.¹⁴⁵ However, in theory

¹⁴⁴ See also Council of Europe, European Commission for Democracy through Law (Venice Commission), *Report on the Democratic Oversight of the Security Services*, CDL-AD(2007)016, 11 June 2007.

¹⁴⁵ See UN Security Council Resolution 1373 (2001), adopted on 28 September 2001, para. 3 (a) and (b), UN

and in practice, it is clear that holding domestic intelligence agencies to account is difficult, and that that difficulty is multiplied when seeking remedies for actions carried out by transnational intelligence operations.

2. Extended powers and roles of intelligence services

To examine the ways in which intelligence services in various parts of the world have extended their powers and roles, the following section looks in turn at surveillance, other data gathering powers, then at arrest, detention and interrogation powers.

2.1. Surveillance and other data gathering powers

The Panel learnt at many Hearings that, in advance of, but particularly since 9/11, States have steadily increased the information-gathering powers of their intelligence services, or law enforcement agencies,¹⁴⁶ without necessarily building in appropriate safeguards. In the US Hearing, for example, participants expressed concern about the move from surveillance practices which in the past involved oversight, towards greater surveillance with reduced or no judicial involvement. This trend is exemplified by the introduction of the warrantless Terrorist Surveillance Program (TSP) by the National Security Agency (NSA), a programme initiated by President Bush in 2001, but kept secret until media coverage in December 2005.¹⁴⁷ The Terrorist Surveillance Program allowed the NSA to conduct electronic surveillance of suspected members of al-Qaeda, or affiliated organisations, and no warrant was required if at least one end of the communication was outside of the USA. The TSP, seemed to contradict the explicit ban on surveillance in the USA set out by the pre-existing Foreign Intelligence Surveillance Act (FISA),¹⁴⁸ and since the Hearing, the US government has amended the FISA legislation (in June 2008) to end all ambiguity: all surveillance of communications with persons outside the US (even if that involves someone in the USA) has now largely been excluded from the previous requirement of individual judicial authorisation and scrutiny.¹⁴⁹

Doc. S/RES/1373 (2001) and UN Security Council Resolution 1465 (2003), adopted on 20 January 2003, para. 6, UN Doc, S/RES/1465 (2003).

146 This chapter focuses on intelligence agencies, but it is clear that such agencies work closely with law enforcement/border control personnel etc. and that these latter services, if not properly regulated, can take on similar attributes and cause concern. See later the Arar case where intelligence-sharing was undertaken by the Royal Canadian Mounted Police, rather than a discrete intelligence agency.

147 US White House, "Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence", 19 December 2005.

148 The order that created NSA in 1952 confined the agency to spying on "foreign governments". In the 1970s, the NSA and other intelligence agencies were found to be monitoring US citizens for political purposes, and the legislation was amended in 1978 to include an explicit ban on NSA surveillance in the US without a warrant.

149 While FISA previously allowed the monitoring of communications, with a special judicial warrant, on the basis of an individualised and particularised application, it now allows mass acquisition of communication orders on the basis of a determination of the Director of National Intelligence. The legislation retains limited judicial review. However, the changes do not allow courts to review individualised surveillance applications, and there is no authority on the part of the courts to supervise the implementation of the government's

Many, including the American Bar Association (ABA), disagreed with the US administration's claim that the President has a constitutional authority to authorise warrantless surveillance; they also testified to the Panel on the serious problems that arose in practice.¹⁵⁰ In particular, it was alleged that the monitoring undertaken under the Terrorist Surveillance Program constrained defence lawyers in their communication with clients detained in Guantánamo Bay, and/or the detainees' family members abroad. Journalists, especially those working on conflict areas or engaged in investigative journalism, also reported that they feared for the confidentiality of their sources with warrantless surveillance.¹⁵¹

The US is not alone in authorising surveillance and intelligence-gathering without judicial authorisation. The Panel was informed of similar legislation having been introduced in Bangladesh,¹⁵² Egypt,¹⁵³ the Russian Federation,¹⁵⁴ Sweden¹⁵⁵ and Uganda.¹⁵⁶ In addition to the critical importance of effective oversight (including judicial oversight) it is vital that there are clear legal thresholds as to when such powers can be used, and a sufficient level of suspicion needs to be present; this has not always been the case.

Countries around the world have introduced measures allowing for better sharing of information across domestic agencies, including law enforcement, intelligence and immigration agencies. Such cooperation is vital, but many examples were given to the Panel of violations arising from the lack of clear criteria, or of rules governing access to, and use of, such information. For instance, in the Philippines, a draft counter-terrorism law, discussed during the Hearing, and enacted a few months later, established a National Security Council with responsibility for establishing and maintaining “*comprehensive database information systems on terrorism, terrorist*

targeting and minimisation procedures, Section 702 FISA.

- 150 Oral testimony by Karen J Mathis, ABA, EJP United States Hearing. In a major move cementing executive powers, the US Government has argued that a combination of congressional authorisation to use force, and the President's constitutional authority as Commander in Chief, allows him the power to authorise warrantless surveillance. See also oral testimony by Ann Beeson, American Civil Liberties Union (ACLU) at the EJP United States Hearing and the complaint of 17 January 2006 in the case of *ACLU v. NSA* submitted to the US District Court Eastern District of Michigan Southern Division.
- 151 *Ibid.* ACLU testimony.
- 152 Section 97A of the Telecommunications (Amdt) Act of 2006 in Bangladesh; Section 97B allows information collected under the Act (without judicial supervision) to be admissible under Evidence Act 1872.
- 153 Constitutional amendments adopted in Egypt on 26 March 2007 (regarding Article 179 of the Constitution) exempt searches, arrests and surveillance in counter-terrorism cases from the requirement of prior judicial authorisation. The modalities are to be regulated in a counter-terrorism law that has not yet been adopted. It was noted that this would effectively sideline existing constitutional protection, and would integrate state of emergency rules and practices into the ordinary legal structure.
- 154 Federal law on counter-action of terrorism, No. 35-FZ, March 6 2006 allows various controls over communication, without requiring judicial authorisation, as required by the Russian Constitution.
- 155 A new Signal Intelligence Act in Sweden authorises monitoring of communications without judicial authorisation or notification; there have been reports of governmental amendments being proposed to establish a quasi-judicial control body, and for increased safeguards.
- 156 Uganda Anti Terrorism Act of 2002, Sections 18-19.

activities and counter-terrorism operations". The legislation, however, sets no clear criteria or safeguards for the sharing and use of such data by different agencies.¹⁵⁷

At the Hearing in Brussels, the Panel was informed that EU countries have increased the exchange of information between domestic intelligence services and law enforcement bodies. At the regional level also, the collection, storage and sharing of data regarding terrorism and counter-terrorism within EU institutions, and between Member States and third countries (including the United States), has been streamlined and extended. Several participants expressed concern that the safeguards regarding information sharing are not clearly set out and, for example, information is shared without requiring equivalence in protection as between sending and receiving States.¹⁵⁸

The Panel was made aware of the fact that the data shared might be of a personal and very sensitive nature and, once shared, might then be used for different purposes than those for which they have been gathered, shared with third parties, or otherwise misused. In some specific cases, information sharing has already had very serious consequences on individuals and their families.¹⁵⁹ The conclusion must be that, while it is useful to share information where there are genuine reasons of national security the need should be documented and safeguards have to be in place. In the European context, there is the added problem (discussed at the Brussels Hearing) that many information sharing measures adopted within the European Union are placed within the inter-governmental pillar of the European Union Treaty (the area of Justice and Home Affairs). The fact that this function is located in the Third Pillar, as it is called, mirrors many of the negative trends the Panel saw at the domestic level: decisions are thereby subject to limited control of the judiciary (in this case European Court of Justice) and do not require approval by the legislature (the EU Parliament).¹⁶⁰ Ordinary EU data and privacy protections do not apply. The fact that the data-sharing measures are adopted long before agreement on a EU data protection framework decision was said to be symptomatic of the steady move towards adopting security measures without ensuring in advance that adequate protection is built in.

International human rights law allows many rights, such as that to privacy, to be limited in specific circumstances.¹⁶¹ Yet care must be exercised: data gathering, data sharing, and covert surveillance, are all sensitive, since measures may interfere with several important rights, for example the right to privacy (in terms of one's

157 See Section 54 (4) of the Human Security Act 2007 of the Philippines.

158 See summary of the EJP European Union Hearing. See in particular oral and written submissions by Ben Hayes (Statewatch) and Hielke Hijmans, Legal adviser to the European Data Protection Supervisor.

159 See case-study of Maher Arar and other cases explored in more detail later in this chapter.

160 See on the scope of judicial review by the European Court of Justice, Article 35 of the EU Treaty.

161 UN Human Rights Committee, *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)* (hereinafter: *General Comment No. 16*), 8 April 1988, reprinted in UN Doc. HRI/GEN/1/Rev.6, para. 4.

family, home and correspondence) and may, if improperly targeted, conflict with the principle of non-discrimination. For example, participants and data commissioners raised concerns, particularly at the EU Hearing, about the lowering of thresholds, the reduction in legal safeguards and a trend towards “data-mining” for national security purposes.¹⁶² The Panel also received detailed studies and statistical information suggesting that the practice of profiling, while it is not necessarily as such a violation of international law, can be problematic. Profiling practices based on national origin or ethnicity have been over-inclusive and can be discriminatory in impact.¹⁶³ Clear guidance on the matter is to be found in the reports of the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism (hereinafter: Special Rapporteur on Human Rights and Terrorism).¹⁶⁴

Testimony also raised concerns about covert surveillance schemes. Whilst accepting that such schemes could be legitimate, the European Court of Human Rights requires that there be effective safeguards, for example, an independent monitoring body.¹⁶⁵ In a similar vein, the UN Human Rights Committee has insisted that measures be introduced to prevent the receipt, processing or use of data by unauthorised persons, or for unlawful purposes.¹⁶⁶ On the basis of the complaints received during the Hearings, it would appear to the Panel that some States have not put in place adequate safeguards to prevent such misuse.

There is one important problem area which is difficult to regulate and that is the fact that, unless the data gathered is used in subsequent criminal or other proceedings, the individual may never be aware that he or she has been the subject of surveillance. There can be no effective remedy for unlawful interference with a right, unless notification of that interference is provided; the assumption in law would therefore be that, once a surveillance operation is ended, the surveillance subjects should be duly notified. The European Court of Human Rights has accepted that covert surveil-

162 The term “data mining” has been described in one written submission to the Panel (in connection with its US Hearing) as the “suspicion-less investigation” of large groups of people, through the use of linked computerized databases, pattern analysis software, and the creation of a “terrorist profile”. See Kate Martin, Director, Center for National Security Studies, “Domestic Intelligence and Civil Liberties”, in *SAIS Review*, Vol. XXIV No. 1 (Winter-Spring 2004), submitted to the Panel, EJP United States Hearing.

163 See Open Society Justice Initiative, “Ethnic Profiling in Europe: Counter-Terrorism Activities and the Creation of Suspect Communities”, June 2007, submitted to the Panel, EJP European Union Hearing.

164 See especially Report of the Special Rapporteur on Human Rights and Terrorism, UN Doc. A/HRC/4/26, 29 January 2007, para. 83 *et seq.*: “*Terrorist profiling practices that are based on ‘race’ are incompatible with human rights. Profiling based on ethnicity, national origin, and/or religion involves differential treatment of comparable groups of people. Such differential treatment is only compatible with the principle of non-discrimination if it is a proportional means of countering terrorism. Profiling practices based on ethnicity, national origin and/or religion regularly fail to meet this demanding proportionality requirement: not only are they unsuitable means of identifying potential terrorists, but they also entail considerable negative consequences that may render these measures counterproductive in the fight against terrorism.*”

165 ECtHR, Judgment of 6 September 1978, *Klass and others v. Germany*, Application No. 5029/71, para. 55 *et seq.*

166 See UN Human Rights Committee, *General Comment No. 16*, para. 10.

lance, without post-hoc notification to those concerned, may be permissible, but only under exceptional conditions.¹⁶⁷

The use of covert surveillance and intrusive data-gathering powers raises potentially difficult issues if the authorities wish to rely on the findings in subsequent legal or criminal proceedings, and this is discussed below. The Panel was disturbed at the reports of a general lowering of legal standards in the gathering, storing and sharing of intelligence. Judicial authorisation and oversight is a useful safeguard, but it seems that States are moving away from this standard, precisely when the extent and nature of the interference with the right would rather require the authorities to strengthen such safeguards. The Panel received no clear, still less valid, reason for this departure from good practice.

2.2 Arrest, detention and interrogation powers

In its Hearings around the world, the Panel was informed that intelligence services have had overall (or lead) responsibility for counter-terrorism operation placed under their control.¹⁶⁸ They have been given new powers of interrogation and detention (for the purposes of intelligence gathering), and/or have effectively taken the place of the ordinary law enforcement authorities in the pursuit of terrorist offences.

The Panel notes that it is a common premise of criminal justice that arrest and interrogation is carried out by law enforcement officers, with the aim of bringing suspects before the courts. Intelligence traditionally plays an important role in providing information and assisting in the building of criminal investigations, so information sharing between intelligence and law enforcement agencies about terrorist crime has gained increasing relevance post 9/11. Yet the roles of intelligence and of law enforcement are fundamentally different and need to remain separate.

Evidence from the Hearings suggests that this traditional approach is under serious attack as some governments argue that the extraordinary and exceptional character of the terrorist threat demands that intelligence agencies be given powers to detain and interrogate people, including for the purposes of gathering intelligence. In other words, both the agents responsible, and the purposes served by arrest and interrogation, are changing. This trend is problematic in principle. Institutional, legal and procedural safeguards built up in law enforcement over the generations have few corollaries in the intelligence arena. Moreover, detention for the purposes of intelligence gathering means that people who are not even suspected of wrongdoing

¹⁶⁷ ECtHR, Judgment of 6 September 1978, *Klass and Others v. Germany*, Application No. 5029/71, para. 58.

¹⁶⁸ The Federal Law No. 35-FZ “On Counteraction to Terrorism” of the Russian Federation adopted March 6, 2006, for example, authorises the President to appoint the commander of a counter-terrorism operation and in practice this authority is entrusted to the Federal Security Services. The law allows far reaching powers of search, seizure of homes and correspondence to be invoked without judicial authorisation. The law also significantly limits accountability, including by way of immunity provisions, and has also given the President the authority to order counter-terrorism operations outside the territory of the Russian Federation without parliamentary authorisation. See EJP Russian Federation Hearing.

may be held by the authorities. In the extreme, family members, friends, community leaders, ministers of religion might all qualify for detention and interrogation on the grounds that they have knowledge of individuals of interest to the authorities.

The Panel was concerned at the growing trend to assign to intelligence agencies the power to detain people. In principle, intelligence bodies should not have detention powers; they certainly cannot be held to lower standards in terms of the treatment of detainees than their law enforcement colleagues; and any special investigative powers they are accorded must comply with basic human rights safeguards. The practical examples given below will testify to the importance of not diluting standards in this important arena of basic liberties.

2.2.1 Interrogation and arrest powers for the purpose of intelligence gathering

The abuse of powers when key functions are handed over to intelligence agencies was a common theme at many Hearings, most prominently at the US Hearing in relation to the detention and interrogation programme of the US Central Intelligence Agency (CIA). The primary purpose of the US rendition and detention programme is supposedly to detain and interrogate persons suspected of involvement in terrorism with a view to gaining intelligence information. Setting aside temporarily the question of the disputed status of such detainees (see Chapter Three), it is not disputed that detainees have been held outside US territory in arbitrary and secret detention, denying them access to lawyers and, until recently, to any effective remedy. Nor has it been disputed that some have urged that the CIA be held to different (lower) standards in the treatment of detainees than would military or law enforcement agencies; or that provisions to bring the CIA in line with newly approved military guidance on the proper treatment of detainees have been vetoed; or that the use of coercive interrogations to extract information, thereby violating the absolute prohibition on torture and cruel, inhuman or degrading, has been engaged in and indeed justified; and that in doing all this, impunity has been encouraged and the fabric of international human rights and humanitarian law has been damaged.¹⁶⁹

At Hearings in other countries, albeit to a very different degree, the Panel heard concerns about the detention and interrogation of people by intelligence agencies for the purpose of intelligence gathering. In Australia, for example the Australian Security Intelligence Organisation (ASIO),¹⁷⁰ can issue questioning and/or detention warrants. Such warrants can relate to persons who are not necessarily criminal suspects, but who are believed to have information that will “substantially” assist the collection of intelligence relating to terrorism. Australian Government officials argued that the powers accorded to the intelligence services amounted to little more than a simple extension of existing information-gathering methods. On the contrary,

¹⁶⁹ See Chapter Three. Summary of the EJP United States Hearing.

¹⁷⁰ Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (ASIO Act).

leading lawyers, civil society representatives, and even former intelligence officials, argued that this development amounted to a significant and worrying intrusion into law enforcement functions.

ASIO questioning and detention powers contain an obligation on the individual concerned to answer all questions truthfully, and a failure to provide accurate information is a criminal offence punishable by up to five years imprisonment (with the evidentiary burden of proof lying on the person subject to the warrant).¹⁷¹ Participants at the Australia Hearing recognised that there are some important internal oversight mechanisms, such as oversight by the Inspector-General of the Intelligence and Security Services and the Ombudsman's Office. However, while these powers carry important implications for the individual concerned, there is no protection equivalent to that required in ordinary interrogations. For example, the law provides for: (a) the possibility of beginning to question a person in the absence of a lawyer; (b) the lawyer's right to intervene is restricted to seeking clarification on ambiguous or unclear questions; (c) the right of the individual concerned to a lawyer of his or her own choice can be limited;¹⁷² (d) restricted rights to communicate in confidence with counsel; and (e) ambiguity as to whether those subject to "detention warrants" (which can apply for up to 7 days) remain entitled to the right of *habeas corpus* before the ordinary courts.¹⁷³

A similar extension to the powers of the intelligence services in Indonesia was under consideration at the time of the South East Asia Hearing. These proposals were met with great anxiety since they raised the spectre of the past: under Suharto, the intelligence agencies had powers of arrest and detention and engaged in serious human rights violations.¹⁷⁴ Witnesses reported on a draft intelligence bill that would provide for the arrest and detention for 30 days of a person "*strongly suspected to carry out activities that are directed towards becoming threats to the nation*".¹⁷⁵ It was apparently envisaged that the person concerned would neither have the right to remain silent, nor the right to a lawyer during interrogation by the Indonesian State Intelligence Agency (BIN).¹⁷⁶

171 Section 34F(5) of the ASIO Act.

172 Section 34 ZP (1) of the ASIO Act, Section 34 (ZQ (6) of the ASIO Act.

173 See also UN Committee against Torture, *Concluding observations and recommendations on Australia*, UN Doc. CAT/C/AUS/CO/1, 15 May 2008, para. 10; and Special Rapporteur on Human Rights and Terrorism, *Australia, Study on Human Rights Compliance While Countering Terrorism*, UN Doc. A/HRC/4/26/Add.3, 14 December 2006, para. 42.

174 See summary of the EJP South East Asia Hearing. Written and oral submissions by Imparsial; written submission by Sidney Jones, Southeast Asia Project Director, International Crisis Group. Participants at the Hearing raised concerns about the dilution of law enforcement and intelligence functions, in particular the use of intelligence reports under the anti-terrorism law during pre-trial detention, the investigation and trial of terror suspects. Serious concerns were also raised about the lack of accountability over the intelligence services BIN and the Military Intelligence Agency.

175 *Ibid.*, based on translations contained in Human Rights Watch, "Indonesia's Draft Law on Intelligence: a Threat to the Life of the Nation, A Human Rights Watch Briefing Paper", July 2005.

176 At the time of writing discussions about new intelligence and state secrecy laws continued.

2.2.2 Law enforcement powers

The Panel was told of countries (see especially the Hearings in the Middle East, North Africa and Pakistan) where the intelligence services exercise powers to arrest, interrogate and detain persons, and are effectively displacing law enforcement agencies in the investigation of terrorist offences.

Sometimes this practice of intelligence agencies performing law enforcement functions preceded 9/11. However, it is indubitably the case that the events of that day have exacerbated this trend. Hearings provided extensive evidence that human rights violations (torture, and cruel, inhuman or degrading treatment, *incommunicado* detention and enforced disappearances) can all too easily flourish in the more secretive world of the intelligence agencies.

At the Pakistan Hearing, for example, repeated reference was made to torture, prolonged arbitrary and *incommunicado* detention and disappearances allegedly committed by the Pakistani Inter-Services Intelligence (ISI). The Panel heard directly from family members of disappeared people, and the trauma that they are living through was all too apparent. It was claimed that persons are held in unacknowledged or secret detention, that individuals have been rendered to other States (often for financial gain), and that individuals have been interrogated by foreign intelligence personnel while in *incommunicado* detention. The Panel heard that the ISI is operating to a large extent beyond either civilian or judicial control. As emblematic of this charge, panellists were told of financial bounties being paid out to intelligence agents to transfer persons without any legal process to US control;¹⁷⁷ and of the utter disregard paid to court orders to produce the disappeared, or to provide information about their whereabouts. In a sharp exchange about the unaccountability of the ISI, the courts have forcefully reminded Government representatives that the latter were expected to be more than simple messengers (a “postbox”) transmitting messages between the judiciary and the intelligence services. The country’s Chief Justice was suspended¹⁷⁸ when the state of emergency, declared in November 2007, was justified *inter alia* on the grounds that some members of the judiciary were “*constantly interfering into executive functions, including but not limited to the control of terrorist activity that has weakened the writ of the government*”.¹⁷⁹

The Panel was told that in several countries – for example Jordan, Morocco and Pakistan – the legal basis for intelligence agents interrogating and detaining persons

177 The Panel met with a Pashtun activist who was arbitrarily detained and ill-treated and then transferred by the ISI to the US, thereby reaping for itself a financial award and ridding itself of a potentially troublesome dissident. Many participants at the Hearing also referred to President Musharraf’s book, *In the Line of Fire: A Memoir by Pervez Musharraf*, 2005 in which he had acknowledged transfers of terrorist suspects by Pakistan to the US in exchange for bounties.

178 The Pakistani Chief Justice was suspended immediately following the hearing of a petition about enforced disappearances; he was subsequently reinstated after the Supreme Court held that his suspension was unlawful, but again suspended following the declaration of a state of emergency in November 2007.

179 Proclamation of Emergency by President General Pervez Musharraf, 3 November 2007, para. 5 *et seq.*

is unclear or disputed.¹⁸⁰ Participants from Egypt, Jordan, Morocco and Pakistan alleged that detention facilities used by the security services were not acknowledged, not listed as official places of detention and were not under the effective control of civilian authorities. In other countries, such as Algeria, the military intelligence agency exercises judicial police powers, and is formally subject to the control of the judiciary or the public prosecutor, but those controls were often said to be ineffective.

In Morocco, for example, the Panel heard consistent reports of terrorist suspects (especially after the 2003 Casablanca attacks) being held in an unacknowledged detention facility in Témara (outside Rabat), run by the *Direction de la surveillance du territoire* (Directorate of Territorial Surveillance: DST). Many allegations have been made of *incommunicado* detention, ill-treatment and torture.¹⁸¹ As the centre is not listed as a detention facility under the authority of the Ministry of Justice, it is not routinely inspected. Participants conveyed a strong sense that the intelligence services act with great impunity, unaccountable to either the courts or the parliament.

Elsewhere in North Africa, the Panel was informed that Algeria's military intelligence, the *Département du renseignement et de la sécurité* (Department for Information and Security: DRS), has authority under the criminal procedural code to exercise the powers of the judicial police. Technically therefore the DRS operates under some civilian control, when exercising judicial police functions. However, in practice there was a wide consensus amongst witnesses that the services are acting without restraint, and the DRS has been accused of involvement in torture, and large scale enforced disappearances (both now and in the past). There continue to be serious allegations of the detention of suspects in unacknowledged places of detention, and *de facto* administrative detention by placing people in "assigned residence" in military compounds. The Panel was told that the Charter on Reconciliation adopted in September 2005 fails to recognise the responsibility of the security services for serious human rights violations. Subsequent Presidential decrees implementing the Charter preclude any criminal investigation for past human rights violations by the

180 In Jordan, different views were raised in the Hearing as to the legal authority for officers of the General Intelligence Department (GID) to arrest and detain persons suspected of terrorism: no explicit legal basis for these powers exist, but the Court of Appeal has treated intelligence officers as qualifying as judicial officers. In Morocco, there was a lack of clarity as to whether the intelligence services have legal authority to detain and arrest terrorist suspects. Government representatives denied that the detention and interrogation of terrorism suspects occur outside the ordinary framework of law enforcement detention, but held that intelligence agents can provide assistance to law enforcement operations, and certain officers have a dual role. In Pakistan, the powers of the ISI are not regulated by any legislation, so there is no clear legal basis for the ISI to detain and arrest individuals.

181 Several detainees rendered to Morocco by the United States, and former detainees from Guantánamo Bay have also reportedly been held under the authority of the DST in Témara.

security services, and criminalise any speech that questions the role played by the security services during the crisis.¹⁸²

In Egypt, Jordan and Syria, the Panel was given similar testimony: there was a consistent message about the lack of basic guarantees (such as prompt access to lawyers and courts and the right to inform the family) and impunity for any human rights violations. In several countries, the Panel was told that the intelligence services had a tendency to use their powers in non-terrorist matters (thereby undermining further the authority of law enforcement personnel and systems). In the Middle East especially, it was alleged that the intelligence services have become so powerful that they are, in effect, “*a state within a state*”.¹⁸³ The counter-terrorism effort (new and old) appears to have privileged the role of intelligence services, and they are displacing and damaging the prerogative of civilian law enforcement and the judiciary.

International law does not preclude powers of arrest, detention and interrogation being assigned to intelligence services, subject to the services complying fully with relevant human rights standards. Unfortunately, the Hearings provided ample evidence that such standards are not being met. This absence of compliance with human rights standards on the part of intelligence agencies, particularly when combined with a weakening of safeguards in terms of administrative measures and in the criminal justice system (Chapters Five and Six respectively), and a steady trend towards impunity, requires urgent attention. There is a valuable role to be performed by the intelligence agencies in gathering information of relevance to subsequent criminal investigations but the function of intelligence for investigatory purposes and law enforcement are two functions that need to be kept distinct.

2.3 Intelligence and “due process”

Intelligence, by its very nature, poses particular problems for the principle of due process. In seeking to protect intelligence sources, some States have amended the regulations governing legal or administrative procedures to broaden the permissible grounds for non-disclosure of materials to suspects; and suspects are given limited opportunities to test the veracity of the information upon which their arrest, detention, or subsequent charges rest. There are conditions under which information may be legitimately withheld, and international law recognises that in certain circumstances tensions may genuinely arise in upholding principles of due process and at the same time protecting valid requirements of secrecy. However, international law also gives practical guidance as to how these tensions can be resolved.¹⁸⁴ The

182 See Article 46 of the Decree Implementing the Charter for Peace and National Reconciliation, February 2006.

183 See the summary of the EJP Middle East Hearing.

184 UN Human Rights Committee, Views of 29 March 2002, *Ahani v. Canada*, Communication No. 1051/2002, para. 10 *et seq*; see also ECtHR, Judgment of 27 September 1990, *Wassink v. Netherlands*, Application No. 12535/86, Series A, No. 185-A. The European Court of Human Rights accepted that information can be

Panel is concerned that the reasons for non-disclosure have become less clear, and go beyond the valid requirements of secrecy attached to intelligence work.

Another cause for concern is the weaker or non-existent role that lawyers are accorded when intelligence agencies carry out law enforcement powers. Due process relies to a large extent on good legal counsel. Lawyers who met with the Panel contended that intelligence agencies tend to be more hostile to their participation in interviews than do law enforcement agencies. The latter are regularly exposed to legal scrutiny, and collect information in the clear knowledge that it may subsequently be legally challenged; intelligence agents have little or no such experience.

3. Intelligence cooperation

The transnational character of the contemporary terrorist threat means that intelligence agencies increasingly cooperate with their foreign counterparts. National security officials told the Panel that they are often dependent on information from foreign intelligence services, since many terrorist networks or cells posing a threat are based in other countries. This cooperation often involves working with States that have insufficient domestic human rights safeguards, or, worse still, with intelligence agencies with a long history of systematic involvement in human rights violations. The Panel believes that such cooperation is necessary. However, if States are to avoid the charge of complicity, and avoid their agents being pursued in subsequent legal actions, a clear legal framework for intelligence cooperation, and safeguards to ensure compliance with human rights law, are essential. It is true that effective oversight of the domestic activities of intelligence agencies is sometimes difficult to ensure; establishing effective oversight of activities carried out in cooperation with other intelligence agencies may prove even more so.¹⁸⁵ The Panel was, nevertheless, left in no doubt as to the need for a clear regulatory framework, and the need for international safeguards to complement domestic measures.

3.1 Rendition and Extraordinary Rendition

In human rights terms, one of the most worrying developments arising from increased intelligence cooperation is the practice of rendition and extraordinary rendition.

withheld from the accused even in criminal proceedings under the condition that there are counter-balancing measures, such as questioning through the judge.

185 Yet the European Commission for Democracy Through Law (Venice Commission) of the Council of Europe has indicated that there is no shortage of ideas as to how to ensure the accountability of intelligence services: the challenge is more one of putting the ideas into practice, see Council of Europe, Venice Commission, *Report on the Democratic Oversight of the Security Services*, 11 June 2007, CDL-AD(2007)016, paras. 261-262. For further guidance on ways to ensure effective accountability over intelligence services, see Hans Born and Ian Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies*, 2005, Chapter 12.

The terms “rendition” and “extraordinary rendition” have no specific legal meaning, but have come to describe the process of seizing and transferring terrorist suspects, usually without benefit of the normal legal procedures used in extradition, deportation, expulsion or removal, and without due process safeguards. Rendition is not itself a post-September 2001 development, but US policy in regard to this tactic dramatically changed after September 2001. In its present form, rendition involves the abduction of a person from one country, with or without the cooperation of the government of that country, and the subsequent transfer of that person to another country for detention and interrogation.

The purpose of rendition appears also to have changed. The initiation of criminal proceedings is now rarely the primary purpose, and instead the main objective appears to be that of intelligence gathering, with its focus on interrogation and detention. Generally, no criminal charges are brought and no criminal trial is initiated. Although the US denies that people are rendered to other States for the purpose of interrogation using torture, or that it would transport a suspect to a country where it is believed that he or she would be tortured, there is ample evidence to suggest that persons rendered since 2001 have suffered torture and other ill-treatment at the hands of their captors.¹⁸⁶ The US has argued that extraordinary rendition is vital in combating terrorism and maintains that it complies with international law.¹⁸⁷ In defending the practice, the US has relied, at least in part, on States’ consent as a legal justification. Secretary of State Condoleezza Rice, for example, has pointed to “*cases where, for some reason, the local government cannot detain or prosecute a suspect, and traditional extraditions are not a good option. In those cases the local government can make the sovereign choice to cooperate in a rendition. Such renditions are permissible under international law and are consistent with the responsibilities of those governments to protect their citizens.*”¹⁸⁸ Even if extraordinary renditions were confined to the kinds of cases mentioned by Secretary of State Rice, the lawfulness of a forcible abduction does not depend solely on the consent of the host State.

Extraordinary rendition violates numerous human rights, including the rights protecting individuals against arbitrary arrest, enforced disappearance, forcible transfer, or subjection to torture and other cruel, inhuman or degrading treatment.

186 For more information see summary of the EJP United States Hearing with further references and submissions. EJP Hearing at the European Union, including oral testimony by Claudio Fava, Rapporteur of the European Parliament Inquiry and information provided on the cases of Abu Omar and Khalid Al Masri. See also on individual cases, UN Human Rights Committee, Views of 6 November 2006, *Alzery v. Sweden*, Communication No. 1416/2005; UN Committee against Torture, Views of 20 May 2005, *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005). See evidence provided at the EJP Canada Hearing and Commission Of Inquiry Into The Actions of Canadian Officials In Relation to Maher Arar, *Reports of the Events Relating to Maher Arar*, September 2006.

187 UN Committee against Torture, *Consideration of the Second Periodic Report of the United States of America*. UN Doc. CAT/C/SR.703, 12 May 2006, para. 38.

188 US Secretary of State Condoleezza Rice, Department of State, “Remarks Upon Her Departure for Europe”, 5 December 2005.

In addition, the Panel recalls that secret and unacknowledged detention itself constitutes a violation of some of the most basic tenets of international law, including the prohibition of cruel, inhuman or degrading treatment. When a rendered person is held in secret detention, or held for interrogation by authorities of other States, with no information supplied to family members or others regarding the detention, this constitutes an enforced disappearance – a crime under international law.¹⁸⁹ Where renditions are part of a widespread and systematic government policy, they may also amount to crimes against humanity. A raft of international human rights and international criminal law standards apply to such situations.

3.2 Complicity in human rights violations

It was clear to the Panel that the practice of rendition and extraordinary rendition was not a problem of the US administration alone, but (in the words of Swiss Senator Dick Marty) involved a “spider’s web” of cooperative endeavours. Participation in various forms in the programme of renditions was raised in many places, notably the Hearings in Canada, the European Union, the Middle East, the Russian Federation, South East Asia, the UK and the USA. Many States have allegedly facilitated extraordinary renditions including Bosnia, Canada, Indonesia, Italy, Macedonia, Pakistan, Poland, Romania, Spain and the UK, to mention only a few. Still other States, including Afghanistan, Egypt, Jordan, Morocco, Syria, Thailand and Uzbekistan have assisted in the rendition process by taking custody of rendered individuals after they were transferred out of the State where they are abducted. Receiving States on occasion engaged in torture and other forms of ill-treatment of these detainees.¹⁹⁰

189 The UN Convention for the Protection of All Persons from Enforced Disappearance (UN Convention on Enforced Disappearance), adopted by the UN General Assembly on 20 December 2006, in Article 2, defines disappearances as: “*the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.*” The UN Working Group on Enforced or Involuntary Disappearances concluded that incommunicado detention for an indefinite period of time does not per se constitute an enforced disappearance but, if the authorities do not acknowledge that the person is in detention and no information is provided to family or others regarding the detention, it is likely to amount to an enforced disappearance. See Report of the Working Group on Enforced or Involuntary Disappearances, UN. Doc. E/CN.4/1435, 26 January 1981; UN. Docs. E/CN.4/1492, 31 December 1981; E/CN.4/1983/14, 21 January 1983.

190 See, Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Rapporteur Dick Marty, *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states* (hereinafter: *2006 Marty report*), Doc. 10957, 12 June 2006. This report, prepared by an investigation committee presided over by Swiss Senator Dick Marty, and released in June 2006, revealed a global “spider’s web” of CIA detentions and transfers and alleged collusion in this system by 14 Council of Europe Member States. In 2007, new evidence of detainees being held in secret CIA prisons in Poland and Romania between 2002-2005 was released by his second report. The report also suggests that NATO may have been implicated in the practice of renditions by virtue of a secret agreement allowing over-flight clearance. Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Rapporteur Dick Marty, *Secret Detentions and illegal transfers of detainees involving Council of Europe member states: second report* (hereinafter: *2007 Marty report*), Doc. 11302 rev., 11 June 2007.

Elsewhere, the Panel heard concerns about cross-border intelligence cooperation under the terms of the Shanghai Cooperation Agreement.¹⁹¹ Participants at the Hearing in Moscow alleged that this Agreement has given rise to a range of extra-legal activities by intelligence services in the Russian Federation and the five Central Asian Republics (notably Uzbekistan). The Agreement gives immunity to the officials involved. The Agreement broadly sets out information sharing arrangements, providing for undefined assistance in operational activities. It also provides that information about assistance shall not be subject to disclosure, making it virtually impossible to verify the scope of cooperation and to ensure accountability. The Panel received information about increasing inter-action between intelligence agencies across the region resulting in the search, detention and subsequent transfer of individuals to their countries of origin, to situations where they risked serious human rights violations, and which, if substantiated, would therefore be a clear violation of the *non-refoulement* principle. Some transfers have apparently followed expedited extradition procedures; others followed kidnappings or disappearances and extra-legal transfers. In some cases, suspects whose extradition had been refused have shortly afterwards been abducted and transferred on questionable immigration grounds.¹⁹²

The concern about foreign intelligence or law enforcement officials interrogating persons held by another State under conditions of arbitrary detention (including prolonged *incommunicado* and secret detentions) was raised in Kenya. The Panel heard allegations that intelligence personnel from Australia, UK and the US interviewed detainees held in secret detention by the Pakistani ISI, and that some countries sent intelligence personnel to interview detainees who were held in US custody in Guantánamo Bay.¹⁹³

191 On June 7, 2002, the Member States in the Shanghai Cooperation Organization adopted the SCO Charter and Agreement on the SCO Regional Anti-Terrorism Structure (RATS). The agreement sets out in broad terms information sharing arrangements between security services and provides for undefined assistance in operational activities. See EJP Russian Federation Hearing.

192 Abduvani Kamaliyev, expelled on 5 December 2007 to Uzbekistan despite interim measures by the European Court of Human Rights (ECtHR) forbidding his transfer: ECtHR, Statement of facts of 9 June 2008, Communicated case *Kamaliyev and Kamaliyeva v. Russia*, Application No. 52812/07; ECtHR, Statement of facts of 4 June 2008, Communicated case *Iskandarov v. Russia*, Application No. 171854/05; ECtHR, Judgment of 11 December 2008, *Muminov v. Russia*, Application No. 42502/06, where the applicant was transferred on foot of an expulsion order which, subsequent to his expulsion, was overturned by an appeal court. See also written statement by Amnesty International, EJP Russian Federation Hearing. Information provided by Civic Assistance Committee, "Agreements of the SCO as the 'legal' basis for the extradition of political refugees", August 2008 <http://www.hro1.org/node/2933>.

193 See on the questioning by Australian Security Intelligence Organisation (ASIO) and Australian Federal Police (AFP) of an Australian citizen detained *incommunicado* by the Pakistani Intelligence Services (ISI), Victoria Supreme Court, *R. v. Thomas*, 2006 VSCA 165. See also, the UK England and Wales High Court, *R. (Binyan Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, (2008) EWHC 2048 (Admin), 21 August 2008, which concluded that UK security services facilitated in various ways the questioning of Binyan Mohamed in Pakistani and the United States detention, while being held *incommunicado* and subjected to ill-treatment, and that the relationship between the UK Government and the US authorities was far beyond that of a by-stander or witness to the alleged wrong doing. Also, Supreme Court of Canada, *Canada v. Khadr*, 2008 SCC 28, 23 May 2008 concerning the questioning by Canadian Intelligence of a Canadian minor, who remains detained in Guantánamo Bay and is charged before Military Commissions. See also written

An example was provided to the Panel in Canada about the impact that cooperative endeavours across several countries can have on any one person, and the case is highlighted here, not because it is exceptional (it is not), but because it epitomises the problems that can arise as a result of transnational intelligence cooperation.

Case-study: Maher Arar¹⁹⁴

Mr Arar is a telecommunications engineer who lives and works in Canada and holds both Canadian and Syrian citizenship.

He was detained at John F Kennedy airport in New York whilst in transit to his home in Canada in September 2002 in the mistaken belief that he was associated with al-Qaeda.

Mr Arar was arrested, interrogated without access to counsel and detained for 12 days by the US authorities. Despite his objection that he risked torture on return to Syria, Mr Arar was issued with an order of removal to Syria, where he was held for nearly a year and repeatedly tortured. Mr Arar is certain that he was being interrogated at the behest of the Americans, since he was asked identical questions in the US and Syria. He was finally released when Syria concluded that it could not find any terrorist links.

The Canadian Government established a Commission of Inquiry, which cleared Mr Arar's name, and confirmed that he had been tortured. Canada gave him financial compensation for its role in the affair, on the grounds that it was very likely that the US had acted on information supplied by Canada which had been *"inaccurate, portrayed him in an unfairly negative fashion, and over-stated his importance to the RCMP (Canadian police) investigation"*.

Mr Arar's attempts to gain redress in the US courts have to date been blocked on the grounds of national security. Apart from the pain and humiliation involved in the process of rendition, and torture, the very fact that Mr Arar was characterised as a suspected terrorist had a devastating impact on him and his family.

submission by Florian Geyer, Center for European Policy Studies (CEPS), EJP European Union Hearing. See also information provided by the Center for Constitutional Rights, "Foreign interrogators in Guantánamo Bay", <http://ccrjustice.org/learn-more/faqs/foreign-interrogators-guantanamo-bay>.

194 See the summary of the EJP Canada Hearing.

The case is a model of how transnational intelligence should *not* be happening:

- The Canadians gave intelligence information (later proved to be inaccurate and grossly over-stated) to the US authorities, without safeguarding the conditions of its use through so-called caveats;
- The US authorities handed Mr Arar over to the Syrians though they had good reason to believe that the person concerned might face torture;
- Until now, the US government has refused Mr Arar any means of redress.¹⁹⁵

On the positive side, however, there are also important lessons. The Canadian authorities established a Commission of Inquiry which examined the circumstances of the case, cleared Mr Arar's good name, apologised to him, and awarded him financial compensation.¹⁹⁶ The Commission also made recommendations aimed at avoiding future such errors, including the importance of the Royal Canadian Mounted Police (RCMP) and the Canadian Security Intelligence Service (CSIS) keeping distinct their separate policing and intelligence functions. Unfortunately, the Panel's inquiry has revealed few other examples of this kind of comprehensive inquiry into alleged human rights violations associated with intelligence cooperation, though Canada has taken such action more than once. During the Hearing, the Panel learnt that in December 2006 the authorities had launched another commission of inquiry to inquire into the role of Canadian officials in the detention and maltreatment in Syria of three other dual citizens. The official report concluded that it is reasonable to infer that action by the Canadian RCMP had resulted indirectly in maltreatment amounting to torture of Mr Almalki by Syrian officials. It also found in respect of the other two individuals that actions of Canadian officials, including the sharing of information by the CSIS and/or RCMP with foreign intelligence services, have indirectly resulted in their detention and/or mistreatment amounting to torture in Egypt and/or Syria.¹⁹⁷

Cooperative endeavours that directly or indirectly result in serious human rights violations inevitably raise the question of complicity. In situations where exchanges of information are *ad hoc*, or sporadic, the question of complicity may pose itself to a lesser extent. However, routine, regular and systematic exchanges of information, of the kind that the Panel was told are common between intelligence agencies, raise

195 While not accepting the claim of "state secrets privilege" as such, a US district court in February 2006 dismissed the case on the grounds that allowing it to proceed would harm national security and foreign relations. The dismissal was upheld by the Court of Appeals on similar grounds in June 2008. On 14 August 2008, however, the Second Circuit Court of Appeals issued a rare order that the Arar case would be heard *en banc* by all of the active judges on the Second Circuit. The case was heard on 9 December 2008 and is pending judgment. See for further details <http://ccrjustice.org/ourcases/current-cases/arar-v.-ashcroft>.

196 Office of the Prime Minister, "Letter of apology to Maher Arar and his family by the Prime Minister of Canada Stephen Harper", 26 January 2007.

197 *Public Report of the Internal Inquiry into the actions of Canadian Officials in Relation to Abdulla, Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin by the Honourable Frank Iacobucci, Q.C.*, 21 October 2008. pp. 35-39.

serious dilemmas. If intelligence or other State agencies are systematically sharing information with countries and agencies with a known record of human rights violations, it is difficult to resist the argument that States are complicit, wittingly or unwittingly, in the serious human rights violations committed by their partners in counter-terrorism. At a Panel meeting with government officials in Washington D.C., there was an implicit charge of hypocrisy levelled against the US's European partners who publicly criticise renditions, and/or call for the closure of Guantánamo Bay, but appear willing to rely on the intelligence gathered as a result of these practices.

A charge of complicity becomes all the more difficult to refute if States differentiate (as they appear to be doing) between those situations when torture, and cruel, inhuman or degrading treatment is, and is not, acceptable. Some States accept the prohibition on intelligence gathered under torture being used in legal proceedings, but at the same time seem ready to justify the use of such intelligence for operational purposes (for example to prevent a terrorist attack). The first usage is supposedly more acceptable (or at least less reprehensible) than the latter.¹⁹⁸

This differentiation between the use of information obtained by torture and other cruel, inhuman or degrading treatment, for “legal” and for “operational” purposes is problematic for several reasons. It undermines the absolute prohibition on torture which entails a continuum of obligations – not to torture, not to acquiesce in torture, and not to validate the results of torture and other cruel, inhuman or degrading treatment. Secondly, it suggests a water-tight distinction between “legal” and “operational” use which is probably illusory, and certainly the Panel was supplied with examples where information was supposedly sought on operational grounds, but subsequently relied upon in legal proceedings that followed. Thirdly, States have publicly claimed that they are entitled to rely on information that has been derived from the illegal practices of others; in so doing they become “consumers” of torture and implicitly legitimise, and indeed encourage, such practices by creating a “market” for the resultant intelligence. In the language of criminal law, States are “aiding and abetting” serious human rights violations by others.

4. Impunity and lack of accountability

The Panel has reported above many of the examples it was given of intelligence bodies operating outside of the law (both domestic and international). On the contrary, few examples were proffered of the intelligence community, or individual members, being held to account for this wrongdoing. Many witnesses testified to a persistent sense of impunity on the part of the intelligence community.

¹⁹⁸ The famous “ticking bomb” scenario has been usefully explored, and debunked, in a booklet by the Association for the Prevention of Torture. However, even this argument is logically irrelevant when seeking to justify the regular and systematic sharing of illegally-garnered intelligence. See also, Association for the Prevention of Torture, “Defusing the Ticking Bomb Scenario – Why we must say No to torture, always”, September 2007.

Respect for international human rights law requires that intelligence agencies, their behaviour, and international cooperation efforts be properly regulated and held to account. Yet, instead of transparency, the Panel heard that secrecy is growing: legal doctrines such as “state secrecy” or “public interest immunity” are being used to foreclose remedies to victims. Attempts to conceal human rights violations on national security grounds are not new,¹⁹⁹ but the current counter-terrorism climate, in privileging intelligence needs, is encouraging yet greater secrecy.

At the Brussels Hearing, the Panel heard from Armando Spataro, a prosecutor who has led the investigation and prosecution relating to the abduction from Italy of Hassan Mustafa Osama Nasr, known as Abu Omar. The abduction was allegedly organised by the CIA, with the assistance of Italian military intelligence services,²⁰⁰ but efforts in Italy to prosecute the case have been thwarted. The Italian Government challenged the production of key evidence before the Constitutional Court claiming that the prosecution’s investigation broke state secrecy laws by wiretapping and by introducing evidence of communications between intelligence officials about the kidnapping. In addition, the Italian Government issued a written order which prevents witnesses from testifying at trial on the grounds that the protection of state secrecy covers anything that affects Italian Intelligence cooperation with foreign intelligence services, including information linked to the events of the kidnapping of Abu Omar in Italy. At the time of writing, the proceedings have been suspended pending decision by the Constitutional Court.²⁰¹ The Italian Government has failed to request the extradition of US officials allegedly involved, but the prosecutor has proceeded with the prosecution *in absentia* of, among others, twenty-six US citizens

199 The European Court of Human Rights (4 May 2001) upheld complaints that British security forces and others were guilty of breaching the human rights of twelve men killed in Northern Ireland: eight IRA men and a passer-by were shot in an ambush by the Special Air Service (SAS) in May 1987; two unarmed IRA members, one in 1982 and another one a decade later (1992), were killed by the Royal Ulster Constabulary (RUC); and in 1991 a Sinn Féin official was killed by Loyalist paramilitaries said to be acting in collusion with security forces. The European Court found that inquiries into the killings had been inadequate. The Court found that, among other problems, public interest immunity certificates had been used to conceal information. See Judgment of 4 May 2001, *Hugh Jordan v. the United Kingdom*, Application No. 24746/94; Judgment of 4 May 2001, *McKerr v. the United Kingdom*, Application No. 28883/95; Judgment of 4 May 2001, *Kelly and Others v. the United Kingdom*, Application No. 30054/96; and Judgment of 4 May 2001, *Shanaghan v. the United Kingdom*, Application No. 37715/97. Equally, see the jurisprudence of the Inter-American Court of Human Rights in *Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003, Series C No. 101, paras. 180, 181 and footnote 258.

200 Abu Omar (Hassan Mustafa Mosama Nasr) was abducted from the street in Milan in an “extraordinary rendition” carried out by the CIA with the collaboration of the SISMI (Italian Military Secret Services). He was taken to Aviano airbase and flown to Egypt, where he was delivered as a suspected terrorist in February 2003. Abu Omar spent nearly four years in the custody of the Egyptian intelligence services, where he was allegedly tortured. See the summary of the EJP European Union Hearing.

201 See Italian Constitutional Court, Admissibility Decision of 18 April 2007, *President of the Council of Ministers v. Prosecutor*, No. 124/2007; Decision of 18 April 2007, *President of the Council of Ministers v. Examining Judge*, No. 125/2007; Decision of 26 September 2007, *Prosecutor v. President of the Council of Ministers*, No. 337/2007; Decision of 26 September 2007, *Examining Judge v. President of the Council of Ministers*, No. 338/2007; Decision of 25 June 2008, *President of the Council of Ministers v. Tribunal of Milan*, No. 230/2008; and Decision of 17 December 2008, *Tribunal of Milan v. President of the Council of Ministers*, No. 425/2008.

accused of the kidnapping.²⁰² The US Government has apparently already indicated that it will refuse to comply with any extradition request made.

At the Brussels Hearing the Panel received testimony about the lack of effective independent domestic investigations into allegations of secret detention centres. For example, detailed official investigations, undertaken by the Council of Europe Parliamentary Assembly, and the Parliament of the European Union, found evidence of CIA-run secret detention centres in Poland and Romania.²⁰³ International law requires that States conduct independent investigations into serious allegations of human rights violations; that they bring those found responsible for such violations to justice; and that they provide reparation. The failure to conduct an independent investigation itself constitutes a breach of human rights law. Yet, despite this, the Polish Government has only recently announced, three years after the allegations were first made, an investigation by the General Prosecutor into the allegations. The Parliament in Romania similarly has failed to date to carry out an effective investigation, issuing its own report, but keeping the annexes (with most of the relevant information) “classified”.²⁰⁴

The US has failed to act on alleged human rights violations committed by its own agents, and has invoked state secrecy privileges when individuals or other governments seek accountability.²⁰⁵ The administration has also invoked state secrecy privileges in cases involving law suits against private US companies and contractors for their alleged cooperation with human rights violations committed by US intelligence agencies.²⁰⁶ Moreover, the US Military Commissions Act contains various

202 Equally, the German authorities have refused to seek extradition of CIA agents for the alleged rendition of German citizen, Khalid el-Masri. Media reports have indicated that the German Government refrained from seeking the extradition of CIA officials on the grounds, among others, that this might damage intelligence efforts with the USA.

203 See *2006 Marty report* and *2007 Marty report*. See also, *Report of the Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners* (2006/2200 (INI)), Rapporteur Claudio Fava, A6-9999/2007, European Parliament, Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners. P6 TA PROV (2007) 0032.

204 Parliament of Romania, *Report of the Inquiry Commission to investigate the allegations of the existence of CIA detention centres or of flights by CIA aircraft on Romanian territory*, 22 April 2008. There were 11 classified annexes to the report. The Committee did not have investigatory powers in the conduct of its inquiry. Senator Marty criticised the restrictive terms of the inquiry's remit and pointed to contradictions between the conclusions of the Parliamentary Committee and flight records of aircraft linked with the CIA, into MK Airfield. He considered that the Romanian Parliamentary inquiry was: “*an exercise in denial and rebuttal, without impartial consideration of the evidence*”, *2007 Marty Report*, para. 230.

205 This includes civil suits brought by Maher Arar, whose case was described above, and Khalid el-Masri, a Lebanese resident in Germany who was allegedly rendered into CIA custody by the Macedonian authorities and detained in Afghanistan. For instance, in the Arar case, the US Government asserted the state secrets privilege, arguing that the lawsuit must be dismissed because allowing it to proceed could “*cause exceptionally grave or serious damage to the United States' national security interests*” by disclosing information concerning intelligence activities, sources and methods as well as pose an “*exceptionally grave or serious risk to diplomatic relations*”, Declaration of Tom Ridge, Secretary of the US Department of the Homeland Security, 17 Jan. 2005.

206 See *Mohamed et al. v. Jeppesen Dataplane, Inc.*, 539 F. Supp. 2d 1128, 1134 (N.D. Cal. 2008) and *amicus*

broad defences, such as ignorance of the law, which may result in indemnity for those involved in improper interrogation and detention practices. Indemnity, immunity provisions, or broad legal defences against prosecution are found in a variety of countries, and the Panel learnt of such measures introduced in the Russian Federation and South Asia as part of their counter-terrorist provisions.²⁰⁷

The lack of willingness on the part of individual States to ensure effective accountability, and to address alleged complicity for human rights violations in intelligence cooperation, is replicated at the regional level. The Council of the European Union failed to respond to the findings and conclusions of the EU Parliamentary inquiry into cooperation with extraordinary renditions. Equally, the Committee of Ministers of the Council of Europe has failed to implement the proposals of the Secretary General of the Council of Europe to draw up standards to protect against renditions and secret detentions, nor taken any decisive follow-up to the inquiry by the Rapporteur of the Council of Europe Parliamentary Assembly.²⁰⁸

European governments have yet to move forward on the recommendations to develop a legal framework that would facilitate intelligence cooperation compliant with European and international human rights standards.

5. Conclusions & Recommendations: intelligence

The gathering and sharing of intelligence is important, so the key question is what safeguards are necessary to ensure that the serious human rights violations of the kinds reported above are avoided in future.

In Chapter One on human rights, the Panel countered the myth that respect for human rights can sometimes run counter to a State's duty to protect human life against terrorist attack. It is perhaps in the sphere of secret intelligence that some of the difficulties of ensuring human rights *and* security (and not human rights "*or*" security) are most pronounced. Intelligence agencies traditionally rely on a culture of secrecy; human rights law demands clear accountability. In the past, the intelligence community has often experienced limited regulation at the domestic level. Several

curiae briefs by REDRESS and the ICJ to US Court of Appeals, July 2008. See also *Hepting et al. v. AT&T Corp. et al.*, (see <http://www.eff.org/cases/hepting>).

207 See Article 22 of the 2006 Law on Counter-terrorism Operation and EJP Russian Federation Hearing; see on similar clauses, EJP Hearing in South Asia and especially Section 26 of the PTA and Section 19 Emergency Regulation 2006 in Sri Lanka; Section 21 (3) TADO in Nepal; the Joint Drive Indemnity Act 2003 in Bangladesh which provided immunity from prosecution to officials involved of the Rapid Action Battalion allegedly responsible for extra-judicial killings and other grave human rights violations.

208 Council of Europe, Parliamentary Assembly, Committee of Ministers, *Secret detentions and illegal transfers of detainees involving Council of Europe Member States: Second Report – Recommendation 1801 (2007), Reply from the Committee of Ministers*, adopted at the 1015th meeting of the Ministers' Deputies on 16 January 2008, Doc. 11493, 19 January 2008. While reaffirming governments' obligations to investigate and bring to justice those responsible for serious human rights violations, the Committee of Ministers failed to respond to calls for concrete measures to prevent recurrence and stated that only "*if necessary, (it) will consider undertaking further work in this respect.*"

of the examples in this chapter of institutional secrecy and impunity pre-date 9/11; others have roots in the response to 9/11 and the increased importance placed on intelligence and intelligence cooperation. These trends have shown the lacunae in the domestic and international regulation of intelligence efforts.

The Panel believes that this has to change. Ending impunity and ensuring accountability are crucial to establishing confidence in the intelligence services. The Panel believes that genuinely accountable intelligence agencies are essential if UN Member States are to comply with their duties under international law (and relevant Security Council Resolutions) to fight terrorism *and* uphold human rights.

The Panel believes that there is an urgent need to take stock of existing mechanisms of democratic control of the intelligence services and to ensure that all aspects, including international cooperation, are governed by law and regulations in full compliance with international human rights standards.

The Panel recommends in particular that at the domestic level:

- States should recognise the clear distinction between the roles of intelligence and law enforcement; intelligence agencies should not perform the function of law enforcement personnel and, in particular, should have no powers to detain or arrest people. To the extent that intelligence agencies are given any coercive powers, intelligence agents must comply with the same standards as exist under ordinary law and in conformity with human rights standards, most particularly by ensuring detainees prompt access to a lawyer and the courts.
- States should ensure that data gathering and storage is handled with due respect for their human rights obligations, and that particular care is taken to ensure the non-discriminatory use of any such material (the text refers to good practice guidance available on the issue of profiling). Judicial authorisation and oversight should be integral to intrusive surveillance powers, with legal clarity as to when such powers can be used and on what criteria.
- States should recognise that they are responsible under international law for the acts of their intelligence agents. To comply with this responsibility, States must make intelligence agencies (including military intelligence units) subject to a combination of effective internal and external controls and oversight mechanisms, including effective parliamentary oversight. Judicial control of intrusive measures, and access to lawyers, and eventually courts, for appropriate remedies, is of great importance. Where States have already instituted controls, they should undertake a review to ascertain that the controls are effective in practice, with adequate powers and resources to fulfil their mandate.

- Where this has not already happened, inquiries should be established to fully investigate allegations of serious human rights violations, bring alleged perpetrators to justice, and provide reparations to victims. To avoid a repetition of such violations in the future, permanent complaints procedures (involving Ombudsmen or Inspector Generals, as in Canada or Australia), can also be of great value, especially if they contain a mechanism that can act *proprio motu*, and can effectively access all relevant information.
- States should seek to protect the secrecy required for effective intelligence without encouraging an institutional culture of secrecy. It is particularly important that States take steps to ensure that serious human rights violations can never be justified in the name of “state secrecy”, and that such crimes are never safe from sanction because of a culture of secrecy. Victims must not be deprived of effective remedies or reparation on the grounds of national doctrines such as “state secrecy”.

And that at the regional and international level:

- States recognise that the responsibility to ensure that their intelligence agents comply with international human rights law is not met simply when their agents refuse to participate directly in human rights violations. Measures (legal, policy, institutional) must be taken to ensure that their agents do not cooperate in human rights violations (such as secret detention, renditions, or torture and other cruel, inhuman or degrading treatment) even when carried out by others.
- States should seek to protect the secrecy required for effective intelligence in ways that do not entrench an institutional culture of secrecy. States should establish clear policies, regulations and procedures covering the exchange of information with foreign intelligence agencies. Where such procedures exist, by way of binding instruments or understandings, they should be reviewed in light of all relevant human rights standards. In particular, information should never be provided to a foreign country where there is a credible risk that the information will cause or contribute to serious human rights violations.
- To assist States in complying with their obligations under international law, it is important to draw up clearer international guidance in this area. The proposal, for example, of the Secretary General of the Council of Europe made in 2006, identifying the need to clarify the obligations under human rights law, in particular in relation to intelligence cooperation, and how to implement these obligations in practice deserves urgent attention in the European arena, and it could provide a useful template for wider consideration.

Chapter Five: Preventive Mechanisms

1. Introduction

The priority for governments in recent years has been for early interventions that will *prevent* terrorist acts from taking place, rather than merely *respond* after the event. This chapter will look into the increasing pattern of administrative measures introduced with the stated intention of preventing terrorist acts. The increased use of these measures since 11 September 2001 is closely linked to the extended powers of, and sharing information among, intelligence services (see Chapter Four).

In the wake of 9/11, States have introduced or strengthened measures that allow more flexibility in the detention, expulsion and deportation of immigrants; administrative detention; control orders and listing.²⁰⁹ Government representatives met by the Panel frequently stressed the need to take effective measures when intelligence sources suggest that a person may pose a risk to national security, but where the nature of the intelligence is not considered suitable for criminal proceedings. States may rule out the option of using the criminal justice system for any number of reasons: the nature of the intelligence and the desire to keep it secret; the fact that the evidence would not be admissible in court; and/or the evidence does not constitute sufficient proof of a criminal offence. This rationale was clearly expressed to the Panel in its Hearing in London by, amongst others, the then UK Home Secretary Charles Clark.²¹⁰

States are entitled to take preventive measures against a terrorist act. Indeed, States have a positive duty to protect people within their jurisdiction. Human rights law explicitly allows States to restrict certain fundamental freedoms, to take measures to disrupt terrorist networks, and to prevent terrorist acts from materialising. The Panel considers that, when information is provided about security risks or threats, it is not only reasonable but required that governments take preventive measures. However, it is important that States take preventive measures within the framework set out by international human rights law: limitations on people's liberties must be provided for by law and cannot be either arbitrary or discriminatory; they must be strictly necessary; and they must be proportionate to the stated purpose (see Chapter One).

The Panel is concerned, however, that a number of the preventive measures discussed in the Hearings do not comply with these basic tests. It is important that States, in taking preventive measures, adhere to their obligations under international

209 “Listing” is a relatively new measure that places individuals on lists of terrorist suspects, at national, regional or international levels, often entailing restrictions on freedom of movement, scrutiny of financial transactions, or even confiscation of assets.

210 See oral testimony of Charles Clark, UK Home Secretary, EJP United Kingdom Hearing.

human rights law. The Panel heard of the terrible impact on individuals of measures such as administrative detention, expulsion or deportation. In some cases, where persons are expelled or tortured, they risk being tortured upon return; in other cases, the results are not quite so dire, but such measures have led to family break-up and serious trauma. The potential damaging impact can range well beyond the individuals directly affected, and the Panel was told that whole communities felt disproportionately targeted by some of preventive measures being pursued. If individuals are seen to be targeted for arrest and deportation because of a fear of their influence, rather than because of any active involvement in terrorism, the State might alienate whole communities. Preventive measures could come to be perceived as nothing more than an attempt to penalise controversial speech and ideas.

The risk of alienating individuals and groups (often those most needed to assist in the prevention of terrorist acts) is greater still when governments rely on unsubstantiated secret intelligence. Doubts about the reliability, quality and provenance of intelligence can undermine otherwise legitimate action because secret intelligence is less amenable to independent verification: preventive measures may be, or appear, arbitrary and discriminatory. States are prevented in law from deporting, or depriving individuals of their liberty, on the basis of information secured by means of torture and other cruel, inhuman or degrading treatment; yet, there is grave suspicion that this may be happening. Although the use of torture and cruel, inhuman or degrading treatment is often difficult to establish, particularly where detainees have been held *incommunicado*, illegal actions of this nature are more likely to be disclosed, and possibly remedied, by the tried and tested principles of criminal law: the individuals concerned have an opportunity to hear, and contest, the evidence against them, to report on any wrongdoing by the authorities, and then to have an impartial authority adjudicate any contradictory claims. The Panel, however, was told of many preventive measures that appear to be created precisely in order to avoid the tried and tested legal requirements of the past.

In effect, the criminal justice system, with its well established evidentiary requirements, has been supplanted, at least in part, by a new network of procedures to be found in administrative, civil and immigration law. Some countries have indicated that criminal prosecutions remain their preferred option, but in practice they seem to prefer to be able to act on the lower standard of “risk” rather than “proof” of criminal activities. Intelligence agencies are less accustomed to having their activities scrutinised, and often have an institutional culture of secrecy that is particularly resistant to disclosure of information in legal proceedings.

The Panel recognises that preventive measures, when measured against international tests such as legality, necessity, non-discrimination and proportionality, can be helpful in countering terrorism. However, the evidence shows that in practice such measures are proving problematic and must not be undertaken lightly, or with

insufficient human rights safeguards. This chapter looks in turn at those preventive measures which were the focus of most attention in the course of the Hearings:

- a. Preventive measures in the area of immigration (detention, expulsions and deportation);
- b. Administrative detention without charge or trial;
- c. Control orders and other preventive restrictions of liberty;
- d. Listing of individuals or organisations on terrorism lists.

2. Immigration detention, expulsions and deportation

The emphasis in recent years on the transnational nature of the terrorist threat has meant that States increasingly have placed their immigration law at the centre of their preventive counter-terrorism strategy. Greater reliance is now being placed on deportations, detention pending deportations, and control schemes when deportation fails, as a way of preventing terrorism.

Human rights law traditionally places less stringent obligations on States in immigration proceedings than in criminal or other legal proceedings, for example as regards the right to examine evidence or to call witnesses.²¹¹ Domestic laws and regulations governing immigration thus tend to provide fewer legal safeguards than those provided to individuals facing criminal charges. Reliance on secret intelligence in this context is likely to reduce those safeguards further. It was, therefore, highly problematic to learn that governments seem to be relying on immigration law as the preferred option in a number of counter-terrorism cases, presumably precisely because it allows governments greater discretion.

States often face less scrutiny from the general public when preventive measures are rooted in immigration procedures, and therefore “only” affect foreigners. Some States have furthermore justified their actions by reference to their duty to protect their own citizens. Foreigners living within the jurisdiction may not have all the same political rights as citizens, but they lose none of their basic human rights, and in that regard they must benefit from exactly the same protections as everyone else. Indeed, governments who give a high public priority to fighting terrorism by way of immigration procedures risk presenting immigration itself as a potential security risk, and conflating terrorism and immigration in the minds of the public.

211 There is a lack of consensus that the right to a fair trial (Article 14 ICCPR, Article 6 ECHR) applies in deportation or expulsion proceedings, with some arguing that it is only the more limited right to an effective remedy (Article 2, para. 3 ICCPR; Article 13 and Article 1 Protocol 7 ECHR) that applies. See, on the due process requirements, UN Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial* (hereinafter: *General Comment No. 32*), UN Doc. CCPR/C/GC/32, 23 August 2007, paras. 17 and 62.

The Panel was concerned at the information garnered regarding the diminution of rights for non-citizens: some States are detaining and deporting non-nationals, all in the name of preventing terrorism. Whereas some of these preventive measures fall on people who are considered to pose a concrete risk, others fall on foreigners that have neither committed a criminal offence, nor pose an immediate threat.

2.1 National security removal

The Hearings have shown that many States that are proud of their human rights record have placed deportation at the core of their preventive counter-terrorism strategy, for example in Australia, Canada and Member States of the European Union. For example, in May 2007, the Interior Ministers of France, Germany, Italy, Poland, Spain and the United Kingdom stated that “*expulsion related to terrorism has proven to be an effective tool for States in order to protect their people from foreign nationals that are believed to pose a threat to national security.*”²¹² International human rights law recognises deportation or expulsion of foreigners, including lawful residents, as an acceptable measure. It also traditionally allows States to apply more abbreviated procedures in case of deportation on national security grounds.²¹³ Problems however arise when (as, on occasion, appears to be the case) States deport individuals without due process, with minimal consideration of the proportionality of the measure, and in violation of the principle of *non-refoulement*.

In France, national security removals have been a core component of the State’s preventive strategy since the mid-1990s, following terrorist attacks on the Paris Metro. The Government has adopted two primary approaches to removing non-citizens whom the authorities consider a threat to national security. The courts can propose deportation as punishment for terrorism-related convictions, in which case, the individual serves prison time and is then deported and banned from returning to France from three to ten years, or permanently.²¹⁴ Alternatively, the Minister of the Interior can order an administrative expulsion based on intelligence reports that classify the individual as a threat to national security.²¹⁵ Although French national security removals can be appealed within the system of administrative justice, the appeals are not automatically suspensive. This means that individuals who risk torture in the country of return can be, and have been, deported or expelled before their appeals are examined, unless a stay has been issued. If an expulsion is appealed by the individual, the Government’s evidence is contained in intelligence reports that have been referred to as “*notes blanches*” (white notes), because they

212 Written submission by Human Rights Watch at the EJP European Union Hearing, p. 5, referring to the Conclusions of the G6 meetings in Venice, 11-12 May 2007.

213 See Article 13 of the ICCPR and Article 1 of Protocol 7 of the ECHR.

214 See Criminal Code Articles 131-30-1, 131-30-2, 422-4 and Law 2003-1119 of 26 November 2003 concerning immigration control, the stay of foreigners in France, and nationality, published in the Official Journal No. 274, November 27, 2003, p. 20136.

215 Code on the Entry and Stay of Foreigners and the Right to Asylum, Article L.521-1 (CESEDA).

are unsigned and do not reveal their sources. These reports, although usually shared with the defence, cannot by their nature be independently verified. The Panel was told that a combination of the lack of precision inherent in the legal concept of “a threat to public order or national security”, and the comparatively low standards of proof in the administrative system of justice, mean that judges often appeared willing to accord the benefit of the doubt to the intelligence report.²¹⁶

A 2003 amendment to immigration law in France²¹⁷ broadened the grounds for administrative expulsion to include incitement to discrimination, hatred or violence against a certain individual or group. It was argued that this permits the French Government to rely on administrative expulsion, rather than criminal prosecution, as a means of dealing with non-citizens accused of extremism and/or fomenting radicalisation. In some testimonies, the Panel was told that allegations of incitement have been wrongly pursued when the “incitement” alleged was nothing more than speech whose protection is guaranteed under the right to freedom of expression.²¹⁸ Concern was expressed that expulsions of Muslims feed the fear and feeling of exclusion and stigmatisation among members of the Muslim community in France, even perhaps encouraging further radicalisation.

The Panel also heard that the Dutch authorities have used national security removals as a substitute for criminal prosecution in some cases. For example, the authorities have declared aliens undesirable, or deported them, when evidence was lacking, or where criminal proceedings have failed to secure a conviction.²¹⁹ Witnesses before the Panel spoke of the significantly lower standard of procedural guarantees in expulsion proceedings on national security grounds, and some reported that exclusion orders are based upon secret reports of the intelligence service, to which the individual has no or very limited access, and over which the administrative judge has only limited scrutiny.²²⁰ Weak domestic standards in this area are complemented by regional safeguards, though these are not always respected.²²¹

216 Written submission by Human Rights Watch, EJP European Union Hearing and its Annex 1 (Human Rights Watch report, *In the Name of Prevention, Insufficient Safeguards in National Security Removals*, June 2007).

217 Law No. 2003-1119 of 26 November 2003 concerning immigration control, the stay of foreigners in France, and nationality (Official Journal No. 274, November 27, 2003, p. 20136) and Article L 521-3 Code on the Entry and Stay of Foreigners and the Right to Asylum (CESEDA). The amendment also broadened the grounds for deportation following conviction.

218 See written submission by Human Rights Watch, EJP European Union Hearing and its Annex 1.

219 Written submission of the Nederlands Juristen Comité voor de Mensenrechten (NJCM), EJP European Union Hearing, para. 5.2, p. 16, referring to judgments of the Highest Administrative Court in ABRvS 10 July 2006, JV 2006/348; ABRvS 18 September 2006, JV 2006/407.

220 Written submission of the NJCM; testimony of Lara Talsma and Saloua Ouchan, NJCM, EJP European Union Hearing.

221 See written submission of the NJCM, *op. cit.*, with reference to the inapplicability of Article 6 ECHR, limited procedural protection under Article 13 ECHR, and Article 1 Protocol 7 ECHR.

Important protections exist in the interim orders that can be issued by the European Court of Human Rights, the Inter-American Court of Human Rights, the UN Human Rights Committee and the UN Committee against Torture to “stay” national security removals. Regional or international safeguards complement and do not replace effective domestic remedies and, as with domestic remedies, these regional safeguards will be difficult to invoke effectively if intelligence reports cannot be independently verified. However, in the case of Member States of the Council of Europe, the European Court of Human Rights has played a particularly important role in staying deportations to allow for further consideration. The Panel was concerned to learn of cases where the person was deported despite a “stay” being issued.²²²

Participants at several Hearings, including in Canada, the European Union and the United Kingdom, questioned the legitimacy of using deportation as a counter-terrorism measure. Some argued that where deportation was used as an alternative to court action, international justice for terrorist crimes is undermined (possibly violating the principle of *aut dedere aut judicare*).²²³ Concern was also expressed that deportation may be premised on the person being “dealt with” on his or her return, in which case deportation is really a disguised form of extradition, but one in which the safeguards commonly applicable in extradition law are being side-stepped.²²⁴

Several representatives of Muslim organisations also highlighted the devastating impact of forced removals on the right to family and private life, both of the individuals removed and their families, particularly when they concern long-term residents. They also emphasised the stigma attached to deportations based on allegations of terrorism, resulting in significant hardship in leading a normal life, including the risk of detention and torture upon return to their home country. It was argued that deportation is a disproportionate measure, given the existence of alternatives.²²⁵ Individuals suspected of links to terrorism could be prosecuted on a range of grounds (see Chapter Six) or be subjected to certain restrictions on their movements, communications or other activities (see on).

222 The Panel learned about a case in which the person had been expelled despite UN Committee against Torture interim measures (Views of 11 May 2007, *Adel Tebourski v. France*, Communication No 300/2006, UN Doc. CAT/C/38/D/300/2006) and where people were deported before interim measures could have been requested – ECtHR, Judgment of 26 April 2007, *Gebremedhin v. France*, Application No. 25389/05; UN Committee against Torture, Views of 24 May 2005, *Brada v. France*, UN Doc. CAT/C/34/D/195/2002.

223 Many terrorism conventions impose on States Parties the obligation to extradite or prosecute (*aut dedere, aut judicare*) alleged perpetrators of offences, see also UN Office on Drugs and Crime (UNODC), *Legislative Guide to the Universal Legal Regime against Terrorism*, 2008.

224 See summaries of the EJP Hearings in Canada, the EU, the Russian Federation and the UK.

225 See for example, the summary of the EJP Canada Hearing.

The Parliamentary Assembly of the Council of Europe recognised the human cost of some of the measures being introduced by Member States, noting that:

*“The application of expulsion measures against [long-term immigrants] seems both disproportionate and discriminatory: disproportionate because it has life-long consequences for the person concerned, often entailing separation from his/her family and enforced uprooting from his/her environment, and discriminatory because the state cannot use these procedures against its own nationals who have committed the same breach of the law”.*²²⁶

2.2 National security detention pending deportation

The Panel received evidence suggesting that, otherwise lawful, residents (including permanent residents) were detained for a prolonged period on national security grounds pending deportation, especially in those cases where the individual cannot be deported because of the risk of serious human rights violations in the country of origin. This issue was extensively discussed at the Hearings in Canada and the UK.

On security grounds, the system of Canadian “security certificates” allows for the detention of non-citizens, without charge or trial, pending deportation.²²⁷ A security certificate is issued by two Government Ministers stating that a permanent resident or foreign national is inadmissible “*on grounds related to security, the violation of human or international rights, serious criminality or organised crime*”. Reference was made at the Hearing in Canada to the lack of due process rights; the lack of a clear time-limit to the period of detention and prolonged detention as a consequence; reliance on intelligence not disclosed to the person affected; broadly defined grounds for detention pending deportation; and a relatively low level of proof (“reasonable suspicion”). According to the evidence submitted, there have been six Muslim men detained for up to six years on the basis of “security certificates”.²²⁸ In February 2007, a constitutional challenge was brought by several individuals who were the subject of “security certificates”; the Canadian Supreme Court found the regime unconstitutional, due to its inadequate due process protections.²²⁹ The Panel heard directly from some of those caught up in these legal conundrums, and it may help to convey the human impact that these measures have on individuals and their families if some detail is given about one emblematic case.

226 Council of Europe, Parliamentary Assembly, Recommendation 1504 (2001) on Non-expulsion of long-term immigrants, adopted on 14 March 2001, para. 3. See also written submission by Human Rights Watch, EJP European Union Hearing.

227 The scheme of security certificates has existed in various forms since 1976. The current provisions date from the Immigration and Refugee Protection Act (IRPA), which was revised by the House of Commons shortly before 9/11, and subsequently amended as a consequence of a ruling from the Supreme Court of Canada – *Charkaoui v. Canada* (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9, 23 February 2007.

228 See summary of the EJP Canada Hearing and oral testimonies by Adil Charkoui and Paul Copeland representing three persons subjected to “security certificate”.

229 Supreme Court of Canada, *Charkaoui v. Canada*, *op. cit.*

The case of Adil Charkaoui²³⁰

The Panel heard from Adil Charkaoui, a permanent resident in Canada from Morocco who is subject to a security certificate. In May 2003, after several interviews with the Canadian Security Intelligence Service (CSIS) agents, he was arrested, and was held in detention for twenty-one months. During his detention, he was told that he constituted a security threat, and that he would be deported to Morocco, on the basis of diplomatic assurances from the Moroccan authorities that he would not be tortured. Mr Charkaoui was released in February 2005, after a decision by the Canadian Supreme Court that the legal regime governing his detention was unconstitutional. At the time of the Panel Hearing in Canada, Mr Charkaoui was subject to twenty-four separate and specific living conditions that amounted to severe limitations on him leading a normal life. For example, Mr Charkaoui was not permitted to leave the Island of Montreal without special permission; he was obliged to wear a GPS-tracker bracelet; and he was living effectively under curfew, since he could only leave his home with designated chaperones, and then for limited times. In order to attend the EJP Hearing in Ottawa, Mr Charkaoui had to obtain special permission to leave the Island of Montreal.

In explanation of this restrictive regime, Adil Charkaoui was provided with 400 pages of “public” evidence against him – only 14 pages of which referred specifically to him. Most of the references said little more than how Mr Charkaoui fitted the stereotype of an al-Qaeda sleeping agent – in other words, he is Arab, Muslim, educated, practises martial arts, married with three children, self-employed, and has “contacts” at his mosques. According to investigative media sources, testimony from the witnesses against him has either been publicly retracted (in one case) or (in the other two cases) was allegedly obtained by torture in Morocco.

Due to recent amendments to the law, the Canadian authorities have now announced that they will cease reliance on the testimony from Abu Zubaydah, one of the “high-level detainees” who had been held in secret CIA detention, subjected to “enhanced interrogation techniques” and transferred in 2006 to Guantánamo Bay.

The “secret” evidence against Mr Charkaoui includes summaries of his own interviews with CSIS intelligence agents, to which he had been denied access. In June 2008, the Supreme Court ordered the CSIS to disclose material that could help Mr Charkaoui rebut the allegations against him.²³¹

230 See EJP Canada Hearing and oral testimonies provided by Adil Charkaoui and Paul Copeland.

231 Supreme Court of Canada, *Charkaoui v. Canada* (Citizenship and Immigration), 2008 SCC 38, 26 June 2008, para. 77: “The only appropriate remedy is to confirm the duty to disclose Mr. Charkaoui’s entire file to the

This case epitomises the cumulative impact of weaker immigration law safeguards; reliance on secret intelligence which is inherently less reliable than evidence, and less easily contested; and, on occasion, reliance on information from foreign intelligence agencies with a record of human rights violations.

Subsequent to the Charkaoui decision, Canada made several improvements to the legislation, including greater access to the courts to challenge detention, and an explicit outlawing of any evidence obtained by torture and cruel, inhuman or degrading treatment or punishment.²³² In order to mitigate the difficulties caused by lack of full access to proceedings and evidence, the Canadian authorities also introduced the system of “special advocates” in the appeal process, which mirrors the system first introduced in the UK Special Immigration Appeals Commission Act 1997.²³³ Special advocates are appointed by the government from a panel of security-cleared barristers to represent the interests of the appellants. Special advocates may see “closed material” withheld from appellants and their legal representative, and may attend any proceedings from which the appellant and counsel are excluded, in order to call for greater disclosure, and to cross-examine witnesses on behalf of appellants.

The special advocate procedure, designed to permit use to be made of classified evidence that is not disclosed to the affected person, does not fit easily into the adversarial system of the common law and requires the special advocate to perform functions different to those ordinarily performed by counsel. The special advocate is required to cross-examine and address argument to the court without instructions from the person whose interests the special advocate is, in part, expected to protect. The judge has to decide the matter without hearing from the person concerned as to the validity of the evidence, and in the knowledge that such a person has not had an opportunity to contradict it. Where there is a strong independent judiciary, and a vigorous, experienced and independent Bar, the intervention of a special advocate of experience and integrity may, to some extent, mitigate the unfairness of taking action against a person without disclosing the evidence on which such action is premised.²³⁴ It is, however, a system which has dangers for the rule of law and, in a different setting, may prove to be no more than a façade of justice to what is an inherently unfair procedure.

designated judge and, after the judge has filtered it, to Mr. Charkaoui and his counsel.”

232 Bill C-3, An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, received Royal Assent on 14 February 2008, shortly before the deadline imposed by the Supreme Court to amend the security certificate regime. See in particular, Sections 82 (1) and (3), and Section 83 (1.1).

233 The creation of a “special advocate” system was part of the UK’s response to the 1996 decision of the ECtHR, Grand Chamber Judgment of 15 November 1996, *Chahal v. the United Kingdom*, Application No 22414/93, paras. 121-133.

234 See for instance the decision of the Court of Appeal in England in *M. v. Secretary of State for the Home Department* 2004 (2) AllER 863.

At both the Canadian and UK Hearings, the Panel heard considerable scepticism about the adequacy of the special advocates system. Many participants at the Hearing in London – including a serving special advocate – argued that the system was incapable of allowing individuals to effectively challenge the allegations made against them. In particular, many considered it problematic that once served with the “closed material”, the special advocate is, as a rule, forbidden from communicating with the appellant or their lawyer. At the Canadian Hearing, participants cited other options in preference to the special advocate system. At the very least, it was argued that the person being “represented” must be able to continue communication with the special advocate (even after the latter had had sight of closed material) – such communication is not allowed in the British system. The system introduced in Canada subsequent to the Hearing nevertheless follows the UK model rather than introducing any further safeguards.

Clearly States have a right to determine who is entitled to stay and enter their territory, and to detain persons prior to their removal from the territory, but the potentially damaging impact that deportation, and detention prior to deportation, is likely to have on all those affected, requires that appropriate safeguards are built in. Obvious safeguards include the need for regular and effective review; time-limits on detention pending deportation; no mandatory immigration detentions;²³⁵ and judicial oversight to verify, amongst other things, the proportionality of the measure and to ensure that the detention is not a disguised form of administrative detention on discriminatory grounds.²³⁶ Especially when a deportation decision affects a long-term or permanent resident, or where there is a risk of the deportee being subjected to human rights violations upon return, only a hearing by a judicial body, vested with full independence in a process which accords with fundamental principles of justice, constitutes an acceptable process. Such an appeal should have a suspensive effect, particularly where irreparable harm is at stake.

2.3 Erosion of the principle of *non-refoulement*

The principle of *non-refoulement* prohibits States from returning, deporting, extraditing, expelling, transferring or otherwise sending someone to a country where he or she might face a real risk of serious human rights violations. The scope of

235 See ECtHR, Judgment of 15 November 1996, *Chahal v. the United Kingdom*, Application No. 22414/93, para. 123 and the UN Human Rights Committee condemning mandatory immigration detentions, in Views of 31 October 2006, *Danyal Shafiq v. Australia*, Communication No. 1324/2004, UN Doc. CCRP/C/88/D/1324/2004), finding that there must be ‘appropriate justification’ for continued mandatory detention.

236 See in particular Article 2, para. 3 ICCPR and Article 9, para. 4 ICCPR with regard to effective *habeas corpus* challenges. See also regarding the potentially discriminatory nature of immigration detention measures, the UK House of Lords decision in *A. v. Secretary of State*, 16 December 2004 (2004) UKHL 56. The 2001 Anti-Terrorism Crime and Security Act empowered the Home Secretary to detain non-nationals who are reasonably suspected of having links to international terrorism and who could not be deported because of a risk of torture upon return. The House of Lords concluded that this system, which effectively allowed indefinite detention of non-nationals, was disproportionate and discriminatory.

the human rights violations that would trigger the *non-refoulement* provision has been extended over time, and has its origins in refugee law. Article 33 of the 1951 *United Nations Convention relating to the Status of Refugees*, sets down that no contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his/her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. Similar protections are expressed in international regulations on extradition.²³⁷

The *non-refoulement* principle is an integral part of human rights law applicable to all individuals under the jurisdiction of the State. As well as being firmly established in several universal and regional human rights instruments, and in the jurisprudence of universal and regional human rights bodies,²³⁸ the principle forms part of customary international law, binding on all States. Unlike the provisions of the 1951 Refugee Convention,²³⁹ the principle of *non-refoulement* under human rights law does not provide for any exceptions on the grounds of national security. *Non-refoulement* applies to any transfer where there is a real risk of serious human rights violations, including torture and cruel, inhuman or degrading treatment or punishment, enforced disappearances, extrajudicial execution, or a manifestly unfair trial.²⁴⁰ In addition, countries that are, for example, State Parties to the *European Convention on Human Rights*, or State Parties to the *International Covenant on Civil and Political Rights* who have abolished the death penalty, are prevented from transferring persons who may face the death penalty on return.²⁴¹

Yet it is clear from the Hearings that this principle of international law is seriously under attack because of the increased reliance by some States on deportation/

237 See, among others, the International Convention against Taking Hostages, Article 9; European Convention on Extradition, Article 3; European Convention on the Suppression of Terrorism, Article 5; the Inter-American Convention on Extradition, Article 4 and the UN Model Treaty on Extradition, Article 3.

238 See, among others, CAT, Article 3, para. 1; the International Convention for the Protection of All Persons from Enforced Disappearance, Article 16; the Declaration on Territorial Asylum, Article 3, para. 1; the Declaration on the Protection of All Persons from Enforced Disappearances, Article 8; the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 5; the Inter-American Convention on Human Rights, Article 22, para. 8; the Inter-American Convention to Prevent and Punish Torture, Article 13, para. 4; the Arab Charter of Human and Peoples’ Rights, Article 28; and the European Convention of Human Rights, Article 3. See also UN Human Rights Committee, *General Comment No. 20: concerning prohibition of torture and cruel treatment or punishment Article 7*, reprinted in UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, at 152, para. 9.

239 Article 31, para. 2, UN Convention relating to the Status of Refugees of 1951.

240 See ICJ Berlin Declaration, Principle 10, Annex 1, and (with more references) *Legal Commentary to the ICJ Berlin Declaration*, p. 93 *et seq.*

241 See in this regard UN Human Rights Committee, Views of 5 August 2003, *Roger Judge v. Canada*, Communication No. 829/1998, para. 10.4.

expulsion as part of their preventive counter-terrorist strategy. The arguments for reversing fifty years of human rights protection vary:

- some argue that the interests of society overall (the majority) must be balanced against the rights of an individual, who may or may not be tortured on return;²⁴²
- some argue that, in seeking diplomatic assurances from the receiving government that the individual concerned will not be tortured or otherwise seriously abused, they sufficiently discharge their duties under the *non-refoulement* principle;
- some argue that the *non-refoulement* prohibition attaches to torture but not to “cruel, inhuman or degrading treatment”, that they make careful distinctions in such matters when determining on cases of *refoulement*, and that risks should be decided on the basis of “more likely than not”;
- some just ignore their duties to comply with the *non-refoulement* principle (see Middle East Hearing), particularly when the principle of *non-refoulement* is not provided for in bilateral or multilateral initiatives (see Russian Federation Hearing with reference to the Shanghai Cooperation Agreement).

The Panel recognises that difficult issues are often at stake. *Non-refoulement* is sometimes seen by governments as an impediment to fighting effectively against terrorism; it would, however, be more correct to say that torture, and other serious human rights violations, are an impediment to *refoulement*.

The Panel thinks it is important to forcefully reiterate that the principle of *non-refoulement*, under universal human rights law, goes beyond the prohibition on torture and covers a range of other serious human rights violations; that any transfer to countries where there is a “real and substantial risk” of such violations is prohibited; and that States must interpret multilateral agreements in the context of international human rights law. Some governments have argued that there is a need for a “balancing” of competing rights; some contributors raised the question of “diplomatic assurances” in the Hearings, so the Panel has explored these two issues in more detail below.

A balancing of rights in the practice of *non-refoulement*?

In the case of *Saadi v. Italy*²⁴³ before the European Court of Human Rights, a number of States (the United Kingdom, Lithuania, Portugal and Slovakia as interveners,

²⁴² See in particular the position in Canada (discussion follows).

²⁴³ ECtHR, Judgment of 28 February 2008, *Saadi v. Italy*, Application No. 37201/06; Observations of the Governments of Lithuania, Portugal, Slovakia and the United Kingdom, intervening in Application No. 25424/05; Decision of 27 May 2008, *Ramzy v. the Netherlands*, Application No. 25424/05.

supported by Italy as respondent government) argued that the *non-refoulement* principle should not be absolute. They claimed that when foreign nationals are thought to constitute a threat to national security, the principle of *non-refoulement* allows for some measure of balancing of competing rights, even when there is a risk of the person being tortured on their return.

Canada also has insisted that Article 3 (1) of the *UN Convention against Torture*,²⁴⁴ does not prevent the authorities, in exceptional circumstances, from deporting individuals who pose a security risk. The Government bases its stance on the Canadian Supreme Court ruling in *Suresh v. Canada*.²⁴⁵ In this case, the Supreme Court overturned the specific deportation case, but did not exclude the possibility that, in exceptional circumstances, deportation to countries where a person risked torture might be justified.²⁴⁶ The Government of Canada has subsequently used the 2002 decision in *Suresh* to allude to a balancing test by which they can justify deportation or expulsion in specific circumstances, even if this violates the principle of *non-refoulement*.

The Panel believes that governments claiming to “balance” the rights of the individual at risk of torture upon return and the supposed needs of society as a whole are working on a false premise. Many human rights compete, and a balancing between majority and minority interests is often required of States (see discussion in Chapter One). This is not, however, a relevant consideration when there is a risk of torture: all international law places an absolute prohibition on torture. The special status and absolute prohibition on torture are ignored when governments claim that they have to balance the risk of torture against other public policy considerations.

In making this assertion, the Panel is of course doing nothing more than invoking the many international and regional rulings that have consistently rejected the idea of a balancing test in the matter of the prohibition of torture and cruel and inhuman or

244 See Article 3, para. 1 of the UN Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment: “No state party shall expel, return (“refouler”) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

245 Supreme Court of Canada, *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1, 11 January 2002.

246 The Canadian Supreme Court stated: “We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified. Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian Government, but because the fundamental justice balance under section 7 of the Charter generally precludes deportation to torture when applied on a case by case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. The ambit of an exceptional discretion to deport to torture, if any, must await future cases” (*Suresh v. Canada*, *Ibid.*, para. 78).

degrading treatment.²⁴⁷ Most recently, the European Court of Human Rights affirmed this position clearly in its 2008 *Saadi* decision:

“...[The Court] cannot accept the argument of the United Kingdom Government, supported by the respondent Government [Italy], that a distinction must be drawn under Article 3 (of the ECHR) between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole. Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule. It must therefore reaffirm the principle stated in the *Chahal* judgment that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3...”²⁴⁸

Diplomatic assurances

A number of States have argued that they can sufficiently discharge their duty under the *non-refoulement* principle by requiring a diplomatic assurance from the receiving country that the individual concerned will not be tortured, or suffer other serious human rights violations. The Panel received evidence on numerous occasions about States’ increasing reliance on diplomatic assurance in counter-terrorism cases; Canada, Italy, the Netherlands, Sweden, the UK and the USA have all relied on such assurances. The assurances, which take different forms, are claimed to reduce the risk of torture once non-nationals are deported to their country of origin, or a third country. The assurances can range from simple contacts up to Memoranda of Understanding between two sovereign countries, such as those concluded by the UK with countries such as Jordan, Libya and Lebanon.²⁴⁹

The European Court of Human Rights in the *Saadi* case cited above, did not reject the notion of diplomatic assurances entirely, but found that there was sufficient evidence of torture and ill-treatment in Tunisian detention facilities to render diplo-

²⁴⁷ See UN Human Rights Committee, *Concluding Observations on Canada*, UN Doc. CCPR/C/CAN/CO/5, 20 April 2006, para. 15; *Concluding Observations on the United States of America*, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 16; Special Rapporteur on torture and other cruel, inhuman and degrading treatment, Theo van Boven, *Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment*, UN Doc. A/59/324, 1 September 2004; UN Committee against Torture, *Concluding Observations on Canada*, CAT/C/CR/34/CAN, 7 July 2005, para. 4; and Views of 20 May 2005, *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005).

²⁴⁸ ECtHR, Judgment of 28 February 2008, *Saadi v. Italy*, Application No. 37201/06, para. 138.

²⁴⁹ Memorandum of Understandings were signed between the UK and Jordan (10 August 2005), with Libya (18 October 2005), and Lebanon (23 December 2005). See also written submission of the Government of the United Kingdom to the EJP United Kingdom Hearing.

matic assurances irrelevant, so that any deportation of the kind envisaged to Tunisia violated Article 3 of the *European Convention on Human Rights*. Other human rights oversight bodies have been more critical still of the concept of diplomatic assurances. The former UN High Commissioner for Human Rights,²⁵⁰ the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Special Rapporteur on Torture),²⁵¹ the UN Special Rapporteur on Human Rights and Terrorism²⁵² and other universal and regional human rights bodies,²⁵³ as well as leading human rights non-governmental organisations, have all rejected the use of diplomatic assurances, not least because the proposed monitoring schemes have been shown to be flawed.

The Panel concurs with the view that – in principle and in practice – there are serious problems with the concept of diplomatic assurances. In principle, reliance on diplomatic assurances is wrongly being used as a way of “delegating” responsibility for the absolute prohibition on torture to the receiving country alone. That undermines the truly *international* nature of the duty to prevent and prohibit torture.

In practice, the Panel heard extensive evidence of problems that have arisen: these are, after all, non-binding agreements typically sought from States that already ignore their legally binding obligation to prevent and prohibit torture. Diplomatic assurances are, moreover, exchanged in situations where neither the sending nor receiving State have any self-interest in monitoring compliance. Even if there was a genuine interest in monitoring compliance, it is difficult to envisage how such a system could operate effectively. Unlike the death penalty, which is relatively easy to monitor, it is difficult to guarantee that torture has not occurred in a particular case, since an individual is unlikely to reveal any ill-treatment if he/she remains in the hands of their torturers. Moreover, in many instances, the risk of torture is highly localised, and reassurances from high level government officials based in the capital city cannot always be relied upon. Most importantly of all, even if it becomes known that a diplomatic assurance has been breached, the affected individual has little or no remedy for the harm done (they indeed have limited opportunity in advance to challenge the reliability of any assurances).

The Hearings in the Middle East, the Maghreb and Pakistan all illustrated the very real risk of torture, *incommunicado* detention and manifestly unfair trials (especially in cases involving national security) in those countries from which assurances are typically sought. Elsewhere, for example, in Canada, the Panel was told of diplomatic

250 UN High Commissioner for Human Rights, *Report of the High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2006/94, 16 February 2006, para. 10 *et seq.* and 34.

251 See for example *Report of the Special Rapporteur on torture, and other cruel and inhuman or degrading treatment or punishment*, UN Doc. A/60/316, 15 August 2005, para. 51.

252 Press Release by UN Special Rapporteur on Human Rights and Terrorism, preliminary findings following visit to Spain, 14 May 2008.

253 For further references see *Legal Commentary to the ICJ Berlin Declaration*, Principle 10, p. 101 *et seq.*

assurances being used in non-terrorism cases – another example of counter-terrorist measures seeping into other domains.²⁵⁴

3. Administrative detention

Administrative detention on national security grounds – imprisoning or severely restricting someone without charge or trial – is not a new phenomenon. The practice of administrative detention has, however, increased, and taken on new features, since the 9/11 attacks. The Panel heard extensive evidence around the world suggesting that the extension of, and changes to, such practices pose a serious threat to well-tested principles of the rule of law.

Administrative detention, at the hands of the executive, on national security grounds supposedly has as its priority the detention of someone perceived to pose a security threat, and the prevention of a criminal act before it occurs, rather than the punishment of a wrongdoer after the fact. Some States appear to rely increasingly on administrative detention as a preventive measure instead of seeing the measure as exceptional and temporary, and necessarily linked to a genuine emergency. Administrative detention includes not only imprisonment but also forms of house arrest, or movement restrictions, which amount to *de facto* loss of liberty (the issue of control orders is discussed later).

Impact of administrative detention

In Chapter Two, it was made clear that the use of administrative detention in the past has led to serious human rights violations. In the Panel's Hearing in the Southern Cone (of Latin America), witnesses testified to the wide-scale and gross violations of human rights – such as torture, disappearances and extra-judicial executions – that occurred under the auspices of administrative detention.²⁵⁵ A similarly stark message was conveyed to the Panel at its Hearing in North Africa, regarding the administrative detention powers used in Algeria in the 1990s. In Northern Ireland, there is general agreement that the practice of internment in the early 1970s fed and fuelled the conflict, by facilitating serious human rights violations, and feeding pre-existing grievances about discrimination and injustice. The Panel was therefore concerned to hear that similar concerns were being raised about modern-day practices of administrative detention.

Concerns over the practice of administrative detention were raised in particular in the Hearings and evidence concerning Australia, Canada (in relation to detention

²⁵⁴ The Panel heard that the Canadian Government secured diplomatic assurances in non-terrorist cases from foreign governments known to systematically practice torture – such as the case of a Chinese asylum seeker suspected of bribery and smuggling. See the summary of the EJP Canada Hearing with reference to the oral testimony by Human Rights Watch.

²⁵⁵ For example, oral testimony by Soledad Villagra, lawyer from Paraguay, EJP Southern Cone Hearing.

under the security certificates), East Africa (Tanzania),²⁵⁶ Israel and the Occupied Palestinian Territory, the Middle East (Egypt, Jordan), North Africa (Algeria), South Asia (Bangladesh, Nepal, Sri Lanka), South East Asia (Thailand, Malaysia), the United Kingdom and the United States.

The Australian Terrorism (Preventive Detention) Act 2006 introduced a system of administrative detention (Preventative Detention Orders, PDOs) allowing administrative detention on the federal level of up to forty-eight hours, and up to fourteen days on the State level. Participants at the Australia Hearing raised a series of concerns – for example, the limited possibility for judicial review while the detention order is in force, the limited amount of information available to detainees and their counsel to effectively challenge detention, and serious restrictions in any communication with the outside world. The fact that all contacts between the person subject to the Order and his or her lawyer is subject to monitoring by the police, was of particular concern.²⁵⁷

The Panel also heard that the changed international context since 2001 has given legitimacy for some States to maintain or revive pre-existing practices of administrative detention, despite the absence of a genuine state of emergency. For example, in Malaysia, where the Internal Security Act (ISA) has been a permanent feature since the 1960's, the Panel was told that the practice of administrative detention had effectively sidelined the criminal justice system in cases involving national security. The ISA allows any police officer to detain an individual for an initial period of up to sixty days, if the officer has reason to believe that the individual is “*acting in any manner prejudicial to the security of Malaysia ... or to the maintenance of essential services therein or to the economic life thereof.*” At the end of this sixty-day period, the Home Minister may order an individual to be detained for a period of two years, renewable, for an indefinite number of times. Detention under the Act is subject to review by an Advisory Board, but Board members are appointed by the executive, and the Board's recommendations are non-binding.²⁵⁸ Whilst ISA detainees may file petitions of *habeas corpus*, the courts are limited to reviewing procedural irregularities, rather than the substantive grounds for detention.²⁵⁹

Participants from Malaysia highlighted several problems, not least the tendency of the courts to be overly deferential to the executive. In most cases, the courts have not been willing to challenge the executive's assessment of the need for detention, and even in one case explicitly declared that “*the executive, by virtue of its*

256 In relation to the 1962 Preventive Detention Act, colonial legislation still in force in Tanzania.

257 See in particular Section 105.34 and 35 of the Criminal Code Act. See also the summary of the EJP Australia Hearing and written submissions by the Australian Lawyers for Human Rights and the New South Wales Council for Civil Liberties.

258 Oral testimony by Edmund Bon, Lawyer, Malaysia Bar Council, Malaysia at the EJP South East Asia Hearing.

259 Section 8B of the 1960 Internal Security Act (ISA) of Malaysia.

responsibilities, has to be the sole judge of what national security requires”.²⁶⁰ The lack of any meaningful judicial review of executive actions has led to the use of the ISA against political opponents, civil society activists, and non-violent dissent.²⁶¹ Allegations of torture and other ill-treatment inflicted on ISA detainees in the past are prevalent, but the Panel was told that the situation in Malaysia has worsened since the events of 9/11. It is alleged that the changed international climate has both supplied the Government with some “justification” for its continuing and increased use of administrative detention; and it has silenced several of those governments that might have been critical in the past.²⁶²

The South Asia Hearing also provided examples of the dangers inherent in administrative detention powers. For example, in Nepal, administrative detention under the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO), had largely replaced criminal prosecutions during the conflict. TADO was first promulgated in November 2001, and repeatedly renewed, until it was finally allowed to lapse in 2006. The Panel was told that almost all individuals who were detained under TADO were held *incommunicado* in unofficial places, such as army barracks or base camps, and repeatedly moved from one place to another, before eventually reaching official detention centres (jails or High Security Centres). Administrative detention in military custody had resulted in serious human rights violations, including torture and cruel, inhuman or degrading treatment, and disappearances. While detainees had the possibility of filing *habeas corpus* petitions, in practice, the military had frustrated court orders by re-arresting the detainees, sometimes even on court premises.²⁶³

Evidence provided to the Panel on Pakistan was particularly striking. When a state of emergency was declared in November 2007, on the grounds among others that some members of the judiciary were “*working at cross purposes with the executive and legislature in the fight against terrorism*”,²⁶⁴ many protestors, including lawyers were subjected to house arrest or administrative detention under the Maintenance of Public Order Ordinance, or detained without reference to any law.²⁶⁵ The Pakistani member of the Panel, Hina Jilani, the then Secretary General’s Special Representative on Human Rights Defenders, and other senior lawyers and judges were targeted in a blatant abuse of counter-terrorism measures against human rights defenders.²⁶⁶

260 Federal Court of Appeals of Malaysia, Case of *Mohamad Ezam bin Mohd. Noor v. Ketua Polis Negara and Others* [2002] 4 M.L.J. 449.

261 See written submission by Suara Rakyat, Malaysia (SUARAM), EJP South East Asia Hearing.

262 *Ibid.*

263 See for example, oral testimony by Mandira Sharma, Advocacy Forum, Nepal, EJP South Asia Hearing.

264 Proclamation of Emergency, issued by President General Musharraf, 3 November 2007.

265 See report by Human Rights Watch, *Destroying Legality: Pakistan’s crackdown on Lawyers and Judges*, December 2007.

266 Ms Hina Jilani had a ninety day detention order issued against her, though it was not enforced after she returned to Pakistan from overseas.

In Thailand, witnesses indicated that the scope of detention powers in the southern provinces is limited in time. Individuals are held under administrative detention powers for no more than thirty days, although it is notable that the police and military routinely make full use of the thirty day limit. Although the permitted grounds for detention are mainly preventive, in reality detention powers are used for investigative purposes. Detainees are denied access to lawyers as a matter of policy – on the basis that since they are not accused of anything, they do not enjoy the constitutional right to consult a lawyer. Yet, many detainees are subsequently charged with criminal offences. Forms of administrative detention are also used as part of Thailand’s strategy on rehabilitation, in so-called vocational training.²⁶⁷

An example from a very different legal context shows, however, that even where there are a variety of supposed safeguards, they often seem to be inadequate. For example, the Panel was told of the practical and damaging impact of administrative detention laws in the Occupied Palestinian Territory. Detainees have lawyers, but almost all relevant material is classified and denied to the detainee and his/her lawyer; detainees can appeal to military courts, but the courts are not considered independent and are said to accept unquestioningly allegations made by the General Security Services; and serious movement and other restrictions makes access to legal counsel, and family, difficult. Particular difficulties for lawyers in accessing detainees held within Israel were reported to the Panel also. There are no maximum time-limits to administrative detention orders and they can be renewed indefinitely; information provided to the Panel suggested that the six-month orders are frequently extended for lengthy periods.²⁶⁸

The Panel was particularly disturbed to hear, often, about the practice of detention without charge or trial outside any legal framework. This concern was raised with the Panel in its Hearings in Colombia, East Africa (in relation to *incommunicado* detention in Kenya and “safe houses” in Uganda), the Middle East, North Africa, the Russian Federation, and South Asia. As discussed in Chapter Four, participants at the Maghreb Hearing noted the current practice in Algeria of detaining suspects without charge (often in undisclosed locations under the responsibility of the intelligence services) and the holding of persons in administrative detention in army barracks (nominally under a form of house arrest). At the Middle East Hearing, serious concerns were raised about administrative detention undertaken by the security services, often without a clear legal basis. In many cases, such accounts were accompanied by allegations of torture and other serious human rights violations.

267 Persons are held in detention for re-education supposedly as a voluntary measure and as an incentive to be released afterwards. See ICJ, *Thailand, Legal Memorandum, ‘Vocational Training Camps’ and Applicable International Standards*, October 2007.

268 Submissions during the visit of the EJP to Israel and the Occupied Palestinian Territory by Israeli and Palestinian organisations including Machsom Watch, HaMoked, B’Tselem and Addameer – Prisoner Support and Human Rights Association. See also Report of the Special Rapporteur on Human Rights and Terrorism, *Mission to Israel and the Occupied Palestinian Territory*, UN Doc. A/HRC/6/17/Add.4, 16 November 2007.

It is clear from this account of the material gathered in Hearings around the world, and the past experiences, that the policy and practice of administrative detention has given rise to many human rights violations. It is equally clear that the problems with the practice arise in part because there are lesser guarantees available to administrative detainees than are accorded to criminal suspects (for example, prompt access to the courts and counsel of one's own choosing). Moreover, the measure is typically applied on an ill-defined basis (such as a generalised threat to national security), often based on unsubstantiated intelligence about the threat posed, and tends to affect a wide range of persons, including those who have no involvement at all in terrorism.

In light of all this, the Panel thought it vital to reiterate that administrative detention must be limited to genuine declared states of emergency threatening the life of the nation. Even in a *bona fide* emergency, administrative detention must be strictly necessary, proportionate to the threat and non-discriminatory; it must allow for prompt access to legal advice of one's choosing; effective *habeas corpus*; provision must be made for the courts to decide on the lawfulness of detention; judicial review must allow for both substantive and procedural challenges; detention must be time-limited; and all individuals subject to administrative detention should as a rule be accorded treatment of the same standards as that accorded to prisoners accused of criminal offences.

4. Control orders

One preventive measure that has obtained prominence in recent years has been the control order – an administrative measure that imposes a range of restrictions on the activities of an individual but falls short of full detention or expulsion.

These orders arose largely as a result of their introduction in the United Kingdom in response to the 2004 House of Lords decision which struck down the regime allowing for the indefinite detention of non-citizens who could not be deported (see above). The Panel received testimony about the operation of control orders in Australia, France,²⁶⁹ the Netherlands,²⁷⁰ and the United Kingdom (and the fact that the Danish Government is reportedly considering their introduction). While the nature and extent of restrictions vary depending on the scope of the order, the severity of these restrictions – and particularly their cumulative impact – can make

269 In France the authorities can place restriction orders on foreigners, such as assigned residence orders. Such orders can be used as a milder alternative to deportations. See written submission by Human Rights Watch, EJP European Union Hearing.

270 See written submission by Nederlands Juristen Comité voor de Mensenrechten (NJCM), EJP European Union Hearing, referring to the Law on Administrative Measures for National Security (Wet bestuurlijke maatregelen nationale veiligheid) which allows for certain geographic or other communication prohibitions and reporting obligations to be placed on individuals that are suspected of being connected with terrorist activity or with supporting terrorism. These measures can be based on intelligence reports, and there are limited opportunities to contest (or subsequently secure remedies) against the measures imposed.

normal life well nigh impossible. A breach of the terms of the order can in due course constitute a criminal offence, punishable by imprisonment of several years.

In the United Kingdom, for example, there are two sorts of control order: those that entail house arrest, and require derogation from the *European Convention on Human Rights* as a deprivation of liberty (derogating orders), and a variety of other restrictions that do not amount to a deprivation of liberty (non-derogating orders). While the former has not been invoked, the latter has been used in more than thirty cases.²⁷¹ Non-derogating orders are issued on a determination by the Home Secretary that there are “reasonable grounds for suspecting” that the person concerned has been involved in “terrorism-related activity”. This test is lower than that of the “balance of probabilities”.²⁷² Once a non-derogating order has been issued, there are more than twenty-two different restrictions that may be imposed. Restrictions may limit movement and/or residency; impose long curfews; require surrendering travel documents or reporting to a police station; impose restrictions on whom the person may meet or communicate with; place limitations on financial transactions or on the person’s employment; specify which mosque a person may attend or whether the individual concerned is allowed to lead group prayers.²⁷³

The Panel was informed that a control order can include a range of these restrictions, and in a House of Lords ruling in October 2007,²⁷⁴ a particularly long (eighteen hour) curfew notice was found to amount to a deprivation of liberty that could only be justified by a formal derogation from the European Convention. The Panel received considerable evidence, at the UK Hearing, and in other venues where control orders were being introduced regarding the real or potential cumulative effect on an individual of – living somewhere different to where they used to live; having their residence subject to frequent searches (at any time of the day or night) by a designated officer, without special authorisation of a court; having their movement restricted for many hours a day; limited to a certain (sometimes extremely small) area; and severely limited in terms of who can be met.²⁷⁵ Control orders also

271 Statistics valid as of February 2008, Lord Carlile of Berriew Q.C. *Third Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (on the issue of control orders), 18 February, 2008, p. 4.

272 This is the same standard that applied to certification as a suspected terrorist under the now-repealed Part 4 of the Anti-Terrorism, Crime and Security Act (ATCSA), which authorised indefinite detention of such persons. *Ajouaou and A,B,C and D. v. Secretary of State for the Home Department* [2003] UKSIAC 1/2002, 29 October 2003, para. 71.

273 Lord Carlile of Berriew, Q.C., *Second report of the independent reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005*, 19 February 2007, para. 10.

274 See UK House of Lords, Judgment of 31 October 2007, *Secretary of State for the Home Department v. JJ and others (FC)*, 2007 UKHL 45.

275 See also oral submission of Lord Carlile of Berriew, Q.C at the EJP United Kingdom Hearing. An overview of the restrictions in practice placed on individuals can be found in the reports of the independent reviewer and the severity of the restrictions is reflected in the summaries provided in Annex 3 to the *Third Report of the Independent Reviewer*, 18 February 2008, *op. cit.* More personalised accounts were given in the written submission to EJP from Peace & Justice, EJP United Kingdom Hearing, where people describe how they cannot visit libraries or colleges (because of restrictions on internet access); feel constrained to

stigmatise someone with the label of a “suspected terrorist”, and can do severe reputational damage. Family members, friends, professional colleagues are all likely to feel the consequences of such labelling, and this “chill factor” may deepen the individual’s sense of isolation.

In the UK, an attempt has been made by the authorities to compensate for some of the procedural failings of control orders by borrowing the “special advocates” system originally introduced in immigration proceedings. As in the immigration context (see earlier discussion), this response has been criticised by many as inadequate to permit the “controllee” to effectively challenge the allegations against them. The House of Lords has not found the control order scheme as such to be incompatible with the Human Rights Act.²⁷⁶ The judiciary has however held that a system of “special advocates” will not necessarily compensate for the grave legal disadvantage experienced by those being issued with a control order, and that courts must look “at the process as a whole” to determine whether or not, on the facts of a particular case, justice has been done.²⁷⁷

In December 2005, Australia enacted the Anti-Terrorism Act (No. 2) 2005 to introduce preventive control order regimes similar to that in the UK. Participants indicated to the Panel that they were particularly concerned over the introduction of such legislation in Australia, where there is not even the equivalent safeguard to the UK’s Human Rights Act. In practice, these control orders have been used only twice, but both have been highly contentious.²⁷⁸ In one case, an interim control order was imposed on Joseph Thomas, shortly after his conviction on terrorism charges was quashed on appeal.²⁷⁹ In the other case, David Hicks, a former detainee at Guantánamo Bay, was transferred back to Australia as part of a plea agreement to serve a nine month prison term after pleading guilty to terrorism charges before the US military commissions. Shortly before finishing his prison term, Mr Hicks was issued with an interim control order.²⁸⁰ In contrast to the UK system, which requires the Secretary of State to consider the viability of criminal prosecution prior to issuing a control order, and the chief police officer to keep under review the investigation of the controllee’s

chat freely on telephones to avoid any misunderstanding in their listeners; and report a total sense of “disorientation”.

276 The Human Rights Act incorporates the European Convention on Human Rights into domestic UK law.

277 See in particular, UK House of Lords, *Secretary of State for the Home Department v. MB (FC)* 2007 UKHL 46, para. 35 and *R (Roberts) v. Parole Board* (2005) AC 738, para. 83.

278 See Parliament of Australia, Department of Parliamentary Services, Research Paper No. 28, 2007-2008 “Anti-terrorist control orders in Australia and the UK: a comparison”, 29 April 2008.

279 Joseph Thomas had his conviction on terrorism charges quashed on the grounds that his confession in Pakistan was not freely given; the subsequent control order included a curfew in his home, reporting to police three times a week, pre-approval of phone and internet communications. See also Special Rapporteur on Human Rights and Terrorism, *Australia, Study on Human Rights Compliance While Countering Terrorism*, A/HRC/4/26/Add.3, 14 December 2006, para. 38.

280 David Hicks’ interim control order covered similar grounds to those of Joseph Thomas (see above). In November 2008, the Attorney General announced that he would not seek extension of the order.

conduct with a view to criminal prosecution for a terrorism offence, there are no such requirements in the Australian legislation.²⁸¹

5. Listing

A counter-terrorism preventive measure that has become increasingly important since 2001 has been the process of creating lists of individuals or organisations suspected of involvement in terrorism. Listed organisations are generally banned, while listed individuals typically face restrictions on their freedom of movement, or in their financial transactions.

A variety of such lists exist both at the national level as well as at the universal or regional level. The UN Security Council introduced its listing system before 9/11 but it has taken on greater significance in recent years.²⁸² The European Union maintains one list that implements the Security Council lists,²⁸³ and an independent European Union list.²⁸⁴ The Panel also heard of concerns in connection with regional listings on religious groups deemed “extremist” within the Shanghai Cooperation Agreement.²⁸⁵

There is, inevitably, a considerable amount of overlap between listing at the national and international levels: international listings are drawn in part from national lists, and national authorities are required to add internationally listed names to their domestic lists. This overlapping of names means that organisations and individuals that appear on one list soon find themselves on a number of different lists, with an array of proscribed activities. With such overlapping, comes both the potential for increased error, and the difficulty of legal challenge, or correction.

Identifying and freezing the assets of persons, groups, and organisations involved in terrorism is clearly an acceptable, and indeed necessary, tactic in effectively combating terrorism. Listing also appears on the face of it to be the least far-reaching

281 See Section 8 of the UK Prevention of Terrorism Act 2005.

282 The 1267 Committee which implements the sanctioning system was established by the UN Security Council Resolution 1267 (1999), adopted on 15 October 1999, UN Doc. Res/1267 (1999) and maintains the Consolidated List of individuals and groups subject to the sanctions measures. See <http://www.un.org/sc/committees/1267/index.shtml>.

283 The Council Common Position 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Osama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and Regulation (EC) No. 881/2002, adopted on the same date. The list, included as an annex to the Regulation, is regularly updated by new regulations to reflect the changes in the Consolidated List maintained by the 1267 Committee.

284 First created pursuant to Council of the European Union, Common Position 2001/931/CFSP and Council Regulation (EC) No. 2580/2001. See also Common Position 2008/586/CFSP updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and Council Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

285 The list of organisations considered “extremist” by the Shanghai Cooperation Agreement is not public nor are the criteria for categorising organisations as “extremist”.

or intrusive of the various preventive measures discussed in this chapter, yet its impact can be considerable. Advances in modern technology and international cooperation also make the potential impact of listing even greater. The Panel learnt that this measure (like deportation, administrative detention and control orders) has had disastrous effects on the life and the livelihood of an individual who is listed, or who is associated with a listed organisation, as well as their families. The consequences can be legal, social, reputational, and financial. Moreover, in most countries, membership of, or association with, a listed organisation is a criminal offence that carries severe penalties.

The Panel also heard of many troubling examples of individuals, and whole families, innocent and law-abiding, being caught up in harrowing situations, simply because their names resembled those of individuals on various unofficial “watch” or “no fly” lists.²⁸⁶ For these reasons, it is important to ensure that any listing process is undertaken with due regard to effective safeguards and eventually remedies.

5.1 Listing at the domestic level

The procedures for listing, and the consequences of being listed, vary to some extent in different jurisdictions. Typically, in most if not all countries, the domestic listing of an individual is likely to result in financial sanctions and restrictions on travel. The State may confiscate assets, prevent an individual from making financial transfers, and/or restrict when and where the listed person may travel. In some countries (for example Australia)²⁸⁷ the designation is subject to time limits of two years (with the possibility of re-designation); elsewhere (for example, Canada and the UK), the designation is valid indefinitely, though subject to review.²⁸⁸ The open-ended nature of the listing process in some jurisdictions renders it likely that individuals (and organisations) are subject to a quasi-permanent deprivation of rights.

Usually the decision to list an individual or organisation is taken by the executive, either alone, or in conjunction with the legislature, but with no judicial involvement.²⁸⁹ At several Hearings, participants criticised the arbitrary nature of such

286 See, for example, the experience of Mr Mohammed and his family when his five year old son's name matched a name on a “security watch list”; or Mrs R and her family attempting (and failing) to attend a family wedding because of name confusions (written submission by American-Arab Anti-Discrimination Committee, EJP United States Hearing).

287 See Section 102.1(3) of the Criminal Code Act 1995 of Australia.

288 In the UK, there is an Independent Reviewer; in Canada, the Minister is the reviewer. In both countries, the listed entity may first apply to the relevant Minister/Home Secretary for de-listing and in case of negative decisions, submit appeal against them to a judicial body.

289 The UK, the US and Australia require approval by the legislature of the regulation/schedule containing a proposed list of proscribed organisations. Canada, India and Tanzania gave the Government a unilateral power to declare a person or an organisation as terrorist, Section 83.01 of the Criminal Code of Canada; Section 35 of the 2004 Unlawful Activities (Prevention) Amendment Ordinance of India; and Section 12 of the 2002 Prevention of Terrorism Act in Tanzania.

decisions, and the absence of any clear criteria for listing.²⁹⁰ A common concern was the fact that many listed organisations are Muslim, and this raised questions as to the potentially discriminatory application of this sanction. Individuals and groups alleged possible bias in the decision-making, and were concerned at the creation of an overall perception of particular communities being targeted.²⁹¹ In those instances where the criteria for listing are in the public domain, they appear broad. In Australia and the UK, for example, there has been much debate about the ambit of listing which involves individuals or organisations that “glorify” or “advocate” terrorist acts.²⁹² Here and elsewhere (especially in countries with a long tradition of restricting political dissent), the risk is great that people who are doing nothing more than expressing “unpopular” opinions will be caught up in the net of supposed supporters of terrorism.

Affected persons or entities are rarely given an effective opportunity to challenge their designation – before or after being designated. Even in situations where legal provisions exist to allow an appeal or review against listing before a judicial body, the remedy is often limited, with the aggrieved person having little or no opportunity to challenge facts, or the proportionality of the measure. Like other preventive mechanisms, the appeal process is characterised by secrecy, allowing for non-disclosure of key materials. Since the original information is often based on secret intelligence, or may originate from an earlier international listing decision (see on), individuals and organisations have few remedies.

5.2 Listing at the international level

The processes of domestic and international listing are greatly intertwined. On the positive side, transnational terrorism needs coordinated responses. On the negative side, attempts at coordination can compound serious errors made at the outset, and the risks to individuals and organisations expand exponentially. As the seriousness of the potential risk of abuse increases, human rights law would require a similar increase in safeguards; this is not currently the case.

It is disturbing to report that there is not due process in the listing procedures carried out by the United Nations. Belatedly, some incremental changes have been introduced in response to criticism, including for example a requirement for subsequent notification that the individual or entity has been listed, and the provision of a “statement of the case” outlining allegations against them. There are however no effective means for challenging a listing decision once made because, despite some reforms, the listed individual or entity seeking de-listing or exemptions must

290 See in particular written submissions from: the American-Arab Anti-Discrimination Committee, the Australian Muslim Civil Rights Advocacy Network and the Canadian Muslim Lawyers Association at the US, Australian and Canadian Hearings respectively.

291 Such concerns were voiced most prominently at the EJP Hearings in Canada, Australia, the United Kingdom and the European Union.

292 Section 21 of the UK Terrorism Act 2006 (c.11); Section 102.1 of the Criminal Code of Australia.

continue to rely on the goodwill of a State, and has no possibility of directly petitioning the Committee.²⁹³ The decision to remove someone from a list is essentially a political one, in that it is taken by consensus by the Sanctions Committee whose membership corresponds to that of the Security Council, allowing any Member State the power to veto a de-listing decision. There is no option for independent review. Once listed by the UN, there is no time-limit to the listing, and de-listing will prove extremely difficult, since it requires the agreement of all five permanent members.

While the UN is not itself party to human rights treaties, its Member States are bound by such treaties. Member States of the UN (including members of the Security Council), and the Security Council itself, are bound by international law, including the obligation to respect fundamental human rights, as reflected in conventional and customary international law. Moreover, the inclusion on one list (such as the UN list) then has consequences for listing at the level of domestic lists and, in some cases, regional lists. The Panel received virtually uniform criticism of the system as it presently operates. The UN sanctioning lists is seen as arbitrary, and this then causes difficulties for Member States if they try to abide by UN procedures. On the one hand, States have their domestic and international human rights obligations, and on the other hand, their obligations to implement decisions under Chapter VII of the UN Charter. The contradiction leaves States open to legal challenge.

In this regard, the Panel welcomes a recent landmark decision²⁹⁴ of the European Court of Justice, which ruled that the implementation within the EU of listings by the Security Council have to be measured for their full compliance with human rights law. The Court found that the EU Council decision implementing the Security Council listings in their current format violates the right to defence (especially the right to be heard), and the right to an effective judicial review. At the time of writing the UN Human Rights Committee equally held Belgium²⁹⁵ to be in violation of its obligation under the right to freedom of movement, and the right to privacy and reputation, in their implementation of the Security Council lists. This was the case, even though Belgium had requested in vain that the individuals concerned be de-listed. Clearly these developments underline the urgent need to reform listings under the UN Security Council.

At the European Union level serious concerns were voiced also in relation to its own counter-terrorism lists (which complement those lists merely implementing the

293 In 2007 the procedure was somewhat improved by the establishment of the “focal point” within the Sanctions Committee. Listed individuals or entities may now submit to the “focal point” a de-listing request for forwarding to the designating government(s) and to the government(s) of citizenship and residence. In the absence of opposition or notification by these governments that they are taking action on the request, the “focal point” will forward copies of the de-listing requests to all members of the Sanctions Committee.

294 See Court of Justice of the European Communities, Judgment of 3 September 2008, *Kadi and Al Barakat International Foundation v. the Council of the European Union*; joint cases C-402/05 P and C-415/05.

295 UN Human Rights Committee, Views of 9 December 2008, *Sayadi and Vinck v. Belgium*, UN Doc. CCPR/C/94/D01472/2006, No. 1472/2006, para. 10.1 *et seq.*

Security Council sanctioning system). The listing process carried out by the European Union has improved following decisions of the European Court of Justice,²⁹⁶ but serious concerns remain regarding the transparency and accountability of the listing and de-listing process, the inter-action between domestic and EU lists, and the nature of information sharing at the EU level.²⁹⁷ While, the EU list is at least subject to review and renewal every six months, which should allow for an active consideration of de-listing, the Panel was informed that this process is nearly always automatic, in practice if not in principle.²⁹⁸

The listing process can have a dramatic impact on people's lives, and the consequences of domestic listing are clearly multiplied when an individual or organisation is placed on an international list. The Panel received testimony about individuals who were effectively turned into "international pariahs", with their reputations destroyed, and arguably placed in considerable danger because of the effect the listing process has had on immigration and asylum decisions.²⁹⁹ Nor is it necessary to rehearse again the problems likely to be created by such lists when they are maintained in large part as a result of secret intelligence: difficult as it might be for courts to assess intelligence sources in the domestic context, it is even less likely that courts will be in a position to challenge any secret information on which the Security Council sanctioning system is based. The decision to place individuals on the UN or EU listings lacks even the rudimentary safeguards that may exist at the national level.

The Panel shares the concerns of the Parliamentary Assembly of the Council of Europe that the current procedures of listing undermine the credibility of the international fight against terrorism, and is "unworthy" of international institutions like the UN and the EU.³⁰⁰ These international bodies should set an exemplary role in countering terrorism in accordance with human rights and rule of law principles.³⁰¹ Instead, the expanding use of listings indicates that the problem is being exacerbated not remedied.

296 Court of First Instance of the European Communities, Judgment of 12 December 2006, *Organisation des Modjahedines du peuple d'Iran (OMPI) v. Council of the European Union*, Case T-228/02. Following the judgment, the EU Council released a statement on 29 June 2007 indicating that a statement of reasons and information about how to appeal would now be provided for parties who have their assets frozen. See, the press release by the Council of the European Union, "EU terrorist list- Adoption of new consolidated list", 11309/07 (Press 158), 20 June 2007.

297 See for instance written submission by Prof. Christian Walter, on behalf of the German section of the ICJ, EJP European Union Hearing.

298 Oral testimony by Ben Hayes, Statewatch, EJP European Union Hearing.

299 See oral testimony by Ben Hayes, Statewatch, written submission of Belgian Comité T (EU Hearing) and oral testimony of Wolfgang Kaleck, German Republican Lawyers Association, EJP European Union Hearing.

300 Council of Europe, Parliamentary Assembly, Resolution 1597 (2008) adopted on 23 January 2008, para. 7; see also 2007 *Marty report*, Doc. 11454.

301 Various proposals have already been made to enhance due process in the UN sanctions process. See, for example, "Discussion Paper on Supplementary Guidelines for the Review of Sanctions Committees' Listing Decisions", Governments of Denmark, Liechtenstein, Sweden and Switzerland, November 2007.

6. Conclusions & Recommendations: preventive measures

On the basis of the material submitted, and its own consideration of international law, the Panel came to a number of conclusions about preventive measures.

In particular, the Panel concluded that the *prevention* of terrorism cannot be constrained to a narrow set of legal and procedural arrangements. Learning from the past suggests that a wide range of policy measures are needed: in the matter of education, community relations, policing, the economy, foreign policy, respect for the rights of minority communities, and in the mainstreaming of human rights and equality considerations into all government policy. The preventive measures explored in this chapter in no sense reflect the comprehensive programme of action required of governments if they are to counter terrorism effectively. While it is true that the Panel, by virtue of its composition, was specially qualified to discuss legal measures, it is noteworthy that this also seemed to be the focus of government efforts. Important as law is, it cannot carry all the weight of preventing terrorism, and governments should take a more holistic approach to the challenges faced.

Having said that law is not the sole answer, law is clearly part of the answer. The Panel was disturbed at the extent to which crucial legal principles are being degraded in the name of dealing with terrorism. While recognising the value of taking steps to try to prevent terrorism, the Panel was left with the impression that some States are supplanting the normal criminal justice system, in part because of its well-established evidentiary and procedural requirements. This is, the Panel believes, proving to be a very “slippery slope”. The Panel is particularly concerned that the secrecy surrounding preventive measures introduced as part of a State’s counter-terrorism efforts may be seeping into legal systems more generally. In Canada, participants noted that closed hearings and non-disclosure in immigration proceedings have become increasingly common in a wide range of cases beyond those relating to allegations of terrorism. In the UK, participants pointed to the expanding use of “special advocates” in a range of proceedings (including proceedings before parole boards), and a serving special advocate highlighted how the system was creating worrying precedents by legitimising greater use of secret evidence and of secret hearings.

a. Preventive measures & immigration

While the Panel acknowledges that deportation is provided for in international law, it believes that the gravity of the measures must be fully recognised. The tests of legality, necessity, proportionality and non-discrimination should be applied rigorously. The following safeguards are vital:

- Immigration law should not serve as a substitute for criminal law;
- Any detention process, and individual detention decisions, should be properly grounded, and subject to regular and effective review by a judicial body;

- Detention pending deportation must be time-limited and cease when deportation is not a realistic prospect; it should not be used as a disguised form of administrative detention on discriminatory grounds;
- The principle of *non-refoulement* must be fully respected;
- “Diplomatic assurances” cannot discharge a State from its duties under the principle of *non-refoulement*;
- Remedies should be provided to allow individuals to appeal detention prior to deportation, and decisions on deportation, before a civilian judicial authority.

This latter point is particularly important. At present, there is no shared international consensus that, in deportation, extradition or expulsion proceedings, human rights law explicitly and necessarily requires a full fair hearing before an independent tribunal. However, the Panel was left in no doubt that, particularly when a deportation decision affects a long-term or permanent resident, and where there is a serious risk of the deportee being subjected to serious human rights violations upon return, only a hearing by an independent judicial body, constitutes an acceptable process. Such an appeal should have a suspensive effect, particularly where irreparable harm is at stake.

The root problem here is that, for some countries, immigration law has now moved centre-stage in their counter-terrorism strategies; the law was not designed with that in mind. States need to re-visit this situation.

b. Administrative detention

Administrative detention has often given rise in the past to serious human rights violations; yet, the Panel felt that much of the learning from the past have been ignored. There is a real risk of continuing human rights violations if the framework of settled international law continues to be set aside when developing current counter-terrorist preventive strategies. It may be helpful to make a clear exposition here of some of the basic tenets of international law as they apply to administrative detention:

- any form of administrative detention must be limited to the most exceptional circumstances, namely a *bona fide* state of emergency threatening the life of the nation;
- even in a *bona fide* emergency, constituting a threat to the life of the nation, and therefore allowing for exceptional measures, administrative detention must be subject to stringent safeguards and

guarantees, and in particular must be strictly necessary, proportionate to the threat and non-discriminatory;

- minimal safeguards must include prompt access to legal advice of one's own choice, effective habeas corpus, and access to independent judicial authority;
- the right to take proceedings before a court so that the court may decide without delay on the lawfulness of detention must not be diminished, even in a state of emergency;
- the option for judicial review of decisions affecting administrative detainees must be not only of a procedural nature; judicial review must allow for substantive consideration of the case and allow for release to be ordered;
- effective access to legal counsel must allow for clients to communicate in confidence;
- strict time limits must apply and States may not detain suspected terrorists for indefinite or prolonged periods without charge or trial; and
- the treatment of individuals subject to administrative detention should as a rule be governed by the same standards as that of prisoners accused of criminal offences.

The right of all persons to be free from arbitrary arrest and detention is central to the rule of law. It is clear from contemporary and historical examples that administrative detention can give rise to a number of serious human rights violations. It is for this very reason that international law requires that any departure from this basic principle be convincingly argued; the Panel was disturbed to find many examples where no such argument was forthcoming.

c. Control Orders

Control orders are qualitatively different from preventive measures such as surveillance. The orders are not aimed at determining risk levels, and gathering information for subsequent criminal proceedings, but rather at placing restrictions (amounting to sanctions) on the individual concerned. Accordingly, control orders could give rise to a “parallel” legal system and, especially over the longer term, undermine the rule of law. This risk can only be minimised by treating control orders as exceptional measures, subject to time limits and judicial review against tests such as “legality”, “necessity”, “proportionality”, and “non-discrimination”.

If control orders are to be used, it is also essential to build in appropriate safeguards. The Panel believes that there are many important safeguards missing in the control order system currently in operation in places like Australia and the UK:

- the evidentiary standard required is often low – that of “reasonable suspicion”;
- there is a limited ability to test the underlying intelligence information;
- there are no definite time-limits and the orders can last for long periods;
- there are limitations on effective legal representation and to legal counsel of one’s own choosing;
- the right to a full fair hearing (guaranteed in both civil and criminal proceedings) is denied.

Such safeguards are all the more important given that criminal sanctions often flow from the currently flawed procedures. The Panel expressed reservations about “alternative” safeguards that have been developed, such as the system of special advocates. The Panel shares the view expressed by Lords Woolf and Bingham (cases cited earlier) in proceedings in the House of Lords to the effect that the procedure puts the affected person “at a grave disadvantage”. While recognising that the introduction of special advocates was intended to compensate for other procedural limitations, and also that there is a strong tradition of an independent judiciary in the UK, the Panel believes that this is an important and worrisome departure from normal practice.

d. Listing

It was clear to the Panel that the practice of listing individuals and organisations has given rise to human rights violations and that, where they exist at all, the procedural safeguards are inadequate. At the time of writing, there is a move to reform the UN sanctioning system on the proposal of a number of Member States. Such reforms are long overdue in the light of consistent criticism by human rights bodies, including the Special Rapporteur on Human Rights and Terrorism. The Panel supports any proposals that would ensure full compliance with international human rights law, in particular the introduction of a genuinely independent judicial or quasi-judicial complaint mechanism, a clear listing and de-listing process, and strict time-limits for listing decisions.

At both the international and domestic levels, the international legal principles are the same as laid out above:

- The criteria leading to listing should be clear, publicly available and non-discriminatory;
- the listings must be strictly time-limited and subject to limited renewal;
- there must be sufficient notification to the affected parties;
- opportunities must be accorded to rectify errors;
- there must be an effective remedy to allow decisions to be contested; and
- there must be independent review mechanisms.

e. General

Having examined different preventive measures, the Panel believes it is impossible to over-state the importance of independent judicial oversight. This chapter gives clear examples where the judiciary has intervened to uphold the rule of law and to prevent human rights violations, and situations where the judiciary has been unable to play this vital role. There may be disagreements about appropriate preventive measures, and necessary safeguards, but it is vital to the rule of law that such debates continue, and that the judiciary is given its full and proper place in the adjudicative process.

New developments in intelligence-gathering and sharing are explored in Chapter Four. It should, however, be noted that as a rule, the more intrusive the interference is with a person's rights, and the more irreparable the potential harm caused, the higher the evidential requirement must be. Secrecy, and the lack of due process that often flows from it, can create both the perception, and indeed the reality, of unfairness. This in turn can undermine the perceived legitimacy of the State's counter-terrorism response. Secrecy has its limits: if secret intelligence cannot be transformed into evidence over time, or if the State fails to obtain new evidence, the preventive measure should cease.

Chapter Six: The impact of terrorism and counter-terrorism on the criminal justice system

1. Introduction

During the Hearings, a number of government representatives told the Panel that in their view modern international terrorism sometimes cannot be dealt with adequately within the ordinary criminal justice system. Officials held that criminal investigations and trials, with their detailed rules of procedure and evidence, are too slow and cumbersome. Whilst recognising the importance of the criminal justice system, several saw more merit in relying on new preventive measures (see Chapter Five), and argued that where prosecution is a possibility, special procedures and, in some countries, special courts, are needed.

The Panel starts from the premise that all acts of terrorism are crimes (see Chapter One). Take away the terrorist label and these acts – murder, hostage-taking, hijacking, and violence against civilians – are all very serious criminal offences under any legal system. If the criminal justice system is inadequate to the new challenges posed, it must be made adequate.

In fact, it is a misconception that the law enforcement and criminal justice system is only or largely reactive. Conventional law enforcement work has a long history of tackling terrorist and other organised criminal networks and of conducting proactive investigations and prosecutions (including the use of informants) to prevent terrorist attacks before they are committed. At various Hearings, current and former prosecutors confirmed the preventive capacity of the criminal justice system, and practical examples abound of law enforcement interventions successfully preventing terrorist attacks. Of course, like all other crimes, a law enforcement model cannot tackle terrorism on its own; it must however be a key component within any counter-terrorist programme.

The criminal justice system has evolved over the generations to ensure that innocent people are allowed to go free, guilty people are properly punished for their crimes, and society can rely confidently on the rule of law to protect it against wrongdoing. The system needs to be resourced to perform its functions effectively; it must not be undermined, as is often the case in connection with terrorism.

This chapter will look in turn at:

- Criminal law (including definitions relating to terrorism and ancillary terrorism offences that affect free speech and freedom of association);
- Procedural framework;

- The principle of independent and impartial courts (including the practice of using special or military courts to try terrorism cases);
- Fair trial and its component elements.

2. Criminal Law

2.1 Definitions in law of terrorism

In the wake of 9/11, the Security Council of the United Nations required that terrorist acts (including the financing, planning, preparation or perpetration of terrorist acts), be established in the domestic law of Member States as serious criminal offences, and that the punishment should reflect the seriousness of such acts.³⁰² Various Member States reacted by introducing new or special legislation, and did so, often at great speed and with minimal legislative scrutiny or debate. The Panel was told at its Hearings of a flurry of new laws that introduce broad definitions of terrorism and a wide range of new ancillary or inchoate terrorist offences, often accompanied by special rules for investigation and/or trials of such offences.

In the intervening seven years, some of these laws have extended well beyond the original intention of targeting terrorists, and now are being used against “ordinary” criminals, political opponents, dissenters, and members of minority communities. The Panel heard many people at the Hearings question both the necessity for, and the use to which special criminal laws on terrorism are being put.³⁰³

In virtually all of the Hearings, witnesses commented on the vague and over-broad definitions surrounding the concept of terrorism or terrorist acts in domestic law. The Panel heard of controversies in this regard with respect to a number of countries, including Algeria, Australia, Chile, Egypt, Germany, India, Jordan, the Maldives, Morocco, Tunisia, the Philippines, the Russian Federation, Sri Lanka, and the UK. At the Brussels Hearing, participants also criticised as too broad the definition of terrorist offence in the 2002 *Council of the European Union’s Framework decision on combating terrorism* (hereinafter: *EU Council Framework Decision*).³⁰⁴ There was criticism at both the Northern Africa and Middle East Hearings about the broad definition of terrorism in the 1998 *Arab Convention for the Suppression of Terrorism*.³⁰⁵ This latter definition, sometimes in an even broader form, has been incorporated

302 UN Security Council Resolution 1373 (2001), adopted on 28 September 2001, UN Doc. S/RES/1373 (2001), para. 2(e).

303 For example, at the EJP East Africa Hearing, many participants expressed the view that new anti-terrorism laws have been proposed or enacted largely because of foreign pressure rather than because existing laws are inadequate.

304 Council of the European Union, *Council Framework Decision 2002/475 on combating terrorism* (hereinafter: *EU Council Framework Decision*), 2002/475/JHA, 13 June 2002.

305 Arab Convention for the Suppression of Terrorism, adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice, Cairo, April 1998.

into the domestic laws of Member States. Complaints about such laws and the fact that the definitions used are vague or over-broad have been fully documented in reports of the UN Human Rights Committee and other treaty bodies.³⁰⁶

The Panel received extensive testimony about the consequences arising from vague and over-broad counter-terrorist laws. Three examples, from different parts of the world, may be of relevance.

Chile

According to Chilean participants at the Hearing in the Southern Cone, political or ideological offences in the Pinochet era were treated as “terrorism”. Legislative amendments in 1991 removed any political connotations, and conceived of terrorism as an egregious type of violent crime against the person.³⁰⁷ The list of offences, which could constitute a crime of terrorism includes arson.

It was alleged that, since early 2002, this law has been selectively applied against members of the Mapuche indigenous community (for arson attacks on properties of landowners and forestry companies in the context of land disputes). The application of anti-terrorism law rather than ordinary criminal law provides for special relaxed procedures, and the use of anonymous witnesses. The prejudice attached to a charge of “terrorism” also meant that Mapuche suspects were usually denied bail, and faced prolonged pre-trial detention.

India

The 1984 Terrorism and Disruptive Activities (Prevention) Act (TADA) and the 2001 Prevention of Terrorism Act (POTA) criminalised as a “terrorist act”, unauthorised possession of arms, including revolvers and pistols, in “notified areas” punishable with up to life imprisonment.³⁰⁸ In practice, the Panel was told that special

306 See, for instance, UN Human Rights Committee, *Concluding Observations on Belgium*, UN Doc. CCPR/CO/81/BEL, 12 August 2004, para. 24; *Concluding Observations on Israel*, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 14; *Concluding Observations on Iceland*, UN Doc. CCPR/CO/83/ISL, 25 April 2005, para. 10; *Concluding Observations on Estonia*, UN Doc. CCPR/CO/77/EST, 15 April 2003; *Concluding Observations on Canada*, UN Doc. CCPR/C/CAN/CO/5, 20 April 2006, para. 12; *Concluding Observations on the Philippines*, UN Doc. CCPR/CO/79/PHL, 1 December 2003, para. 9; *Concluding Observations on Uzbekistan*, CCPR/CO/83/UZB, 6 April 2005, para. 18; and *Concluding Observations on Algeria*, UN Doc. CCPR/C/79/Add.95, 18 August 1998, para. 11; *Concluding Observations on Egypt*, UN Doc. CCPR/C/79/Add.23, 9 August 1993, para. 8; and *Concluding Observations on Peru*, CCPR/C/79/Add.67, 25 July 1996, para. 12; Inter-American Commission on Human Rights, *Second report on the situation of human rights in Peru*, OAS Doc. OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, para. 80; Inter-American Court of Human Rights, Judgment of May 30, 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, para. 121.

307 The law 18,314 (Anti-terrorism law) provides a list of offences which would constitute a crime of terrorism, if committed “[w]ith the intention of producing in the population, or in part of it, a well-founded fear of falling victim to the same type of crime, either because of the nature and effects of the method used, or by evidence that the act was part of a premeditated plan to attack a specific group or category of persons”. The list of offences which can potentially constitute crimes of terrorism include: murder; kidnapping; hostage-taking; sending explosive substances; arson; attacks on transport; assassination.

308 Section 4 of POTA provided: “Where any person is in unauthorised possession of any—(a) arms or

anti-terrorism powers were abused in several ways. The laws are used to arrest and detain individuals who had committed only minor criminal offences. Statistics shown to the Panel indicate that of 65,000 individuals detained under TADA, 19,000 were detained in Gujarat, a State without any significant terrorism. The law was also applied disproportionately to minority communities.³⁰⁹ The risk of abuses, specifically of discrimination,³¹⁰ is inherent in laws that are over-broad, since it leaves much to the discretion of local law enforcement officers. The Indian Supreme Court³¹¹ subsequently held that a requirement of *intent* to use firearms for terrorist activity had to be read into these laws.

United Kingdom

At the London Hearing, the Panel was informed of the case of Walter Wolfgang. 82 years old, Mr Wolfgang had fled to Britain as a Jewish refugee from the Nazis, and spent a lifetime as a peace activist and Labour Party member. In the audience at the annual Labour Party conference in 2005, Mr Wolfgang shouted the word “nonsense” at Foreign Secretary Jack Straw during his speech about British policy in Iraq. Stewards bundled Wolfgang out, and the police then detained Mr Wolfgang under Section 44 of the Terrorism Act 2000 (this provision allows the police to stop and search people without any need to show that they have a reasonable suspicion of an offence being committed). The televised proceedings caused uproar, and Mr Wolfgang was quickly released, and received an apology. A parliamentary question revealed that Section 44 has been used to stop and search anti-war protestors at one military base on 995 occasions between 21 February and 11 April 2003.³¹²

These three examples highlight testimony that was given to the Panel repeatedly at most of the Hearings: over-broad or ambiguous definitions of terrorism can all too easily be used in a discriminatory way against minorities, be applied arbitrarily, and/ or limit legitimate expressions of dissent. Clear cases of the legislation being used to stifle political dissent were given in relation to Uganda and the Maldives. In the latter case, the now President of the Maldives was charged with terrorism in August

ammunition specified in columns (2) and (3) of Category I or Category III (a) of Schedule I to the Arms Rules, 1962, in a notified area, (b) bombs, dynamite or hazardous explosive substances or other lethal weapons capable of mass destruction or biological or chemical substances of warfare in any area, whether notified or not, he shall be guilty of terrorist act notwithstanding anything contained in any other law for the time being in force [...] In this section, notified area means such area as the State Government may, by notification in the Official Gazette, specify.” Section 5 of TADA contained a similar provision.

309 Statistics by the National Human Rights Commission of India cited in the written submission by Mr Rohit Prajapati, Documentation & Study Centre for Action, EJP South Asia Hearing.

310 See summary of the EJP South Asia Hearing at which this was debated heatedly, with reference to the oral testimony of Soli Sorabjee, former Indian Attorney General stating that “in practice, the misuse is rampant” and Collin Gonzalves, Executive Director of Human Rights Law Network who spoke about discriminatory use of counter-terrorism laws.

311 Supreme Court of India, *People’s Union for Civil Liberties v. Union of India* (2004) 9, SCC 580; *Katar Singh v. Union of India* (1994), 3 SCC 569.

312 UK House of Commons, Hansard, Column 219W, 28 April 2003, written answers on RAF Fairford.

2005 for leading a political protest.³¹³ Some countries (see Australia,³¹⁴ Canada³¹⁵ and Tanzania³¹⁶) have attempted to limit the risks by including specific exclusionary clauses regarding advocacy and protest not directed against life or person, and this may provide some safeguard against misuse.

Even disregarding the danger of abuse, witnesses at the various Hearings expressed grave doubts about the “new” offences now being created. Trained lawyers testified that the language of the statutes was often so vague as to make it difficult for them, still less for members of the public, to predict, with a reasonable degree of certainty, what kind of activities would constitute such offences. The principle of “legal certainty” is an important one, and yet it is being undermined by much of the legislation discussed before the Panel.

2.2 Freedom of expression, free speech

Many witnesses at the Hearings expressed concern that new offences under counter-terrorism laws are being used to restrict basic freedoms of speech and expression (as well as freedoms of association and assembly, addressed subsequently).

International law sets out binding standards in the area of freedom of expression; it also recognises that there can be valid limitations placed on the right. It is clear that speech and other forms of expression can incite terrorism, and that it is legitimate to criminalise such activities. Any limitation must, however, respect international law and not limit forms of expression that are merely controversial.

Article 19 of the ICCPR, for example, recognises that the right to freedom of expression may 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.*” Moreover, Article 20 (2) of the ICCPR explicitly requires States to prohibit by law “*any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*”. Given this obligation, and in response to the current threats from terrorism, the Security Council has called on all UN Member States (Security Council Resolution 1624), to prohibit by law “*incitement to commit a terrorist act or acts*”.³¹⁷ Regional instruments have

313 At the EJP South Asia Hearing, Husnu Al Suood, the Maldives Centre for Human Rights and Democracy, testified to several cases in which terrorism legislation was used against political activists.

314 Section 100.1 of the Criminal Code of Australia containing the definition of a “*terrorist act*” excludes: “(3) *Action falls within this subsection if it: (a) is advocacy, protest, dissent or industrial action; and (b) is not intended: (i) to cause serious harm that is physical harm to a person; or (ii) to cause a person’s death; or (iii) to endanger the life of a person, other than the person taking the action; or (iv) to create a serious risk to the health or safety of the public or a section of the public.*”

315 Paragraph 83.01(1)(b)(ii)(E) of the Criminal Code, as amended by the 2001 Anti-Terrorism Act of Canada.

316 Article 4 (4)(b) of the 2002 Prevention of Terrorism Act of Tanzania.

317 UN Security Council Resolution 1624 (2005) adopted on 14 September 2005, UN Doc. S/RES/1624 (2005).

started to include similar provisions – see the *2005 Council of Europe Convention on the Prevention of Terrorism* (hereinafter: *Council of Europe Convention*) requiring Member States to criminalise “public provocation” of a terrorist act.³¹⁸

However, States in making domestic provisions for “incitement” appear to have introduced a much wider array of offences. At different Hearings, attention was drawn to “new” offences such as “apologia”³¹⁹ or “praising”,³²⁰ “glorification or indirect encouragement”,³²¹ “public justification”,³²² and the “promotion” of terrorist acts.³²³ These “new” offences often criminalise the dissemination, publication and possession of material which are considered to fall foul of the incitement provisions.³²⁴ There are also offences criminalising various forms of support for, or association with “terrorist organisations”, defined so as to include those that

318 Article 5 of the Council of Europe Convention on the Prevention of Terrorism (hereinafter: Council of Europe Convention) required States Parties to criminalise “*public provocation*” of a terrorist offence, defined as “*the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.*” A legislative provision in similar terms is under consideration by the Council of the European Union: Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, COM(2007) 650; amendments have been proposed by the European Parliament: European Parliament legislative resolution of 23 September 2008, P6_TA (2008) 0435, 23 September 2008.

319 Article 218(2) of the Criminal Code of Morocco.

320 Article 578 of the Spanish Penal Code criminalises “*praising or justification, through any means of public expression or broadcasting, of the offences....*”.

321 Section 1 of the UK Terrorism Act 2006 provides for offences that “*intend members of the public to be directly or indirectly encouraged or otherwise induced (to terrorism) ...; or (ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced....*”. The Act clarifies that this provision includes “*every statement which – (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences*”.

322 Russia’s Law No. 153-FZ (amendments of a number of federal laws pursuant to the ratification of the Council of Europe Convention on the Prevention of Terrorism) of 27 July 2006 amended the Penal Code to introduce a new offence of public justification of terrorism. A note explaining this article says that “*public justification of terrorism shall be understood as public statements which recognize the terrorist ideology and practice as legitimate and deserving to be supported and emulate*” (ICJ translation).

323 Section 9 of the Uganda’s Anti-Terrorism Act of 2002 provides for the death penalty for the offence of establishing, running, or supporting an institution, for: “*(i) (a) promoting terrorism; (b) publishing and disseminating news or materials that promote terrorism; or... (2) Any person who, without establishing or running an institution for the purpose, trains any person for carrying out terrorism, (or) publishes or disseminates materials that promote terrorism...*”.

324 *Ibid.* See also Section 2 of the UK Terrorism Act 2006 which makes it an offence to distribute, circulate, give, sell, lend, circulate electronically, or have in one’s possession a “terrorist publication” (defined by reference to provisions including indirectly encouraging/glorifying terrorism).

“glorify”,³²⁵ “advocate”³²⁶ or “promote”³²⁷ terrorist acts. These provisions all tend towards a weakening of the causal link that is normally required in law between the original speech (or other form of expression) and the danger that criminal acts may be committed. The formulations set out in law, largely since 2001, cover a potentially extremely wide range of expressions, which, in a very generalised or abstract way, somehow support, justify or condone terrorism.

The rationale provided to the Panel for this gradual extension of the concept of “incitement” was that individuals engaging in “radical” or “extremist” speech must be prevented from doing so, both when they directly incite violence, and when they contribute to a climate in which terrorism might flourish. The Panel learnt at the Hearing in Morocco, for example, that there was public debate, after the Casablanca bombings in May 2003, regarding the fact that the expression of “extremist” ideas, which had previously enjoyed much popular support, could create a real and heightened risk of violence against civilians. Officials in several Hearings raised concerns regarding the developments in communication technology (both the Internet and mass media), which can create an increased risk that radical speech and other expressions might inspire others to commit terrorist acts, albeit in an undefined future, and at undefined places. As noted earlier, however, statutes giving vague definitions of crimes are in violation of international provisions which require that individuals should be able to foresee whether behaviour is criminal or not.

One of the most controversial examples of this trend was provided to the Panel at its UK Hearing. The UK legislation allows for the offence of “indirect encouragement” of acts of terrorism by “glorification” and outlaws certain forms of expression and organisations on these grounds. The offence of “indirect encouragement by glorification” is *inter alia* committed, irrespective of the intent of the author, if some members of the public may “*reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated.*”³²⁸ For example, the UK government purports simply to be implementing the *Council of Europe Convention*, but fails

325 Section 21 of the UK Terrorism Act 2006 added as an additional ground for proscription of organisations, those in which the activities of the organisation “(a) include the unlawful glorification of the commission or preparation (whether in the past, in the future or generally) of acts of terrorism; or (b) are carried out in a manner that ensures that the organisation is associated with statements containing any such glorification.”

326 Article 102.1 (2) of the Australian Criminal Code, as amended in 2005, provides for an organisation to be specified as terrorist if it “advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).” The term “advocates” is defined in law as: “the organisation directly or indirectly counsels or urges the doing of a terrorist act; or the organisation directly or indirectly provides instruction on the doing of a terrorist act; or the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairmentto engage in a terrorist act.”

327 In India, Section 35 of the 2004 amendments to the Unlawful Activities (Prevention) Act 1967 allows the Central Government to proscribe an organisation as a terrorist organisation if it believes that the organisation is “involved” in terrorism, defined as follows: “...(c) promotes or encourages terrorism...or (d) is otherwise involved in terrorism.”

328 See Section 1.3(b) of the UK Terrorism Act 2006.

to integrate into UK law the requirement that there be an “*intent to incite*”.³²⁹ Many participants at the UK Hearing raised concerns that the breadth, and the ambiguity, of the offence of “glorification” create a risk of arbitrary and discriminatory application. The risk of such abuse is exacerbated by the fact that the offence applies also to past acts of terrorism and to terrorist acts occurring in other countries. Witnesses expressed concern that such wide-ranging laws reduce legitimate political debate, particularly within immigrant or minority communities.

Government representatives repeatedly assured the Panel that targeting a particular community was neither their intention, nor the result of the “new” offences, but other witnesses testified to the marginalising impact of this type of legislation on their communities. The Islamic Human Rights Commission at the UK Hearing testified that “*certain statements made by Muslims will be regarded as “glorification” due to its delivery to a Muslim audience; similar comments made by members of other communities will not be held to the same standard*”.³³⁰ The representative of the Mayor of London also stressed to the Panel the counter-productive effect this legislation could have on anti-terrorism operations: “*Preventing terrorist attacks, relies heavily on intelligence, which can only come from our communities...laws that criminalise non-violent behaviour and groups, perceived as unfairly targeting Muslims and stifling legitimate debate, will lead to a breakdown in trust, resulting in a reduced flow of information....*”³³¹

Human rights violations flowing from broadly formulated speech laws are particularly likely in situations where there are poorly entrenched traditions of free speech, weaker judicial oversight, and/or serious internal conflict. The concern about broad legal definitions, and the lack of an independent judiciary, was raised particularly forcefully at the Maghreb Hearing.

The risk that legitimate expressions of dissent could be treated as terrorist acts, or justification of terrorism, was also raised in the Hearing in the Russian Federation.³³² Amendments introduced a broadly defined new offence of “public justification” of terrorism.³³³ There is also an act of “extremism” under the Russian law on extremist activity, triggering a range of additional legal consequences.³³⁴ Government officials

329 Article 5 of the Council of Europe Convention.

330 The telling parallel was drawn, at the EJP United Kingdom Hearing, between the likelihood of Sheykh Yusuf al-Qaradawi being arrested for glorification of terrorism (when publicly stating that he understood why oppressed Palestinians might become human bombers), and the same happening to Cherie Blair (wife of the then Prime Minister) who made a similar statement. See, written submission by the Islamic Human Rights Commission, p. 9.

331 See oral testimony by Rebecca Hickman, Mayor of London Office, EJP United Kingdom Hearing.

332 See the summary of the EJP Russian Federation Hearing. See also written submissions provided by the Centre for Democracy and Development, the Sova Centre and the Human Rights Institute.

333 See Russian Federation, Federal Law No. 135 FZ July 2006.

334 See Russian Federation, Federal Law on Counter-action of Extremist Activity, No. 113 FZ July 2002, Articles 6-16, as amended in 2006 and 2007. Organisations, including NGOs and media organisations, that distribute materials, containing public appeals “justifying” terrorism or of an “extremist” nature can be closed

justified these laws on the grounds of needing to prevent radicalisation. During the Hearing, repeated concerns were expressed about the broad definitions of terrorism and extremism, and the serious impact this was having on members of civil society, human rights organisations and the media (especially in relation to discussions of the conflict in Chechnya).³³⁵ In a particularly striking example, the Panel was informed of attempts to use the extremism law to close down the organisation “Mothers of Beslan”, an organisation of victims of terrorism, when they criticised the manner in which the government had conducted its operation to free hostages in the school in Beslan.

In East Africa, the Panel was briefed on Uganda’s Anti-Terrorism Act (ATA) of 2002, which in Section 9 criminalises (under threat of the death penalty) the offence of establishing, running and supporting any institution which “*promotes*” terrorism and “*publishing and disseminating news or materials that promote terrorism.*” The legislation does not require that there be a risk of any imminent terrorist act, and the Panel heard at the East African Hearing of the chilling impact this can have on the media, leading to a form of self-censorship. A journalist and lawyer described the situation as follows:

*“We have heard reports of journalists being detained, or their materials and equipment being destroyed or confiscated by State agents. In their defence, government officials claim that by publishing such material on the war situation, the media is actually promoting terrorism or encouraging terrorists. Faced with such a scenario, journalists are caught in the catch 22 situation. Ultimately, the public is denied their right to information.”*³³⁶

In North Africa, the Panel was told that broad speech offences are part of Algeria’s counter-terrorism legislation, with laws that criminalise apology for, and/or encouragement of terrorist or subversive acts; and prohibit reproduction or dissemination of documents, publications or recordings which condone terrorist or subversive acts.³³⁷ The Moroccan parliament, one week after the Casablanca bombing in May 2003, adopted a new anti-terrorism law,³³⁸ introducing a range of ancillary terrorism offences, including apologia and incitement,³³⁹ without requiring either intent to incite or a concrete risk of violence. A particular concern was expressed that restrictions on the process of free expression in Morocco might undermine the important process of transition and reform which had previously been initiated. In Tunisia, incitement to hatred or racial or religious fanaticism is treated as a terrorist offence,

down – see Law on Mass Media and NGOs.

335 See EJP Russian Federation Hearing regarding closure of the Russian-Chechen Friendship Society.

336 See oral testimony of Moses Sseruwanga, Editor, Monitor Newspaper, Uganda, EJP East Africa Hearing.

337 Article 87 bis 4 and bis 5 of Ordinance 95-11 of 25 February 1993 of Algeria.

338 Law 03-03 of 5 June 2003 of Morocco (anti-terrorism law).

339 Articles 218(2) and 218(5) respectively of the Criminal Code of Morocco.

without requiring intent to incite violence.³⁴⁰ At the Hearings, several participants reflected on the consequences of such speech offences on the already reduced space for civil society engagement in Tunisia. Witnesses expressed particular concern about the legal ambiguities which could deter journalists from writing about terrorism, and/or result in them facing prolonged detention in police custody.

Spanish participants at the Brussels Hearing also argued strongly against penal sanctions for “praising” or “justifying” terrorist offences, since they were legally nebulous concepts. Article 578 of the Spanish Penal Code, which sets out the offence, has subsequently been interpreted fairly narrowly by the Spanish Constitutional Court. The Court held that any “praise” must relate to an actual concrete crime, or the persons responsible for the crime. Very importantly, the Court clarified that the publication of a statement, without making any judgment or expressing any opinion in favour of the statement, falls within the legitimate exercise of the freedom of expression. In practice, few cases of “apologia” have come before the Spanish courts and, in 2004, the total number of convictions for “apologia” was estimated at less than 12.³⁴¹ José Antonio Martín Pallín, an emeritus judge of the Spanish Supreme Court argued that the offence of “apologia” was unnecessary and should be abolished:

“I suggest the abolition of the crime of apology. It is not possible to punish the expression of an idea, even the most repugnant we can think of. Otherwise, we take a very dangerous route leading us to situations like the one that Galileo’s story recalls and the suppression of political dissent. We must contest the apology with the strength and the serenity of the democratic ethic.”³⁴²

Helpful guidance on the matter is given in the Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on the Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, International Mechanisms for Promoting Freedom of Expression which stated that:

“while it may be legitimate to ban incitement to terrorism or acts of terrorism, States should not employ vague terms such as “glorifying” or “promoting” terrorism when restricting expression. Incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.”³⁴³

340 Article 6 of the 2003 Anti-terrorism law of Tunisia.

341 Council of Europe, Committee of Experts on Terrorism (CODEXTER), *Apologie du Terrorisme and Incitement to Terrorism, Analytical report*, CODEXTER (2004) 04 rev, 24 June 2004, p. 25.

342 Oral testimony by José Antonio Martín Pallín, EJP European Union Hearing (original in Spanish, unofficial translation).

343 The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, “Joint Declaration on International Mechanisms for Promoting Freedom of Expression” adopted on 21 December 2005.

2.3 Freedom of association and assembly

The Panel heard many similar concerns regarding the curtailment of rights of association and of assembly in new counter-terrorism measures. Freedom of association, like freedom of speech, is guaranteed by the *Universal Declaration of Human Rights* and by subsequent international and regional treaties.³⁴⁴ Like the freedom of expression, the right to association and assembly are not absolute rights, and may be limited under specific conditions, but again the conditions of legality, necessity, proportionality and non-discrimination must be observed. The need for governments to impose certain restrictions on the freedom of association or assembly when there is a fear of violence is understandable; however, the Panel was made aware of several countries abusing this flexibility.

At several Hearings, including those in Australia, East Africa, Canada, Europe, the Middle East, North Africa, the Russian Federation, South Asia, the United Kingdom, and the United States, the Panel learnt of legislation proscribing terrorist organisations, and ancillary offences targeting the provision of financial and material and other support to terrorist activities or organisations. In addition to the problem that the term “terrorism” was often ill-defined, or defined over-broadly, many objections were based on the failure of domestic legislation to comply with international principles.

At the Canadian Hearing, for instance, the Panel heard that the 2001 Anti-Terrorism Act (ATA) created a number of new offences, including “facilitating” a terrorist activity, and acting for the benefit, or at the direction, of a terrorist group. One witness suggested that the formulation of the offence of “facilitation”³⁴⁵ was wide enough to deter charities from supporting humanitarian work in conflict areas where armed groups, characterised as “terrorist”, operate.³⁴⁶

A similar point was made to the Panel at the Hearings in East Africa, South East Asia, South Asia and the Occupied Palestinian Territory. The characterisation of many groups engaged in areas of armed conflict as “terrorists”, and their activi-

344 See Article 21 of the ICCPR: “*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*” and Article 22 “*1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*”

345 The offence of facilitation is defined under the Anti-Terrorism Act (ATA) of Canada as follows: “83.19 (1) *Everyone who knowingly facilitates a terrorist activity is guilty of an indictable offence [...] a terrorist activity is facilitated whether or not (a) the facilitator knows that a particular terrorist activity is facilitated; (b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or (c) any terrorist activity was actually carried out.*”

346 Oral testimony by Terrance S. Carter, Carters Professional Corporation, EJP Canada Hearing.

ties as “terrorist acts”, renders humanitarian work legally hazardous. Moreover, the Panel learnt that it has become increasingly common since 2001 to criminalise membership in, or support for, a terrorist organisation, irrespective of where that organisation carries out its activities.³⁴⁷ The ambiguity surrounding the meaning of “support” for a terrorist organisation is said to have a chilling effect upon the public discourse around conflict resolution, and was cited as problematic in Sri Lanka. Clearly, sometimes public debate, or charitable work, can be subverted for terrorist propaganda or terrorist purposes, and some legal provisions to counter such abuses are necessary. At the same time, caution must be exercised: violations on the part of governments can mean that provisions that are intended to subvert terrorism may be inadvertently stoking it.

The Panel was told of a wide range of related offences, including: associating with or providing material support to terrorists; receiving or giving training to a terrorist organisation; and failure to report information relating to a terrorist act. Valid arguments can be made for pursuing such offences, but examples of their chilling effect and of serious abuse were provided. States have to ensure appropriate safeguards against such human rights violations, and must take precautions not to destroy the lives and reputations of individuals who may come to be publicly portrayed as dangerous terrorist associates, despite having no actual involvement in terrorist activities. It is particularly incumbent on States to avoid casting the net of “association” so widely that the media, defence lawyers,³⁴⁸ human rights groups, and family members (especially children) are wrongly penalised.

In the South Asia Hearing, the Panel was told that provisions of the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) in Nepal,³⁴⁹ first promulgated in November 2001, were used by the military to implicate a range of people allegedly “associated” with terrorism:

*“Maoist organisations were termed as terrorist organisations and the definition of terrorist acts was so ambiguous anything and everything was covered under the definition. [...] Civilians, lawyers who were working for the detainees and even judges were considered as terrorists and the military detained them. So society became silent. Human rights activists and lawyers providing legal aid to detainees were threatened by both the security forces and Maoists as well.”*³⁵⁰

347 See, for example, such legislation in Australia (the Criminal Code Amendment (Terrorist Organisations) Act of 2004), India (UAPA (Amendment) Ordinance of 2004), Tanzania (Prevention of Terrorism Act of 2002), Uganda (Anti-Terrorism Act of 2002) and the UK (the Terrorism Act 2000 (c.11)).

348 Article 22 of the anti-terrorism law in Tunisia makes it an offence punishable with up to five years in prison for anyone “even where bound by professional secrecy” to fail “to notify immediately the competent authorities of any acts, information or instructions which may have emerged concerning the commission of a terrorist offence”.

349 The Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) of Nepal was allowed to lapse in September 2006; hundreds of those detained under TADO have also been released.

350 Oral testimony by Mandira Sharma, Advocacy Forum, Nepal, EJP South Asia Hearing.

It is a fundamental principle of international criminal law that an offence requires both a criminal act and proof of criminal intent on the part of the accused person. The Panel is aware of several examples where legislators have sought to comply with these principles. For example, the *EU Council Framework Decision* provides that only “*intentional acts*” which include “*participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with the knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group*” are punishable.³⁵¹ The Canadian Anti-Terrorism Act criminalises as “*participants*” in an activity of a terrorist group, those who “*knowingly participate in or contribute to an activity of a terrorist group for the purpose of enhancing their ability to carry out a terrorist activity*” (emphasis added).³⁵² This kind of legal formulation avoids some of the ambiguity, and therefore is less likely to lead to abuse.

Safeguards are also needed when declaring an organisation to be terrorist. As discussed in the report’s introduction, there is no internationally shared consensus on the definition of “terrorism”. Obviously, this vacuum has consequences for the definition of a “terrorist” organisation. The Panel was told of instances where organisations can be labelled “terrorist” by the executive,³⁵³ without notice to the organisation concerned, and with little, if any, room for judicial review. The problem of “listing” is discussed elsewhere (see Chapter Five), but it is important to record here the problem created by having inadequate criteria for what constitutes a “terrorist” organisation. The Panel agrees with the recommendation of the UN Special Rapporteur on Human Rights and Terrorism that a minimal safeguard would be to ensure that, before anyone is punished for membership in, support of, or association with a terrorist organisation, there must be a judicial determination of the nature of the organisation.³⁵⁴

The need for such safeguards (especially judicial involvement) was highlighted to the Panel at its Hearing in Brussels. The German Penal Code (Section 129a) incorporating the *EU Council Framework Decision*, criminalises membership of a terrorist organisation, defined as having for its purpose “*to significantly impair or destroy the fundamental political, constitutional, economic or social structures of a state [...] and*

351 Article 2, para. 2 of the EU Council Framework Decision.

352 See Section 83.18 (1) of the Canadian ATA which provides: “*Everyone who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; (2) An offence may be committed under subsection (1) whether or not (a) a terrorist group actually facilitates or carries out a terrorist activity; (b) the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or (c) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.*”

353 See for example, Section 10 Ugandan ATA 2002, which leaves the decision solely to the Minister of Interior without any further substantive requirements. See also Section 12 of the Tanzanian ATA.

354 Report of the Special Rapporteur on Human Rights and Terrorism, UN Doc. A/61/267, 16 August 2006, p. 11.

which, given the nature or consequences of [the] offences, may seriously damage a state or an international organisation”.³⁵⁵ This provision was relied upon to justify the search of houses, offices, internet servers and others connected to members of *Militante Gruppe* to prevent violent protests against the G8 summit. The group was alleged to have been responsible for a series of incidents, including setting military vehicles on fire. The German Supreme Court held that the property violations involved were criminal but were not sufficient to meet the standard required for considering an organisation to be a “terrorist organisation.”³⁵⁶

3. Procedural issues

3.1 The principle of an independent and impartial judiciary

At the heart of the concept of the rule of law is the principle of an independent and impartial judiciary. Nothing less will ensure the proper separation of powers (as between the executive, legislature and judiciary) and ensure that everyone (victim, perpetrator, or member of the public) can be confident that his/her case will be dealt with in accordance with the law. An independent judiciary enforces the law without fear or favour.

Many witnesses to the Panel reported on their serious concerns about the creation of military or special courts to deal with terrorism. Military or special courts do not necessarily violate the principle of independence and impartiality, but they pose – both in principle and in practice – a grave risk. Accordingly, international law has been moving towards strict restrictions and even prohibitions on the use of either military or special courts to try civilians.³⁵⁷ Since concerns about their operation were brought to the attention of the Panel in several Hearings, there is a brief discussion of the dangers they can pose.

3.1.1 Trial by military courts

Military courts, including Courts Martial, are a recognised form of military justice, and there are a number of good reasons to have military courts deliver justice to members of the military for military offences. Many military courts merit a reputation for excellence. The situation is, however, very different when such military courts are called upon to try civilians for non-military offences. The military is a closed, hierarchical institution and it stresses loyalty to the institution. For the most part, judges

³⁵⁵ Article 129a German Criminal Code (translation by the ICJ), based on Article 1(i) of the EU Council Framework Decision 2002/475.

³⁵⁶ Bundesgerichtshof (Federal Supreme Court), BGH StB 43/07 – Beschluss vom 28 November 2007, HRRS 2007, Nr. 1090.

³⁵⁷ The UN Human Rights Committee, reaffirmed 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.” UN Human Rights Committee, *General Comment No. 32*, para. 22.

in military courts are military officers, appointed by the executive, and subordinate to their superiors in the military hierarchy, even though they may be independent in exercising their judicial functions. Still, the manner in which such judges conduct trials may play a role (or be perceived as playing a role) in subsequent decisions about promotions, assignments and professional rewards. Accordingly, there has been a growing consensus at the international level that military courts should be used only for trying members of armed forces for offences of a military nature.³⁵⁸

In the course of the Southern Cone Hearing, the Panel heard testimony from many participants criticising the laws and practices adopted during the dictatorships of the 1970s and 1980s. Participants reported on serious human rights violations arising from the practice of using military courts to try civilians accused of terrorism, treason and other security offences. With the return to democracy, the use of military courts to try civilians was repealed.³⁵⁹

However, this trend of ending the use of military courts to try civilians is not being followed everywhere. In the chapter on the war paradigm (see Chapter Three) there is reference to the decision by the US administration to employ military commissions to try suspected terrorists characterised as “enemy combatants”. This decision has been cited by others to give an aura of legitimacy to the practice of military courts elsewhere. For example, several countries in the Middle East continue to use military courts or State Security Courts, consisting of civilian and military judges, to try civilians for terrorist and other security offences. The Egyptian President Mubarak reportedly claimed in December 2001 that the establishment of military tribunals in the US “*prove(s) that we were right from the beginning in using all means, including military tribunals, [in response to] these great crimes that threaten the security of society*”.³⁶⁰

Evidence at the Middle East Hearing alleged that military courts lacked independence and impartiality; that they exercised limited scrutiny, even when allegations of torture were made; and that they convicted individuals in a summary fashion to

358 Principle No. 8 of the Draft Principles Governing the Administration of Justice Through Military Tribunals, *Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights*, Emmanuel Decaux, E/CN.4/2006/58, 13 January 2006. In recent decisions on the use of military courts to try civilians in Turkey, the European Court has noted a trend toward excluding criminal jurisdiction of military courts over civilians. See for instance, ECtHR, Judgment of 4 May 2006, *Ergin v. Turkey* (No. 6), Application No. 47533/99, paras. 22-25 and paras. 38-49. The African Commission on Human and Peoples’ Rights has gone even further and has taken the view that military courts should not, in any circumstances whatsoever, have jurisdiction over civilians and that special tribunals should not try offences that fall within the jurisdiction of regular courts. See African Commission on Human and Peoples’ Rights, *Media Rights Agenda v. Nigeria*, Communication No. 224/98 (2000), 28th Session, from 23rd October to 6th November 2000, para. 62.

359 Countries such as Argentina, Colombia and Guatemala have even introduced constitutional provisions explicitly prohibiting trial of civilians by military courts. In the case of Chile, a number of laws from the period of military dictatorship continue in force, including the jurisdiction of military courts to try civilians for violence against the police.

360 Cited in the report by Human Rights Watch, *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, March 2003.

lengthy prison terms, or even death. The accused was rarely able to have a fair trial in public because military courts typically sit in irregular locations, such as military compounds or prisons, effectively denying the public, including family members, the opportunity to be present. For instance, trials by the Supreme State Security Courts (SSSC) in Syria can be held “*in any place and time the SSSC Presidency deems suitable.*”³⁶¹ Apparently, most of the trial sessions are held in the office of the Chair of the SSSC, rather than in an ordinary courtroom. During the visit to Israel and the Occupied Palestinian Territory (OPT), the Panel was informed that in many cases, trials by military courts of Palestinians from the West Bank were held in military bases located in Israel. Coupled with requirements for special entry permits into Israel itself, such a trial location makes it practically impossible for the families of detainees’ to attend the trial, and hinders the work of lawyers defending such detainees.

Participants particularly highlighted the lack of, or serious limitations, on the right to appeal decisions of these courts, even in death penalty cases. For instance, the Panel was informed that, in Syria, many individuals have been sentenced to death by the Supreme State Security Courts, and such decisions can only be appealed by an order of the President of the Republic.³⁶² In Egypt, there was no possibility to appeal decisions by military courts until April 2007, when a new law introduced a limited right to appeal (but this has been criticised as inadequate).³⁶³ In Tunisia also, decisions of the military courts can only be appealed on procedural issues, before a higher military court, and within a time-limit of three days.³⁶⁴

The Panel was informed that military courts (established to deal with security offences), have had their remits progressively broadened to cover a range of ordinary crimes such as arson³⁶⁵ and defamation.³⁶⁶ Participants from Egypt, Syria and Jordan indicated that the executive has discretion to refer cases to military courts or State Security Courts. This discretion both allows the executive the option of side-stepping unwelcome decisions from the civilian courts, and a mechanism for oppressing non-violent political opponents. Many of the Egyptian participants at the Hearing expressed anxiety that a recent constitutional amendment would entrench executive discretion to refer terrorism related cases to military courts. According to the

361 Article 1 of Legislative Decree No. 47 of 28 March 1968.

362 Written submission by Haissam Manna, President, Arab Commission for Human Rights, Syria, EJP Middle East Hearing.

363 The Supreme Court for Military Appeals is composed exclusively of military officers and may only examine the law, its interpretation and procedural issues, but not the factual basis of the convictions and sentences. Testimony by Hisham El Bastawisi, Vice President, Court of Cassation, Egypt, EJP Middle East Hearing.

364 Article 123 of the Military Justice Code provides that every Tunisian who puts him or herself at the service of a terrorist organisation operating abroad can be tried before military courts.

365 Code of Military Justice (Law No. 25 of 1966) and offences under Law 97/1992 of Egypt.

366 The 2003 Law No. 45 of Jordan introduced various new offences that restrict freedoms of expression, such as abuse of authority of the State, integrity or reputation, defamation, dissemination of false information or hearsay and gave jurisdiction over these offences to State Security Courts. See written submission by Adala Centre for Human Rights, EJP Middle East Hearing.

amended Article 179 of the Constitution, the President will have the power to refer crimes under a proposed anti-terrorism law, replacing the decades-old state of emergency, to “any judicial body”, including military courts and State Security Courts.³⁶⁷ At the East Africa hearing, the Panel was informed that a terrorism charge, being heard before the General Court Martial in Uganda, prevented Dr Kizza Besigye, chairperson of the opposition party (Forum for Democratic Change), from campaigning during the months leading up to the presidential election.³⁶⁸

The Panel was given no convincing reason why military courts would be better equipped than civilian courts to deal with terrorism cases. Rather, the evidence suggests that military courts are used to bypass normal standards applicable in ordinary civilian courts, and to benefit from simplified rules that facilitate the conviction of accused persons.

3.1.2 Trial by special courts

In some countries, the authorities have created special courts to handle terrorist cases. The rationale provided by the authorities concerned is often the same as for military courts – that such specialised courts can bring perpetrators of terrorist offences to justice in a more efficient manner than might be expected within the ordinary court system. The risk in terms of due process and human rights do not differ greatly from those in military courts.

In Pakistan, the 1997 Anti-Terrorism Act (ATA) authorised the Government to establish special Anti-Terrorist Courts (ATC) to try offences under the Act.³⁶⁹ There are significant differences between the ATCs and ordinary courts. ATC judges do not enjoy the ordinary guarantees of independence such as security of tenure and protection from undue dismissals;³⁷⁰ ATCs allow prolonged police custody without access to a court; and they admit confessions made to senior police officers. Participants told the Panel that strict seven-day time-limits³⁷¹ covering each stage of the proceed-

367 Article 179 of the Constitution as amended in March 2007, provides that “*The President may refer any terror crime to any judiciary body stipulated in the Constitution or the law.*”

368 Dr Kizza Besigye, chairperson of the opposition party Forum for Democratic Change in Uganda was first charged with offences of treason and rape in the civilian High Court, and later, when an acquittal by civilian courts became a possibility, he was also charged with terrorism and firearms offences before a military court. Despite being granted bail by a civilian court, he was kept in military custody awaiting military trial. In January 2006, the Constitutional Court ruled that trial on the basis of the same facts in two courts is unconstitutional – charges apparently still pending as of December 2008.

369 In declaring a state of emergency in Pakistan in November 2007, the President provided for terrorist-related offences to be tried before military courts by amending the 1952 Army Act. The amended Act says: “*any offence, if committed in relation to defence or security of Pakistan or any part thereof or Armed Forces of Pakistan...*” The vagueness of ‘crimes against security’ leaves it largely to the executive to decide whether to charge persons in anti-terrorist courts or in military courts.

370 See Section 14(2) of ATA, amended in 1999.

371 The investigation of offences must be completed within seven days (Section 19 (1), ATA, 1997) and the trial must occur within seven days (Section 19 (7)). The trial judge is specifically barred from granting more than two consecutive adjournments (Section 19 (8)), at the risk of disciplinary action against the presiding judge (Section 19 (8-a)). Convicted persons have seven days to appeal the judgment, which must also be heard

ings have led to a heavy reliance on confessions, which in turn encourages the use of torture and other ill-treatment. Witnesses also cited credible reports of the Government resorting to extra-legal means, such as enforced disappearances, to deal with suspected terrorists. ATA has also been used in non-terrorist cases, most notably against lawyers protesting the dismissal of the Chief Justice in November 2007.

Evidence from the Hearings showed how the creation of special courts, with more relaxed standards, risks being maintained beyond the immediate needs of the situation, and seeping into other areas of law. For example, though the right to be tried by a jury does not form part of the body of international human rights law, it is long-established practice in countries such as the UK and the Republic of Ireland, and at the Northern Ireland Hearing, the Panel heard about the experience of the Diplock courts in Northern Ireland, and the Special Criminal Court in the Republic of Ireland. Both special court systems are intended to deal with the consequences of the violent conflict in Northern Ireland in the past, but continue to operate despite a dramatically improved security situation.³⁷² Under both systems, the Director of the Public Prosecution is given broad discretion to refer cases to non-jury trial,³⁷³ with no or very limited possibility for the accused to appeal against such decisions.³⁷⁴ The model of juryless courts was discussed in Britain for use in serious fraud cases, and the Panel was told that in the Republic of Ireland, Special Criminal Courts are increasingly used to deal with organised crime such as drug trafficking.³⁷⁵ The Panel was told that the negative experience of using special courts to try terrorist offences has led some countries to abandon them. In Algeria, special courts to try terrorism cases operated between 1992 and 1995, but are used no longer. In India, after the repeal of the POTA in 2004,³⁷⁶ those suspected of terrorist offences (other than those already involved in pending cases) are tried in ordinary courts under ordinary criminal procedures.³⁷⁷ Indian participants said that, judging by the low conviction rate, special courts had been no more efficient than ordinary courts. Uganda considered introducing special courts but chose not to: constitutional amendments allowing the establishment of special courts for terrorism-related offences were proposed by the

and decided within seven days (Section 25 (3)).

372 The Diplock courts were abolished in 2007, but a similar system of non-jury trial was retained under the Justice and Security (Northern Ireland) Act 2007 to deal with cases where there is an alleged risk of jury intimidation.

373 Section 1(2)-(6) of the Justice and Security (Northern Ireland) Act 2007 and Section 48 (a) of the Offences Against the State Act, 1939.

374 Section 7 of the Justice and Security (Northern Ireland) Act 2007.

375 In its recent concluding observations on Ireland, the UN Human Rights Committee reiterated its concerns about the continuing operation of the Special Criminal Court, and the establishment of additional special courts, see *Concluding observations on Ireland*, UN Doc. CCPR/C/IRL/CO/3, 30 July 2008, para. 20.

376 Under the 2004 amendments to the Unlawful Activities (Prevention) Act of 1967 (UAPA), adopted after the repeal of the 2002 Prevention of Terrorism Act (POTA), ordinary courts are given jurisdiction over terrorist offences.

377 At the time of the final editing of the report and following the terrorist attacks in Mumbai in November 2008, however, the Panel learnt about the possible reintroduction of special courts to try terrorism offences.

Government, but rejected by Parliament in July 2005 (following a recommendation by the Legal and Parliamentary Affairs Committee).³⁷⁸

The stance of international bodies in relation to both military and special courts is set out in a General Comment by the Human Rights Committee: “*Trials 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.*”³⁷⁹

The Panel notes, on the basis of its findings, that military and special court systems easily lead to abuse: the tribunals often fail to meet the requisite standard of independence and impartiality and do not offer due process guarantees. The temptation appears to be great to extend the system to try non-terrorist offences, because of the lower safeguards which make convictions easier. If the rationale for their use is that the ordinary criminal justice system is considered slow, inefficient or corrupt – the rationale most often proffered – it would surely be better to tackle these problems directly rather than create a parallel justice system with its own problems.

3.1.3 Specialisation and centralisation within the existing system of criminal justice

Some countries have chosen to handle terrorist cases by centralising or creating specialisations within the system of investigation, prosecution and trial of cases.

Typically, a court of higher instance (based in the capital city) is given exclusive jurisdiction over terrorist offences committed anywhere in the country. Well-known examples of this model include the *Audiencia Nacional* (National Court) in Madrid, Spain, and the *Cour d’assises spéciale* (Special Court of Assizes) in Paris, France, both in use since the 1980s.³⁸⁰ These specialised courts apply ordinary rules of evidence and procedure, with certain procedural modifications in terrorism cases. The system of centralisation is sometimes cited as good practice, because it adheres to the ordinary criminal system while adjusting to the special needs of terrorism, and it allows investigators, prosecutors and judges to develop expertise in the handling of such cases. Indeed, the Panel was informed that in 2003 both Tunisia³⁸¹ and Morocco³⁸² adopted the system of centralisation similar to that of France for the trial

378 Parliament of Uganda, Legal and Parliamentary Affairs Committee, *Report on the Government White Paper on Constitutional Review and Political Transition*, 20 December 2004.

379 UN Human Rights Committee, *General Comment No. 32*, para. 22.

380 See, for Spain, Organic Law 4/1988 of 25 May 1988; for France Law 86-1020 of 9 September 1986.

381 Tunisia Law 2003-75 granted jurisdiction over terrorism offences to the Tribunal of First Instance of Tunis, but under Article 123 of the 1957 Code of Military Justice, military courts may still try civilians charged with serving a terrorist organisation that operates abroad.

382 In Morocco, the counter-terrorism law adopted in June 2003 centralised the responsibility for charges, investigation and trial of terrorism offences in the Court of Appeal in Rabat.

of suspected terrorists. This approach, however, is not without problems. In both France and Spain, there was no right to appeal decisions, until both governments were criticised by the UN Human Rights Committee, and legislative amendments were introduced.³⁸³

Another potential problem with specialised court arrangements was raised with the Panel at several Hearings, and that is the risk of “case-hardening”. It was argued that, given the constant interaction between investigators and prosecutors specialising in terrorism cases, appearing before the same judges, all involved may gradually come to see themselves as part of the State’s counter-terrorism machinery and lose their independence. Such a risk would obviously be greater in those countries where the judiciary is not effectively independent.

The potential for “case-hardening” was raised with the Panel in regards to the Tribunal of First Instance of Tunis, the Court of Appeal in Rabat, and regarding Diplock courts in Northern Ireland (in the past). Perhaps the starkest example, however, related to Yemen. The Specialised Criminal Court in Yemen was established by Presidential Decree of No. 391/1999 with jurisdiction over a broad range of offences from kidnapping to “crimes of grave social danger” committed in any part of the country.³⁸⁴ Testimony to the Panel alleged that the rights of suspects have been seriously breached by way of arbitrary arrests, prolonged detention without access to a judge or a lawyer, the denial of access by lawyers to case-files, and the use of torture and other forms of ill-treatment. The Court allegedly lacks the independence and impartiality to act as a check upon executive abuses. Reports by treaty bodies and other independent organisations regarding ill-treatment and unfair trials of suspected terrorists lend credence to these allegations.³⁸⁵ Lawyers have boycotted trials before the Court on the grounds that it is an exceptional court, and therefore unconstitutional: Article 148 of the Yemeni Constitution provides that: “...*No exceptional courts may be established under any circumstances.*”

Several of the problems highlighted in military and special courts are replicated in the specialised systems – in all instances, the risk is high that specialised court arrangements go hand-in-hand with other procedural changes, and thereby run the real risk of contributing to a parallel criminal justice system. In both Tunisia and

383 France enacted the Act 2000-516 of 15 June 2000 to institute the possibility of appeal to another chamber in response to the Concluding Observations of the UN Human Rights Committee on France. See UN Human Rights Committee, *Concluding observations on France*, UN Doc. CCPR/C/79/Add.80, 4 August 1997, para. 23. In Spain, Organic Law 19/2003 of 23 December modifying Organic Law 6/1985 of 1 July of the Judicial Branch formally created an appeals chamber in response to the 1996 Human Rights Committee’s concluding observations on Spain. See UN Human Rights Committee, *Concluding observations on Spain*, UN Doc. CCPR/C/79/Add.61, 3 April 1996, para. 19. The right to appeal decisions of *Audiencia Nacional* is still limited to questions on law and procedural issues. It should be noted, however, that Article 2(2) of Protocol No.7 of the ECHR expressly provides an exception of the right to appeal “*in cases in which the person concerned was tried in the first instance by the highest tribunal*”.

384 Article 3(1)-3(6) of Law 391/1999, Yemen.

385 See, *inter alia*, UN Human Rights Committee, *Concluding observations on Yemen*, UN Doc. CCPR/CO/84/YEM, 9 August 2005.

Morocco, for example, the centralisation was accompanied by a number of special rules applicable to terrorism cases, such as prolonged *garde-à-vue* (detention in police custody) without access to a judge and/or a lawyer. Witnesses alleged that these practices facilitate ill-treatment, and judges have decided cases on the basis of forced confessions, inaccessible evidence and in rushed proceedings.

3.2 Fair Trial

The right to a fair trial is a fundamental principle of international human rights and international humanitarian law and is only possible before an independent and impartial judiciary and court system, as discussed above. There are, however, a number of additional specific guarantees.

The *Universal Declaration of Human Rights* (see Chapter One) devotes several of its thirty Articles to the importance of the basic right of liberty and due process. Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) addresses in more detail the requirements of a fair trial under international human rights law.³⁸⁶ Identical or similar guarantees are included in regional human rights treaties,³⁸⁷ and the UN Human Rights Committee has clarified that fundamental fair trial requirements cannot be departed from, even at a time of emergency.³⁸⁸ In situations of armed conflict, international humanitarian law also insists on the requirements of a “fair trial”, as enshrined in Common Article 3 of the *Geneva Conventions*, and in the relevant provisions of the *Geneva Conventions*. This requirement is reiterated

386 Article 14 of the ICCPR provides: “1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.... 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail [...] of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing....; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (g) Not to be compelled to testify against himself or to confess guilt....[...] 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

387 The right to a fair trial is enshrined in Article 6 of the European Convention on Human Rights; Articles 8 and 9 of the American Convention on Human Rights; Article 7 of the African Charter of Human and Peoples' Rights; and Article 16 of the 2004 Revised Arab Charter on Human Rights and in many national constitutions.

388 In its *General Comment No. 29* on states of emergency, the Human Rights Committee states: “*The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant.*” See UN Human Rights Committee, *General Comment No. 29*, para. 16; reaffirmed in *General Comment No. 32*, para. 6. According to the Inter-American Commission on Human Rights (IACHR), “*most fundamental fair trial requirements cannot justifiably be suspended under either international human rights law or international humanitarian law.*” IACHR, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 261.

and further detailed in Article 75 (4) of the *Protocol I* and Article 6 of the *Protocol II*. Altogether, it is clear that fair trial rights are guaranteed also as part of customary international law.

Despite the clarity of international legal standards in this area, the Panel was repeatedly told by officials that some fair trial measures were difficult to comply with in proceedings against alleged perpetrators of terrorist offences. Yet the Panel is aware of such cases (even complex ones requiring cooperation between several States) that have been successfully prosecuted by way of the normal criminal justice system. In the US, in addition to those responsible for the 1993 bombing of the World Trade Center and the 1998 attacks on US embassies in Nairobi and Dar-es-Salaam, 261 people were convicted in the ordinary courts of terrorism-related offences between September 2001 and June 2006.³⁸⁹ In Spain, twenty-one men were convicted of involvement in the 2004 Madrid train bombings; in the UK four men were convicted of attempted suicide bombings in July 2005; and, in Indonesia, a number of people have been convicted of involvement in the 2002 Bali bombing.

3.2.1 Access to courts after arrest

Human rights law requires detention before conviction and sentencing to be the exception, rather than the rule.³⁹⁰ While the complexities of terrorism investigation, and the potential danger posed by those accused of terrorist offences, may often require detention pending trial, the UN Human Rights Committee has provided some useful guidance in the matter. The Committee in various country observations has argued that compliance with international law standards requires, at least, that the need for detention be assessed on an objective case-by-case analysis; that it is appropriate to take into account the risk of flight, the potential for interference with evidence, and/or the possibility of the crime recurring; and, all such decisions, must be subject to periodic review.³⁹¹ The Committee also reiterated the principle that, regardless of the gravity of the offence, a detainee must be treated in line with all basic standards governing the treatment of detainees.

The Panel was told that detention (sometimes prolonged) pending charge or trial for terrorism offences, is increasingly the norm, rather than the exception.

389 US Department of Justice, Counterterrorism Section, *Counterterrorism White Paper*, 22 June 2006, available at <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf>.

390 Article 9 (3) of ICCPR provides that: “*It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*”

391 UN Human Rights Committee, Views of 23 July 1990, *Hugo van Alphen v. the Netherlands*, Communication No. 305/1988, UN Doc. CCPR/C/39/D/305/1988, para. 5.8; Views of 5 November 1999, *Aage Spakmo v. Norway*, Communication No. 631/1995, UN Doc. CCPR/C/67/D/631/1995, para. 6.3; Views of 21 July 1994, *Albert Womah Mukong v. Cameroon*, Communication No. 458/1991, UN Doc. CCPR/C/51/D/458/1991, para. 9(8); and Views of 3 April 1997, *A v. Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993, para. 9.2.

There are two distinct periods of time involved: suspects detained, usually in police custody, prior to being brought before a judge and/or informed of charges against them (*i.e.* pre-charge detention in the common law system and *garde à vue* detention in civil law jurisdictions), and suspects detained on remand prior to and during trial (*i.e.* held under judicial oversight). The Panel heard concerns at the Hearings about what happens during both phases of detention. Several countries, for example, France, Spain and the United Kingdom have extended the maximum legal limit of detention without charge and/or detention pending trial for those suspected of terrorist offences. The rationale offered to the Panel (by these and other government representatives) for extended pre-charge or pre-trial detention in terrorism cases, was the complexity of the investigations which may require making inquiries in different parts of the world before official charges can be formulated, or the court case can be commenced. At the same time, governments are obviously eager to apprehend suspects at a relatively early stage of an investigation, before the commission of overt acts.

Whatever justification may exist in particular cases for early arrests and subsequent detention, there must be adequate safeguards against ill-treatment and arbitrary detention. One such guarantee is that an arrestee be promptly brought before a judge. Human rights jurisprudence rules that what constitutes “prompt” access to the court depends, to some extent, on the circumstances of the case, but there is no disagreement that effective judicial oversight of detention must be respected, even in *bona fide* emergency situations where there is a serious terrorist threat.³⁹² The quality of judicial authorisation and supervision of detention is also crucial. The courts must have sufficient authority to perform their role adequately. Courts must be empowered to review the merits of the decision to detain; have sufficient information to allow for the testing of the reasons for detention; and decide, by reference to legal criteria, whether detention is justified and, if not, to order release. Instead, the Panel heard of a steady trend to lower the potential for judicial scrutiny.

In some countries, pre-trial detention of terrorist suspects occurs without the detainees being able to challenge the legality of their detention, or to secure relief against ill-treatment. This procedural failure arises because the laws themselves limit access to defence counsel during the initial period of detention, or because the courts are stripped of the jurisdiction to entertain certain kinds of complaints. In other cases, the problem is created because the laws are not being properly implemented, and detainees are denied effective access to courts, due to the secrecy

³⁹² The UN Human Rights Committee, in its *General Comment No. 8* on Article 9 of the ICCPR, states that an arrested person should be brought before court “within a few days.” See also *General Comment No 8: Right to liberty and security of persons (Article 9)*, 30 June 1982, reprinted in UN Doc. HRI/GEN/1/Rev.1 at 8 (1994). See also UN Human Rights Committee, Views of 26 April 1996, *Mc Lawrence v. Jamaica*, Communication No. 702/1996). In *Brogan and others v. the United Kingdom*, the European Court of Human Rights held that four days pre-charge detention, without judicial supervision, even in a situation of a serious terrorist threat, was not permissible, ECtHR, Judgment of 29 November 1988, *Brogan and others v. the United Kingdom*, Application Nos. 11209/84, 11234/84, 11386/85).

surrounding their detention, and their resultant inability to communicate with family or lawyers. The inability of detainees to access a court promptly to challenge the legality, or conditions, of detention – for whatever reason – renders it possible for further serious human rights violations to occur. The Panel heard evidence of such violations at several of the Hearings.

For example, with regard to pre-charge/*garde à vue* provisions, the Panel was informed that, in Spain, an examining magistrate may authorise detention in police custody for up to five days, and impose restrictions on communications with the outside world. Such restrictions include limitations on access to a lawyer of choice, a doctor of choice, or notification to family members.³⁹³ While the suspect is assigned a lawyer by the State, the lawyer is not permitted to consult in private.³⁹⁴ In France, unlike in ordinary cases where access to a lawyer must be granted from the first hour of detention, access to a lawyer in terrorist cases may be delayed for 72 hours,³⁹⁵ where the maximum period of *garde à vue* is six days.³⁹⁶ Provisions for speedy access to lawyers – as in the French case, within one hour of detention for non-terrorist cases – is intended to prevent the risk of ill-treatment or coerced confessions. Such provisions safeguard the suspects, but also law enforcement officials, who might otherwise face malicious complaints. Delays lay the authorities open to the risk that in reality, or in perception, detainees will be at risk of abuse, as wounds will heal and scars become inconspicuous. Some witnesses before the Panel suggested that prolonged detention without charge, where a suspect is often held on vague or unclear grounds, is open to misuse as a disguised form of preventative detention.

At the Maghreb Hearing, the Panel was informed that a prolonged period of police custody (*garde à vue*) in terrorism cases is a norm in the region. In Algeria, the 1992 terrorism law allows the duration of *garde à vue* to be extended up to twelve days, with written authorisation of the prosecutor, without conditions or judicial control. Throughout the whole of this twelve day period, detainees are denied access to counsel. Under Moroccan anti-terrorism provisions (passed into law less than two weeks after the 2003 Casablanca bombing), those accused of terrorist offences may be placed under *garde à vue* for up to twelve days.³⁹⁷ Detainees may be denied access to counsel for the first six days. The 2003 anti-terrorism law in Tunisia allows the prosecutor to prolong *garde à vue* from three days to six days, without explaining

393 Article 520 bis (2) of the Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*).

394 Article 527 in combination with Article 520(6)c, Criminal Procedural Act (*Ley de Enjuiciamiento Criminal*).

395 Article 36 (4) of the French Code of Criminal Procedure (CCP).

396 Under Article 706 (88) Code of Criminal Procedure (CCP) six-day *garde à vue* is possible if acts of terrorism are imminent in France or abroad, or if international cooperation demands it.

397 Article 4 of the law 03-03 (*modifiant Article 66 loi 22-01 sur la procédure pénale*): *garde à vue* in terrorism cases is fixed for 96 hours, twice renewable by a written order of the public prosecutor, instead of a judicial order. Detention (for up to twelve days) is essentially at the discretion of the public prosecutor; nor is there any requirement that the arrested person be brought before the prosecutor before renewal.

the grounds for extension as would ordinarily be required.³⁹⁸ At no point was the Panel given any satisfactory reason for such restrictive measures.

At various Hearings, witnesses raised concerns as to the reasons for prolonged detention in police custody without judicial oversight. Participants at the Maghreb and Middle East Hearings were particularly vocal in their objection to this practice, which they considered was designed to allow the authorities to conceal the marks of torture before detainees are brought before a judge. Alternatively, people may be kept in detention so as to be subjected to greater psychological pressure. For example, the Panel was informed in Israel, that allegations of physical torture against suspected terrorists have reduced since 1999,³⁹⁹ but it was alleged that a common pattern had emerged by which detainees are almost automatically denied access to a lawyer, placed in complete isolation from the outside world, and are subjected to psychological pressure. Moreover, the 2006 law made this special regime part of the Israeli criminal procedure, authorising detention without access to a judge for up to ninety-six hours (twice the ordinary period of forty-eight hours), and denial of access to a lawyer for up to twenty-one days in cases of “security offences”.⁴⁰⁰ These procedures are applied principally to Palestinians from the Gaza Strip.

In some countries, appropriate safeguards are built into the law, but ignored in practice, leading to suspected terrorists being detained *incommunicado* for a prolonged period without prompt access to courts, to lawyers, family and/or medical examination. Allegations of this nature were made with regard to Tunisia; in Yemen where access to courts or lawyers is frequently denied in terrorism cases; and in Colombia, Nepal and Sri Lanka. Prompt access to the courts appears to be particularly difficult because suspects are detained by the intelligence services (see Chapter Four) and/or military services.⁴⁰¹

Even where suspects are promptly brought before a judge, the effectiveness of judicial review in some countries has been questioned.⁴⁰² For instance, in Russia, the 2004 amendments to the Code of Criminal Procedure allowed detention of terrorism suspects for up to thirty days, without formal charges, upon authorisation of a court. While the accused must be brought before a court within two days of their arrest, the Panel learnt that this safeguard had little effect in practice because suspects,

398 Article 13 bis of the Code of Criminal Procedure states that *garde à vue* is possible for a maximum period of three days, that can be prolonged for further three days by the public prosecutor.

399 Oral testimony by the Public Committee against Torture in Israel.

400 See, Criminal Procedure (Enforcement Powers – Detention) (Detainees Suspected of Security Offences) (Temporary Provisions) 5765-2006. Palestinians from the Gaza Strip are tried by civilian courts in Israel instead of military courts in the Occupied Palestinian Territory since the Israeli “disengagement” from the Gaza Strip.

401 See summaries of the EJP Hearings in Southern Cone of Latin America and South Asia. In the latter, the Panel heard, for example, that individuals in Nepal were routinely arrested by the military and held in military barracks without access to the courts or to legal advice for prolonged periods.

402 See Federal Law No. 18-FZ of April 22, 2004 amending Article 100 of the Code of Criminal Procedure, Russian Federation.

including those arrested on such broad grounds as the finding of “*undoubted traces of the crime*” (on the person, his clothes, near him or in his dwelling),⁴⁰³ may only receive generic information about allegations against them. This restriction precludes suspects from effectively challenging their continued detention.

In the UK, those arrested on suspicion of terrorism offences must be brought before a judge within forty-eight hours, but can be detained without charge for up to twenty-eight days with judicial authorisation.⁴⁰⁴ The judicial review concerns not the merits of the case against the suspect, but whether continued detention is necessary to obtain or preserve relevant evidence, and if the investigation is being conducted diligently and expeditiously.⁴⁰⁵ In addition, the Panel was informed that suspected terrorists are generally told no more than that they are suspected of involvement in the “*commission, preparation or instigation of a terrorist offence*”, making it difficult to challenge their continued detention.⁴⁰⁶

The Panel received testimony at various Hearings suggesting that those accused of terrorism offences are almost always denied bail,⁴⁰⁷ and often detained on remand for years,⁴⁰⁸ sometimes in harsh conditions,⁴⁰⁹ until they are brought to trial or released. For instance, in India, under the provisions of the now repealed POTA,⁴¹⁰

403 Article 91(1)(3) of the Code of Criminal Procedure of the Russian Federation.

404 The UK Terrorism Act 2000 authorised detention without charge for seven days, with judicial supervision; this period was then successively extended, to fourteen days (Criminal Justice Act 2003), and twenty-eight days under the Terrorism Act 2006. Since 2006, there have been repeated calls from government for extension of pre-charge detention to 90 days. In October 2008, draft legislation making provision for pre-charge detention of forty-two days was withdrawn when it failed to secure support in the House of Lords.

405 Paragraph 32 of Schedule 8 to the Terrorism Act 2000 (c. 11) gives the judge discretion to withhold evidence from the defence and exclude the defence it from part of the hearing on continued detention.

406 Paragraphs 31- 34 of Schedule 8 of the Terrorism Act 2000 as amended. See UK Parliament, Joint Committee on Human Rights, *Second Report Counter-Terrorism Policy and Human Rights: 42 days*, 14 December 2007, HL Paper 23/HC 156, para. 85.

407 For instance, according to Section 49 of the Tanzania’s Prevention of Terrorism Act, offences under the Act are non-bailable.

408 Several countries, including France, Spain, the Netherlands, and Tanzania, have formally extended the maximum period of pre-trial detention in respect of terrorism offences. For example, Article 145 (2) of the French Code of Criminal Procedure, as amended by law No. 2002-1138 of 9 September 2002 makes provision for up to four year pre-trial detention for offences of terrorist acts, in contrast with one year in ordinary cases. Article 504 (2) the Spanish Code of Criminal Procedure (Law 53/1978) permits a period of two years pre-trial detention, renewable once on the decision of a judge: in reality, it is alleged, pre-trial detention of suspected terrorists is often extended to four years. In India, many accused of POTA offences are still languishing in jail despite repeal of the legislation in 2004.

409 For example, according to the testimony of José Antonio Martín Pallín, a former Judge of the Supreme Court of Spain, at the EJP European Union Hearing, suspects can be, and often are, held in repressive conditions of detention, including 22 hours of isolation. Similar concerns were raised at the Australia Hearing that all remand detainees charged with terrorist offences to date had been classified as Category AA inmates, housed in “super-maximum prisons” along with convicted prisoners, and subject to harsh conditions of detention, such as prolonged isolation.

410 See especially Section 49 (7) of 2002 Prevention of Terrorism Act (POTA). In India, both the 1987 Terrorist and Disruptive Activities (Prevention) Act (TADA) and Section 49 (2)(b) of the 2002 POTA allowed detention without charge for up to a year under TADA, and 180 days under POTA, with judicial authorisation. Coupled with strict standards for release on bail, this resulted in many individuals being detained on the basis of

if the prosecutor opposed bail, then the court was able to release the accused only if there were reasonable grounds to believe that the latter was guilty of the alleged offence, and not likely to commit any offence while on bail. In Australia, denial of bail is automatic in cases of “terrorist offences”, including ancillary offences such as membership of a terrorist organisation, unless the court is satisfied that “exceptional circumstances” exist.⁴¹¹ Participants argued that this standard was excessively high, and that individuals charged with terrorist offences are denied the principle of “innocent until proven guilty”.

In other countries such as Chile, France and Spain, the Panel was informed that there are no special rules governing bail in relation to terrorism cases; in practice, however, those suspected of terrorist offences (including relatively minor offences), are often denied bail.

3.2.2 Use of confessions and evidence procured by torture or cruel, inhuman or degrading treatment

One of the most important reasons to ensure prompt access to the courts is to prevent detainees being subjected to any ill-treatment whilst in detention. This safeguard can only be effective if the judiciary responds urgently and effectively when any allegations concerning such ill-treatment are brought to their attention. This responsibility is all the greater when countries (as some do) rely heavily on confessions from detainees in terrorism cases; some countries have even made changes to their laws to facilitate the use of confessions as evidence.

For instance, at the South Asian and Pakistan Hearings, the Panel was informed that India, Pakistan and Sri Lanka have all changed their legislation to allow the court, in terrorist cases, to rely on confessions given to police officers (though this is not ordinarily admissible in evidence).⁴¹² In Sri Lanka, the burden of proof that a confession was made involuntarily is placed on the accused.⁴¹³ This is the case in Jordan also. Participants from these countries were almost unanimous in their view that this departure from the ordinary rules of procedure had encouraged torture, ill-treatment and other human rights violations. The Panel notes that there seems to be a trend in the counter-terrorist legislation of some countries to relax requirements for the admissibility of confessions. If regard is had to the harsh conditions in which detainees are often held, including *incommunicado* detention, there should be more, not less, stringent requirements for the use of confessions.

vague suspicions, without having any effective means to challenge the detention. These laws were allegedly used to preventatively detain individuals perceived to be a threat, by circumventing the minimum safeguards available under existing preventive detention laws (e.g. periodic reviews).

411 Section 15AA(1) of the Crimes Act 1914, as amended by Anti-Terrorism Act 2004 of Australia.

412 Sections 16(1) of the Sri Lankan PTA; 32(1) of Indian POTA; and 21H of the Pakistani ATA.

413 Section 16(2) of the Sri Lankan PTA, places on the accused the burden of proving that their confessions were “irrelevant” under Section 24 of the Evidence Ordinance, as having been extracted by “inducement, threat or promise” and thus inadmissible.

Even in the absence of formal changes to the law and/or to evidentiary rules, the Panel was informed that convictions in terrorism cases are frequently based on statements obtained under duress and ill-treatment. This was a common complaint from participants in the Maghreb and the Middle East Hearings, where evidence secured with the use of torture and cruel, inhuman or degrading treatment is not always explicitly excluded under domestic law. For instance, in Tunisia, despite the criminalisation of torture, confessions obtained by torture are not excluded as evidence.⁴¹⁴ In Jordan, while statements obtained involuntarily are formally inadmissible, the law places the burden on the accused to prove its illegality.⁴¹⁵ Participants also told the Panel that prosecutors and judges often failed to conduct investigations into allegations of ill-treatment during detention.⁴¹⁶ It is beyond doubt that important legal safeguards are missing in a number of States.

The Panel also heard that due to the international dimension of recent terrorism attacks, there have been cases where the prosecution sought to rely on statements of the accused or witnesses obtained abroad under conditions that cast doubt about their reliability. For instance, in the case of Joseph Terrence Thomas, discussed at the Australia Hearing, his initial conviction for a terrorist offence⁴¹⁷ was based largely on his statements given to officers of the Australian Federal Police (AFP) while he was detained without access to a lawyer in Pakistan. After the Panel's Hearing in Australia, in August 2006, the verdict was quashed by the Victoria Court of Appeal mainly on the ground that his confessions could not be considered "voluntary" because he had been repeatedly told by his Pakistani interrogators that his fate would to a very substantial extent be determined by the extent of his cooperation.⁴¹⁸ Similarly, in July 2006, the Spanish Supreme Court acquitted a Spanish citizen of terrorism charges because the only evidence incriminating him (a confession given to Spanish officers while he was detained in Guantánamo Bay), was declared to be void by the Court.⁴¹⁹

The Panel considers that national law should explicitly prohibit any confessions of the accused obtained under duress and any evidence obtained by torture or other ill-treatment. The same rule must be applied to witness' statements. Evidence obtained as a result of other violations of internationally recognised human rights cannot be

414 UN Human Rights Committee, *Concluding observations on Tunisia*, UN Doc. CCPR/C/TUN/CO/5, 23 April 2008, para. 12.

415 See UK Court of Appeals, *Othman (Jordan) v. Secretary of State for the Home Department* (2008) EWCA Civ 290.

416 See oral testimony by Me Samir Dilou, human rights lawyer, Tunisia, EJP North Africa Hearing.

417 In February 2006, a jury found Thomas guilty on two counts of intentionally receiving funds from a terrorist organisation and of possessing a falsified passport.

418 Victoria Court of Appeals, *R v. Thomas* (2006) VSCA 165 (18 August 2006), para. 94. The Court of Appeal also held that the absence of a lawyer made the AFP interview void notwithstanding the absence of an equivalent requirement for a lawyer under the Pakistani law.

419 Supreme Court of Spain, Sentence No. 829/2006, 20 July 2006. The case was discussed by Sebastia Solellas, criminal lawyer, at the EJP European Union Hearing.

introduced into legal proceedings if the violation casts substantial doubt on the reliability of such evidence, or the admission of such evidence would be antithetical to and would seriously damage the integrity of the proceedings.⁴²⁰

3.2.3 Access to witnesses

At various Hearings, the Panel heard from former and current law enforcement officials that the protection of witnesses, including informers, is crucial in the prosecution of terrorism. Participants from some countries, such as Sri Lanka and Colombia, told us that cooperation with the authorities could expose potential witnesses to serious threats from armed groups, including a risk of abductions or killing. Some anti-terrorism laws, both in the past and present, have thus provided for special procedural rules in order to protect vulnerable witnesses.⁴²¹ In addition, the increased role played by intelligence services and intelligence information in counter-terrorism (see Chapter Four) has prompted some countries to introduce special rules of procedure and evidence concerning State witnesses.

For instance, under the 2003 anti-terrorism law in Tunisia, “in case of peril” witness testimonies may be collected through visual or audio communication outside the ordinary court room. It is possible to withhold from the defence the identity of judicial police officers, public servants, victims, witnesses and “*all persons responsible, at whatever title, for alerting the competent authorities*”.⁴²² In the Netherlands, new legislation was enacted in 2006 that would allow an examining magistrate to collect a testimony of an intelligence agent, including under anonymity, without the presence of the defence.⁴²³ Participants from both countries questioned whether these regimes offered sufficient safeguards to counter-balance the prejudice caused the accused.

This is clearly a difficult challenge. It is important that States protect witnesses, and effective intelligence gathering may require some procedural changes in criminal trials. However, the Panel was also told of terrorism cases post 2001, in which governments sought to prevent or restrict examination of witnesses, in an apparent effort to conceal information relating to human rights violations, rather than to protect any

420 Article 69 (7) of the Statute of the International Criminal Court provides that evidence obtained by means of a violation of the Statute or internationally recognised human rights shall not be admissible if: “(a) the violation casts serious doubts on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”

421 See the 2003 anti-terrorism law in Tunisia, ATA in Pakistan, TADA, POTA and UAPA in India and anti-terrorism law in Chile. The use of “faceless” witnesses was previously common in Latin America.

422 Article 49 and Article 51 of Law No. 2003-75, 10 December 2003: while the defence may request the disclosure of the identity of such persons to judicial authorities, according to Article 52, their request may not be granted if there is fear for the life or property of such persons or their family, regardless of the degree of prejudice to the rights of the accused.

423 Written submission of Nederlands Juristen Comite voor de Mensenrechten (NJCM), EJP European Union Hearing.

legitimate State interest.⁴²⁴ Such suspicions of improper conduct, whether founded or not, could be dissipated if any proposed restrictions on defence rights were made subject to effective review by an independent judiciary, and accompanied by sufficient safeguards that ensure the fairness of the trial.⁴²⁵

While not excluding the use of anonymous witnesses, human rights bodies have consistently emphasised that the practice must be limited to cases where other protective measures are inadequate, appeal against the decision to grant anonymity is possible, and adequate opportunity is given to the defence to test the evidence.⁴²⁶ Moreover, conviction should not be based solely, or to a decisive extent, on testimonies of anonymous witnesses.⁴²⁷

3.2.4 Access to evidence

Some countries have introduced counter-terrorist legal measures that broaden the scope of information that can be withheld from the defence.

In Australia, the Attorney General can issue a certificate ordering non-disclosure of information the disclosure of which is likely to prejudice “national security” or “law enforcement interests”.⁴²⁸ These provisions were criticised on the grounds that the scope of information that could be withheld was excessively broad.⁴²⁹ Similarly, in Canada, the 2001 Anti-Terrorism Act (ATA) broadened the scope of information the Government could seek to withhold in federal criminal and immigration proceedings.⁴³⁰ At the Hearing, it was suggested that on one reading of provisions

424 See, for example, testimony about the so-called “Hamburg cell” cases in Germany where testimony from two detainees in US custody, though apparently favourable to the defence, was withheld, see oral testimony by Wolfgang Kaleck, Lawyer, President of the Republican Lawyers Association, Berlin, EJP European Union Hearing.

425 See UN Human Rights Committee, *Concluding observations on Canada*, UN Doc. CCPR/C/CAN/CO/5 (2005), 20 April 2006, para. 13.

426 UN Human Rights Committee, *Concluding Observations on The Netherlands*, CCPR/CO/72/NET, 27 August 2001, para. 12. While the European Court of Human Rights has recognised that the anonymity may be necessary in limited circumstances, it has set several criteria for permitting such measures: (1) reliance on anonymous witnesses must be strictly necessary: in particular, there must be a real fear of safety of the witness or his family/there are no milder means such as video recording, non-disclosure to the public, use of screens to shield identity from accused (but not the defence counsel), use of video links, or use of witness protection schemes; (2) there are counter-balancing measures, which require that the defence must have the possibility in an adversarial hearing to question the reliability of the witness, either prior to or during the trial itself; (3) the assessor of fact must have had the opportunity to assess the reliability of the witness; (4) conviction shall not be based solely or to a decisive extent on statements by anonymous witnesses. ECtHR, Judgment of 26 March 1996, *Doorson v. the Netherlands*, Application No. 20524/92, Reports 1996-II, paras. 72–73.

427 *Ibid.*, *Doorson v. the Netherlands*.

428 See Australia’s National Security Information (Criminal and Civil Proceedings) Act 2004.

429 Section 7 of the Act defines information as -“information of any kind, whether true or false, and whether in a material form or not, and includes: (a) an opinion; and (b) a report of a conversation.”

430 Section 38 of the Canadian Evidence Act, as amended by the ATA. This included “potentially injurious information,” which is defined as information that, if disclosed, “could injure international relations or national defence or national security” and “sensitive information,” defined as information “relating to international

such as “information that could injure international relations”, evidence might be withheld on the grounds that its disclosure might, if it concerned human rights violations, embarrass a foreign country.⁴³¹ While in both Australia⁴³² and Canada,⁴³³ the defendant may appeal (under limited conditions) against the non-disclosure to a court, many considered this safeguard insufficient. In Australia, the court is required to give greatest weight to the question of “the risk of prejudice to national security” rather than to the needs of the accused.⁴³⁴ In Canada, the trial judges, who must ultimately decide whether to proceed or order a stay of the proceedings, are arguably placed in a difficult position of having to assess the potential prejudice of non-disclosure upon the rights of the accused, without seeing the withheld material. The Human Rights Committee noted with concern the provisions regarding non-disclosure of information, and concluded that they do not fully abide by the requirements of Article 14 of the ICCPR.⁴³⁵

According to human rights jurisprudence, the right to disclosure of relevant evidence (or the right to examine witnesses – see above) may be limited under certain exceptional circumstances.⁴³⁶ However, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counter-balanced by the procedures followed by the judicial authorities.⁴³⁷

3.2.5 The reversal of the burden of proof

The Hearings revealed that the response to terrorism has led countries to apply, in law and in practice, lower procedural and evidentiary standards than would normally

relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard.”

431 See oral testimony by Robert Diab, University of British Columbia, at the EJP Canada Hearing.

432 In Australia, under Section 29 (3) of the Act, the hearing on the Attorney General's certificate will be held in the absence of both the defendant and his/her legal representative, unless they have a security clearance.

433 In Canada, the Attorney General is given the power to issue certificates which would override a court order of disclosure (Section 38.13). The Court of Appeal is required to confirm the certificate if all of the relevant information relates to information “obtained in confidence from, or in relation to a foreign entity or for the purpose of protecting national defence or security”, regardless of the importance of the information for the defence (Section 38.131 (10)).

434 Section 31(8) of the National Security Information (Criminal and Civil Proceedings) Act 2004 of Australia.

435 See UN Human Rights Committee, *Concluding observations on Canada*, UN Doc. CCPR/C/CAN/CO/5 (2005), 20 April 2006, para. 13.

436 For instance, the European Court of Human Rights has recognised that this right can be limited on the ground of national security or the need to protect witnesses at risk of reprisals or very secret police matters of investigation of crime. ECtHR, Judgment of 26 March 1996, *Doorson v. the Netherlands*, Application No. 20524/92, Reports 1996-II, para. 70. It also held that in some cases it might be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of other individuals or to safeguard an important public interest. ECtHR, Judgment of 23 April 1997, *Van Mechelen v. the Netherlands*, Reports 1997-III, para. 58.

437 See the *Doorson* judgment, *ibid.*, p. 471, para. 72, and the *Van Mechelen and Others* judgment, *ibid.*, p. 712, para. 54.

operate in the criminal justice system. This trend is particularly true with regard to offences tried by military or special courts, but also appears in ordinary courts. The right to be presumed innocent is explicitly guaranteed under human rights and international humanitarian law.⁴³⁸ This right requires, in principle, that the prosecution bear the burden of proving an offence beyond reasonable doubt.⁴³⁹ Yet it appears that in a number of common law jurisdictions, such as the Australia,⁴⁴⁰ Pakistan, Tanzania,⁴⁴¹ Uganda, and the UK,⁴⁴² legislative changes have meant that ancillary terrorism offences (for example membership of a terrorist organisation or failure to report information relating to terrorism), place the burden on the accused to disprove certain elements of the charges.

Article 17 of the Ugandan Anti Terrorism Act (ATA) makes it a crime punishable by up to five years imprisonment to destroy or dispose of material, which is or is likely to be relevant to an investigation, unless the accused persons can prove that they had no intention of concealing any information contained in the material in question from the person carrying out the investigation.⁴⁴³ Under the 1997 Anti Terrorism Act (ATA) of Pakistan, a person charged with failure to disclose to a police officer “*his belief or suspicion*” that a person has committed an offence under the ATA will be found guilty and can be punished with up to ten years imprisonment unless he/she can prove that they had a reasonable excuse for not making the disclosure.⁴⁴⁴ Participants at the Pakistan Hearing said that it was difficult for the accused to do more in such circumstances than present proof of past good behaviour, or provide blanket pleas of innocence.⁴⁴⁵

Presumptions of fact are not necessarily inconsistent with the principle of the presumption of innocence, but an overly-flexible approach could severely undermine the principle of “innocent until proven guilty”. The European Court of Human Rights

438 Article 11 (1) of the UDHR; Article 6 (2) of the ECHR, Article 8 (2) of the ACHR, Article 7 (1) of the African Charter, Article 16 of the Revised Arab Charter, Article 75 (4)(d) of Additional Protocol I and Article 6 (2)(d) of Additional Protocol II. See also UN Human Rights Committee, *General Comment No. 29*.

439 UN Human Rights Committee, *General Comment No. 32*, para. 30.

440 Under Section 102.3 of the amended Criminal Code of Australia criminalising membership of a terrorist organisation, it is a defence, with the legal burden on the accused, to prove that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.

441 Section 6 (3) (membership to a proscribed organisation), Section 17 (2) (dealings with terrorist property), Section 25 (2) (membership to a terrorist group) of the Tanzanian PTA. Section 9 (3) provides as a “terrorist act”: “*Any person who receives any code, password, sketch [...] unless a proof exist that such communication was against his wish, commits an offence.*”

442 See, Section 11 (2) (membership of a proscribed organisation) of the UK Terrorism Act 2000.

443 Article 17 of the Ugandan ATA: “(3)...it is a defence to prove that the accused person had no intention of concealing any information contained in the material in question from the person carrying out the investigation.”

444 Section 11-L (2) of the Pakistani ATA. Such onus is also on the accused in cases where he is charged with disclosing to another person “*anything that is likely to prejudice an investigation*” or “*interferes with material which is likely to be relevant to an investigation*”. Section 21-A (6) & (8), ATA, 1997.

445 Written submission by the Human Rights Commission of Pakistan, EJP Pakistan Hearing.

has given some assistance in the matter by ruling that presumptions of fact must be kept within reasonable limits, and that judges must, amongst other things (a) take into account the opportunity given to the defendant to rebut the presumption; (b) weigh up the importance of what is at stake; and (c) consider the difficulty which a prosecutor may face in the absence of a presumption.⁴⁴⁶ Clearly if a disproportionate burden is placed on the accused to prove facts, or prove a lack of criminal intention, the principle is effectively set aside.

3.2.6 Assistance by counsel

All international law provisions around fair trial emphasise the right to prompt access to legal counsel of one's own choice. However, lawyers often face considerable obstacles when defending persons suspected of involvement in terrorism.

In Hearings around the globe the issue of independent legal representation was discussed. Witnesses testifying about the situation in Algeria, Colombia, Nepal, Northern Ireland (in the past), the Russian Federation, Sri Lanka, Thailand, Tunisia and the USA (with specific reference to lawyers working for Guantánamo Bay detainees) spoke of the difficulties encountered in the exercise of defence activities in an environment where the rule of law was faltering.

Lawyers have been killed for acting on behalf of (terrorist suspect) clients; others find it impossible to carry out their defence activity, or have been ostracised for their perceived opposition to governmental counter-terrorism measures. It is wrong and highly dangerous for lawyers ever to be identified with the cause of their clients, and measures need to be taken to protect the independence and integrity of lawyers, especially when their clients are seen as “unpopular”. The legal establishment has a particular responsibility to ethically regulate the behaviour of the profession, to ensure integrity, and encourage collegiality. Society needs to be made aware of the important role that lawyers play when, in accordance with the highest traditions of their profession, they take on the defence of “unpopular” causes, and give substantive effect to the right to a fair trial. States have a duty to uphold the rule of law by actively and publicly supporting the independent role of the judiciary, and lawyers generally, in their professional endeavours.

4. Conclusions & Recommendations: criminal justice

The Panel recognises that effective criminal prosecution is an indispensable instrument in the fight against terrorism. Furthermore, it does not dispute the need in certain instances to adjust ordinary rules of criminal procedure and evidence to the complexities of terrorism investigation and prosecution. International law recognises

⁴⁴⁶ See, for example, ECtHR, Judgment of 7 October 1988, *Salabiaku v. France* Application No. 10519/83; ECtHR, Judgment of 25 September 1992, *Hoang v. France*, Application No. 13191/87. See also the UK House of Lords in *R v. DPP ex parte Kebilene* (1999) WLR 972; the South African Constitutional Court in *State v. Mbatha* (1996) 2 LRC 208, *State v. Bhulwana* (1996) LRC 194, and *State v. Manamela* (2000) LRC 5.

the need for such adaptation; it does, however, also build in a number of safeguards. Our investigations have shown that these safeguards are not always met.

States are often under pressure to demonstrate effectiveness in the fight against terrorism. The Panel was given the impression that States often do not trust their ordinary judicial system which is indeed slow and cumbersome. Some countries have given in to the pressure by establishing special procedural machinery, which is expected to produce results within a shorter time-frame. For this purpose, the competence of military tribunals has been extended, or special courts have been established. At the same time, countries have made efforts to “streamline” proceedings at the expense of both transparency and the rights of the defence. The evidence gathered in the Hearings shows that in a number of cases the basic principles of the rule of law were overturned. Instead, the Panel concludes that States should concentrate their efforts on improving the productivity of the ordinary judicial apparatus.

Several countries have extremely weak law enforcement mechanisms and no solid tradition of respect for the rule of law: in such situations, giving more authority to law enforcement agencies inevitably leads to abuses. Countries that have a judicial system that is slow, and/or inefficient, and/or lacking independence and professionalism, need to reform the system radically. Side-stepping systemic changes creates short and long term problems. In the short-term, terrorist suspects have their rights abrogated, and/or real terrorists may escape completely from justice because of failures in the system. In the long-term, resources are diverted away from bringing about vitally necessary reforms of the criminal justice as a whole. Consistent disrespect for the ordinary system of law creates a vicious circle. For judges, as important cases are withdrawn from them and heard outside the normal judicial system, there is a weakening of the expertise of, and of the respect due, the ordinary civilian judiciary. For lawyers, their professional role becomes steadily eroded, as they are increasingly treated as allies (or indeed as enemies) in the State fight against terrorism, rather than as independent advocates for their clients. Law enforcement officials become reliant on coercive methods to secure convictions, and normal investigative skills are lost (or never developed). These trends then reinforce any original doubts about the adequacy of the system to cope.

The criminal justice system becomes so unreliable that international efforts to bring suspects to trial are also thwarted. In the last chapter, there was a discussion of the trend towards undermining the principle of *non-refoulement*. This trend happens in part because host countries want to deport a terrorist suspect but are constrained due to the risk posed in their home country. Instead of undermining, or side-stepping, this important principle, efforts and resources should be invested into improving the conditions in the home country, so that any fear of human rights violations will become ill-founded. At present, the wide divergence of criminal offences on terrorism, the use of military and special courts, and the extent of systematic human rights violations such as torture, seriously hamper effective international cooperation.

The Panel concludes that priority should be accorded to improving the performance of the ordinary criminal justice system, *inter alia* by strengthening judicial independence, increasing the resources of the criminal justice and law enforcement systems, and improving international judicial cooperation. The Panel was particularly struck at the problems reported from liberal democracies. Countries with supposedly long established legal traditions have introduced rules significantly deviating from ordinary standards in respect of terrorism cases, yet the legality, necessity and proportionality of the measures are far from self-evident. It is also distressing to see how the slackening of procedural safeguards in countries like France, the UK and the USA, has been exploited by other States with less well-entrenched legal systems and human rights safeguards.

The Panel was deeply concerned at what might be called a “cancerisation” of the legal system. Hard-won legal safeguards are disregarded in terrorist cases, yet these are precisely the cases that need heightened scrutiny. The experience of past serious violent conflicts, and generations of advances in legal protection, suggest that States would counter terrorism most effectively by:

- a. increasing human rights safeguards in criminal justice provision;
- b. resourcing law enforcement and criminal justice institutions (by way of personnel, training, professional development, infrastructure, and, as appropriate, effective civilian oversight);
- c. reviewing all legislation to make it “fit for purpose”; where amendments are called for, measure them against the international tests of legality, necessity, proportionality and non-discrimination;
- d. in particular, reviewing and strengthening the mechanisms of governance, independent oversight, and complaints systems to ensure effective accountability, provide reassurance that any abuses that arise are expeditiously tackled and to counter impunity.

The Panel accordingly recommends:

1. States should adopt new criminal laws on terrorism only if there is a demonstrable need, and should conduct a review of all current counter-terrorism legislation to ensure that measures aimed at countering terrorism are precise and ensure the principle of legal certainty. It is particularly important to avoid over-broad and vague definitions.
2. In particular, States should exercise caution about legal provisions that could restrict rights to freedom of expression. Independent media is an important safeguard for the rule of law and measures must ensure that journalists are not penalised for reporting on contentious issues.

3. Furthermore, to limit serious restrictions on the freedom of association, criminal punishment ought only to be attached to membership, support or association of an organisation, if there has been a judicial determination on the nature of the organisation. Non-governmental organisations play an important role in society (especially when working with and for minority groups); their work in defence of human rights should not be improperly constrained, but rather reinforced.
4. States should try cases of terrorism in the ordinary criminal justice system. They should repeal laws allowing for trials of civilians for terrorist offences in special or military courts.
5. Even in an emergency or armed conflict, fundamental guarantees of a fair trial before an independent and impartial tribunal must be accorded to persons suspected of terrorism, regardless of nationality or status. States should, accordingly, both in law and in practice, respect the right of suspects to be treated as innocent until proved guilty; should not compel anyone to testify against themselves; and should ensure that pre-charge and pre-trial measures respect these principles and that detention during these phases is time-limited and not prolonged.
6. Prompt access to a lawyer of one's own choosing must be ensured. The legal profession should be supported in its endeavours to uphold the rule of law and appropriate resourcing should be provided to increase the capacity of defence lawyers, prosecutors and the judiciary to comply with the highest standards of their calling. Priority should be given and, where necessary, technical assistance provided, to strengthen judicial independence and improve international judicial cooperation.
7. National law should explicitly prohibit the use of any confessions of an accused which have been obtained under duress, any evidence obtained by torture or other ill-treatment, or such material gained as a result of other serious human rights violations. This prohibition should apply regardless of whether the prohibited treatment took place at home or abroad, and with or without the involvement of domestic agents. Where allegations of torture or other prohibited treatment are made, the competent authorities should take all necessary steps to ascertain the veracity of such allegations and to bring to justice those responsible.

Chapter Seven: Conclusions and Recommendations

Terrorism sows terror, and many States have fallen into a trap set by the terrorists. Ignoring lessons from the past, some States have allowed themselves to be rushed into hasty responses, introducing an array of measures which are undermining cherished values as well as the international legal framework carefully evolved over at least the last half-century.

Seven years on from 9/11, it is time for the international community to re-group, reverse the damage caused, and re-commit to the values and principles enunciated over the previous six decades. Those values and principles were intended to withstand crises, and they provide a robust and effective framework from within which to tackle terrorism. It is clear that the threat from terrorism is a long-term one, and solid long-term responses are needed.

The Eminent Jurists Panel has travelled the globe, taken testimony from people in relation to more than forty countries in all five continents, and held discussions with representatives of governments in different parts of the world. We have witnessed the harm done by terrorism and the fear generated by it. We have also witnessed the harmful results of intemperate responses to the threat of terrorism, and heard the concerns expressed by prominent members of the legal profession and civil society about the implications this has for societies based on the rule of law and respect for fundamental human rights. We have also, however, witnessed, and been heartened by, the strength and resolve shown by civil society in the face of both terrorism and counter-terrorism measures.

The time has come to take stock, to look back at the past seven years, to assess the harm done by terrorism and counter-terrorism, and to focus on what needs to be done to repair that damage.

Conclusions

The importance of international law

The Panel has no doubt that there is a real and substantial threat from terrorism in different parts of the world, and that governments are under a duty to take effective measures to counter that threat. This does not mean that well established principles of international law can or should be ignored. International human rights and international humanitarian law have been developed so as to be able to regulate the behaviour of States in times of crisis. They are complementary and rooted in respect for human dignity. Human rights law is applicable in times of peace, and supplements international humanitarian law in times of war. This legal framework was formulated in the wake of genocide and war, and is grounded in an understanding of the challenges States face in times of crisis. These laws are not an impediment to countering terrorism. They were devised by States to be flexible and to respond to

need in times of crisis; to ensure that expediency does not prevail over the minimum standards that are the hallmark of free and democratic societies in which the dignity of all people is respected and upheld.

The erosion of international humanitarian law

Despite this, the United States, one of the world's leading democracies, has adopted measures to counter terrorism that are inconsistent with established principles of international humanitarian law and human rights law. Erroneously conflating acts of terrorism with acts of war, the United States Government proclaimed a "war on terror", thereby misapplying war rules to situations not entailing armed conflict as understood by international humanitarian law. In genuine settings of warfare, it distorts, selectively applies and ignores otherwise binding rules, including relevant principles of human rights law. Other States have been complicit in some of the practices that have flowed from the war paradigm, and it is vital that the serious human rights violations that have occurred now be repudiated and remedied. The damage done to the rule of law must be repaired and the importance and value of upholding international humanitarian law and human rights law during all armed conflicts must be re-affirmed.

The erosion of international human rights law

In the sixty years since the adoption of the *Universal Declaration of Human Rights*, and the subsequent International Covenants and other treaties, extensive international human rights jurisprudence has evolved. Domestic, regional and international courts, various treaty bodies, and a number of other governmental and inter-governmental bodies have provided rulings and guidance on underlying principles, and how they can be given practical effect, so that States can fully comply with their treaty obligations. Yet this legal framework is being disregarded: many of the new counter-terrorism measures are illegal because they fall foul of the requirements established for legitimate restrictions and derogations.

Practices referred to in the evidence given to the Panel – torture and cruel, inhuman or degrading treatment, secret detentions, abductions, illegal transfers, *refoulement*, arbitrary, prolonged and *incommunicado* detention, unfair trials, and enforced disappearances – are not legitimate responses to the threat of terrorism. Such practices are not only inconsistent with established principles of international law, and undermine the values on which free and democratic societies are based, but as the lessons of history show, they put the possibility of short term gains from illegal actions, above the more enduring long term harm that they cause. Steps must be taken nationally and internationally to ensure that the prohibition on torture and cruel, inhuman or degrading treatment, and other such serious human rights violations again become the unquestioned norm.

The importance of the criminal justice system

In the view of the Panel, an effective criminal justice system based on respect for human rights and the rule of law is, in the long term, the best possible protection for society against terrorism. This is the lesson of history. Yet, ignoring lessons from the past, long held systems of criminal justice are being set aside as being inadequate. Principles of fairness and due process, which should be at the heart of any system of criminal justice, are being ignored by some countries in light of the supposed exceptional nature of the threat from terrorism. In place of tried and tested procedures, extraordinary measures are proposed as the way forward. Some governments are merely using the excuse of counter-terrorism to justify repressive laws and practices to strengthen their power, but others are genuinely struggling to respond effectively to the threat as they perceive it. The problem is often not a lack of law, but a rush to ill-considered new laws, and in those situations where the criminal justice system is weak, it needs to be strengthened and resourced not by-passed.

The centrality of intelligence

A striking discovery for the Panel in nearly all of its Hearings was the centrality now accorded to the role of intelligence in counter-terrorism policies, and the new challenges this poses for democratic and legal accountability. Intelligence gathered in accordance with human rights law by recognised methods such as surveillance, infiltration of organisations, wire taps and similar measures, continue to be used, and rightly so, for intelligence is an essential component of any counter-terrorism policy. The quest for intelligence has, however, broadened and led to illegal practices by some countries that violate international law, including the use of torture and cruel and degrading treatment to extract information from detainees, often held *incommunicado* and without charge or trial. Intelligence, procured legally and illegally, is exchanged with security services of other countries with limited controls. Sometimes these exchanges involve countries that are widely known to have bad human rights records. This intelligence, sometimes faulty, is being used in an increasing array of administrative procedures, in which more often than not the information relied on is not disclosed to the individuals concerned or their legal representatives. Raw intelligence starts to substitute for evidence, to the detriment of individuals and the criminal justice system.

As the work of intelligence agencies in tackling terrorism has grown in importance, increased powers have been accorded to them, but legal and political accountability has not kept pace. The Panel is of the view that terrorism is not likely to be a short-term phenomenon, and that the role of intelligence agencies will continue to be central to any effective counter-terrorist strategy. Accordingly, it is vital to agree on a regulatory framework that will ensure that these agencies comply with the State's human rights obligations (domestically and internationally). If intelligence-driven approaches are not to predominate to the point of the agencies forming a "State

within a State”, appropriate safeguards at the domestic, regional and international levels need to be introduced.

Accountability

Whilst respect for democracy and human rights requires transparency and accountability, in many countries the threat of terrorism is encouraging a growing culture of secrecy. Obviously, there is a need for some secrecy, but secrecy can all too easily act as a useful shield for those who never wanted to have to answer for their actions, or who want to hide serious wrongdoing. Accountability is not an obstacle to countering terrorism: it provides the crucial under-pinning of counter-terrorist measures if the latter are to secure the necessary public support and legitimacy to be truly effective. It is the view of this Panel that the authorities must be prepared to account fully for the use of their powers, and must be prepared to submit themselves to adequate independent scrutiny.

The centralisation of power in the executive

In tackling terrorism, executives have accrued more power. The privileging of “security” above other policy issues, heard by the Panel at most of its Hearings, inevitably centralises power with the executive and its agencies. This trend, if not compensated for, weakens the legislature. The scrutiny role that ought to be performed by the legislature can be undermined at the very time it most needs to be heightened. Judicial oversight would and should provide an important safeguard against abuse of power, but it too risks being sidelined. These trends are not healthy ones, and they certainly should not happen surreptitiously or by default.

The role of the judiciary and the legal profession

An independent and impartial judiciary and an independent legal profession are crucial to ensuring the maintenance of appropriate checks and balances in power relationships, and in the relationships between the individual and the State.

In some countries the judiciary has played an important role in the oversight of counter-terrorism policies, and in holding governments to their obligations under the law; the importance of this should be recognised and affirmed. In other countries the judiciary has either been ineffective, or has been sidelined in favour of military courts or special tribunals, or through the curtailment of its jurisdiction to deal with cases brought by detainees suspected of terrorism. Nobody should ever be beyond the protection of the courts and the law, and it is imperative that these steps be reversed.

At all the Hearings members of the legal profession came forward to express concern about aspects of counter-terrorism policies in their countries. Access to a lawyer of one’s own choosing and the right to be effectively represented by that lawyer before an impartial and independent judicial body, is a fundamental building block to

ensure fair treatment; yet in some countries it is a right that is being whittled away, and lawyers who have sought to perform their role conscientiously have often done so at great personal risk.

The role of civil society in countering terrorism

Counter-terrorist policies can only be successful over the longer term with the active support of an informed public. Yet, many of the measures we observed tend to discourage such an approach. Instead, the Panel heard of policies which appear to encourage an “us and them” approach and which alienate communities whose support is essential for successful counter-terrorism action. At times of crisis, unpopular or minority groups are easily singled out for harassment and repression, and the Panel heard evidence of worrying trends in this regard. The Panel also heard of restrictions being placed on freedom of expression and association, with journalists and human rights defenders reporting a growing culture of fear. We need to strengthen not weaken civil society so as to more effectively counter terrorism. In the view of the Panel, what is needed to thwart this downward spiral is a plan of action which engages with any real or perceived grievances that might give succour to terrorists, which strengthens accountability, and which integrates human rights and equality considerations into all government policies.

The way forward

Political leadership is needed urgently at a national and international level to develop a comprehensive strategy committed to combating terrorism, that will *inter alia* repudiate torture and all other serious human rights violations, restore respect for well established principles of international human rights and international humanitarian law, and insist on the effective integration of human rights into counter-terrorist initiatives. It is particularly important that those countries that have previously been at the forefront of developing human rights standards return to that role once again. This is necessary since it is clear that countries with a long tradition of human rights violations have found great succour in the fact that some of their former critics are now engaged in collaborating closely with them, and even sharing in the fruits of human rights violations.

This report draws attention to serious violations of international human rights and international humanitarian law that have taken place over the past seven years in the furtherance of counter-terrorism policies. The Panel has, however, gained the impression from its Hearings and discussions that there is widespread concern about the implications of the policies that have had these results. This has been the subject of vigorous debate in many countries, and the way is open for States to reconsider policies in order to bring them into line with the requirements of international law.⁴⁴⁷ With that in mind the panel makes the following key recommendations.

447 “If the daunting challenges now facing the world are to be overcome, it must be through the medium of rules,

Key recommendations

Each chapter of this report sets out the Panel's detailed recommendations and provides a fuller argumentation for each proposal. The following is a summary of the key recommendations:

1. Stocktaking and repairing the damage

There is a need to take stock, take remedial action, and make a fresh start. Measures need to be taken at the international, regional and national levels:

- a. Internationally: All UN bodies, including the Security Council, should take a leadership role in restoring respect for human rights in the counter-terrorism efforts of its agencies and Member States. In particular, the Human Rights Council should develop a detailed plan of action and ensure a systematic follow-up to the recommendations of the Special Rapporteur on the protection and promotion of human rights while countering terrorism.
- b. Regionally: Relevant organisations should conduct a comprehensive review of regional agreements and measures on counter-terrorism, and review, where necessary, the mechanism to ensure compliance with human rights standards, including mechanisms for monitoring implementation by Member States.
- c. Nationally: States should undertake comprehensive reviews of their counter-terrorism laws, policies and practices, including in particular the extent to which they ensure effective accountability, and their impact on civil society and minority communities. States should adopt such changes as are necessary to ensure that they are fully consistent with the rule of law and the respect for human rights, and to avoid all over-broad definitions which might facilitate misuse.

2. Preventing the normalisation of the exceptional

States should take explicit precautions to ensure that any measures, intended to be exceptional, do not become a normal part of the legislative framework. Precautions could include ensuring that any new counter-terrorist laws or measures:

- a. fill a demonstrable gap in existing laws;

internationally agreed, internationally implemented and, if necessary, internationally enforced. That is what the rule of law requires in the international order', Rt Hon Lord Bingham of Cornhill KG, *The Rule of Law in the International Legal Order*, Grotius Lecture at the British Institute of International and Comparative Law, 17 November 2008.

- b. comply with all the requirements of international human rights law, and where relevant, international humanitarian law;
- c. are subject to clear time-limits;
- d. are subject to periodic independent review, not solely as to implementation, but also as to the continuing necessity and proportionality of the measure;
- e. and that the review process monitor that any formal derogations entered by the State are only in place for as long as terrorism poses a genuine threat to the life of the nation, and are in compliance with all substantial and procedural requirements of relevant instruments.

3. Equality and non-discrimination

States must ensure that counter-terrorist measures are non-discriminatory, and that due respect be paid to the rights of those, such as juveniles, women and minority communities, who may experience terrorism and counter-terrorism measures differentially. A particular effort must be made to ensure that people are not treated as terrorist suspects on the sole basis of their ethnicity, religion, or similar identity.

4. Accountability in counter-terrorism measures

States should ensure that where human rights violations have been alleged, effective inquiries, with proper disclosure, should be established. Accountability should be strengthened on all levels and, in particular, provisions for immunity, indemnity clauses, and limitations on access to courts should be removed. Effective remedies and accountability depend to a large extent on a strong, independent and knowledgeable judiciary and legal profession: efforts should be made to strengthen the criminal justice system, including the provision of technical assistance where needed.

5. Repudiating the war paradigm

The incoming US administration should reaffirm the US's historic commitment to fully uphold and faithfully apply international humanitarian law (the laws of war) during situations of armed conflict and recognise that human rights law does not cease to apply in such situations. Accordingly, it should seek the repeal of any law and repudiate any policies or practices associated with the "war on terror" paradigm which are inconsistent with international humanitarian and human rights law. In particular, it should renounce the use of torture and other proscribed interrogation techniques, extraordinary renditions, and secret and prolonged detention without charge or trial.

It should also conduct a transparent and comprehensive investigation into serious human rights and/or humanitarian law violations committed in the course of the “war on terror” and should take active steps to provide effective remedies to the victims of such abuses. The military detention centre at Guantánamo Bay should be closed in a human rights compliant manner and persons held there should be released or charged and tried in accordance with applicable international law standards.

Other countries that have been complicit in human rights violations arising from the war paradigm should similarly repudiate that behaviour and review legislation, policies and practices to prevent any such repetition in future.

6. Human rights compliant intelligence efforts

States should take steps to ensure that the work of intelligence agencies is fully compliant with human rights law. The powers of intelligence and law enforcement should be separated and intelligence agencies should not in principle have the power to arrest, detain and interrogate; if they are assigned such powers, they should be exercised in conformity with human rights standards.

Care should be taken to regulate by law the powers of intelligence agencies, the gathering of intelligence and the sharing of intelligence with other agencies. It is also imperative to establish independent oversight mechanisms. There should be precise rules on the protection of privacy and measures such as surveillance and interception of communications should require judicial authorisation.

States should provide effective remedies and reparation for human rights violations (including those carried out by their intelligence services) and conduct thorough and independent investigations into allegations of human rights violations, such as renditions and secret detentions or ill-treatment. The need to maintain secrecy of intelligence services’ activities must not deprive victims of access to an effective remedy and reparation.

7. The prevention of terrorism

Measures to prevent terrorism, especially when based on secret intelligence, must be mindful of the fundamental rights of the individuals concerned. Administrative detention, control orders, the freezing of assets and other actions on the basis of terrorist lists, must in the first place be necessary and proportionate, limited in time, non-discriminatory and subject to independent periodic review. Furthermore, those affected must have an effective and speedy opportunity to challenge the allegation before a judicial body.

States should repeal laws authorising administrative detention without charge or trial outside a genuine state of emergency. Even in the latter case,

States are reminded that the right to *habeas corpus* must be granted to all detainees and in all circumstances.

States should ensure that immigration law does not serve as a substitute for criminal law in its counter-terrorism efforts and should, in particular, reaffirm their commitment to the principle of *non-refoulement*. They should not rely on diplomatic assurances or other forms of non-binding agreements to transfer individuals when there is a real risk of serious human rights violations.

The UN Security Council, the Council of the European Union and other organisations using a listing system should urgently comply with basic standards of fairness and due process, including, as a minimum, allowing affected persons and organisations the right to know the grounds of listing and the right to challenge such listing in an adversarial hearing before a competent, independent and impartial body.

8. Reasserting the value of the criminal justice system

States should ensure that their criminal justice law, and the various agencies of the criminal justice system, are “fit for purpose” so that they can meet the long-term challenges posed by terrorism. Priority should be given to efforts to strengthen the capacity of ordinary law enforcement and judicial systems to enforce their existing criminal law and to improve international judicial cooperation. The international community should support such efforts, including by providing technical assistance, where needed, to strengthen States’ ability to investigate complex crimes within a framework of the rule of law.

9. Repudiation of serious human rights violations

The international community should repudiate the serious human rights and humanitarian law violations that have been committed worldwide by many States in the name of countering terrorism. Given the ambiguity that has arisen around previously uncontested truths, it is vital to reiterate that all forms of torture, cruel and inhuman or degrading treatment, extra-ordinary renditions, and secret detention are illegal and unacceptable.

Annex 1: The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism (The Berlin Declaration)

Adopted 28 August 2004

160 jurists, from all regions of the world, meeting as Commissioners, Honorary Members, National Sections and Affiliated Organisations at the International Commission of Jurists (ICJ) Biennial Conference of 27-29 August 2004, in Berlin, Germany, where it was founded 52 years ago, adopt the following Declaration:

The world faces a grave challenge to the rule of law and human rights. Previously well-established and accepted legal principles are being called into question in all regions of the world through ill-conceived responses to terrorism. Many of the achievements in the legal protection of human rights are under attack.

Terrorism poses a serious threat to human rights. The ICJ condemns terrorism and affirms that all States have an obligation to take effective measures against acts of terrorism. Under international law, States have the right and the duty to protect the security of all people.

Since September 2001 many States have adopted new counter-terrorism measures that are in breach of their international obligations. In some countries, the post-September 2001 climate of insecurity has been exploited to justify long-standing human rights violations carried out in the name of national security.

In adopting measures aimed at suppressing acts of terrorism, States must adhere strictly to the rule of law, including the core principles of criminal and international law and the specific standards and obligations of international human rights law, refugee law and, where applicable, humanitarian law. These principles, standards and obligations define the boundaries of permissible and legitimate State action against terrorism. The odious nature of terrorist acts cannot serve as a basis or pretext for States to disregard their international obligations, in particular in the protection of fundamental human rights.

A pervasive security-oriented discourse promotes the sacrifice of fundamental rights and freedoms in the name of eradicating terrorism. There is no conflict between the duty of States to protect the rights of persons threatened by terrorism and their responsibility to ensure that protecting security does not undermine other rights. On the contrary, safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the State. Both contemporary human rights and humanitarian law allow States a reasonably wide margin of flexibility to combat terrorism without contravening human rights and humanitarian legal obligations.

International and national efforts aimed at the realization of civil, cultural, economic, political and social rights of all persons without discrimination, and addressing political, economic and social exclusion, are themselves essential tools in preventing and eradicating terrorism.

Motivated by the same sense of purpose and urgency that accompanied its founding, and in the face of today's challenges, the ICJ rededicates itself to working to uphold the rule of law and human rights.

In view of recent grave developments, the ICJ affirms that in the suppression of terrorism, States must give full effect to the following principles:

1. **Duty to Protect:** All States have an obligation to respect and to ensure the fundamental rights and freedoms of persons within their jurisdiction, which includes any territory under their occupation or control. States must take measures to protect such persons, from acts of terrorism. To that end, counter-terrorism measures themselves must always be taken with strict regard to the principles of legality, necessity, proportionality and non-discrimination.
2. **Independent Judiciary:** In the development and implementation of counter-terrorism measures, States have an obligation to guarantee the independence of the judiciary and its role in reviewing State conduct. Governments may not interfere with the judicial process or undermine the integrity of judicial decisions, with which they must comply.
3. **Principles of Criminal Law:** States should avoid the abuse of counter-terrorism measures by ensuring that persons suspected of involvement in terrorist acts are only charged with crimes that are strictly defined by law, in conformity with the principle of legality (*nullum crimen sine lege*). States may not apply criminal law retroactively. They may not criminalise the lawful exercise of fundamental rights and freedoms. Criminal responsibility for acts of terrorism must be individual, not collective. In combating terrorism, States should apply and where necessary adapt existing criminal laws rather than create new, broadly defined offences or resort to extreme administrative measures, especially those involving deprivation of liberty.
4. **Derogations:** States must not suspend rights which are non-derogable under treaty or customary law. States must ensure that any derogation from a right subject to derogation during an emergency is temporary, strictly necessary and proportionate to meet a specific threat and does not discriminate on the grounds of race, colour, gender, sexual orientation, religion, language, political or other opinion, national, social or ethnic origin, property, birth or other status.

- 5. Peremptory norms:** States must observe at all times and in all circumstances the prohibition against torture and cruel, inhuman or degrading treatment or punishment. Acts in contravention of this and other peremptory norms of international human rights law, including extrajudicial execution and enforced disappearance, can never be justified. Whenever such acts occur, they must be effectively investigated without delay, and those responsible for their commission must be brought promptly to justice.
- 6. Deprivation of liberty:** States may never detain any person secretly or incommunicado and must maintain a register of all detainees. They must provide all persons deprived of their liberty, wherever they are detained, prompt access to lawyers, family members and medical personnel. States have the duty to ensure that all detainees are informed of the reasons for arrest and any charges and evidence against them and are brought promptly before a court. All detainees have a right to habeas corpus or equivalent judicial procedures at all times and in all circumstances, to challenge the lawfulness of their detention. Administrative detention must remain an exceptional measure, be strictly time-limited and be subject to frequent and regular judicial supervision.
- 7. Fair Trial:** States must ensure, at all times and in all circumstances, that alleged offenders are tried only by an independent and impartial tribunal established by law and that they are accorded full fair trial guarantees, including the presumption of innocence, the right to test evidence, rights of defence, especially the right to effective legal counsel, and the right of judicial appeal. States must ensure that accused civilians are investigated by civilian authorities and tried by civilian courts and not by military tribunals. Evidence obtained by torture, or other means which constitute a serious violation of human rights against a defendant or third party, is never admissible and cannot be relied on in any proceedings. Judges trying and lawyers defending those accused of terrorist offences must be able to perform their professional functions without intimidation, hindrance, harassment or improper interference.
- 8. Fundamental Rights and Freedoms:** In the implementation of counter-terrorism measures, States must respect and safeguard fundamental rights and freedoms, including freedom of expression, religion, conscience or belief, association, and assembly, and the peaceful pursuit of the right to self-determination; as well as the right to privacy, which is of particular concern in the sphere of intelligence gathering and dissemination. All restrictions on fundamental rights and freedoms must be necessary and proportionate.
- 9. Remedy and reparation:** States must ensure that any person adversely affected by counter-terrorism measures of a State, or of a non-state actor whose conduct is supported or condoned by the State, has an effective remedy and reparation and that those responsible for serious human rights

violations are held accountable before a court of law. An independent authority should be empowered to monitor counter-terrorism measures.

10. ***Non-refoulement:*** States may not expel, return, transfer or extradite, a person suspected or convicted of acts of terrorism to a State where there is a real risk that the person would be subjected to a serious violation of human rights, including torture or cruel, inhuman or degrading treatment or punishment, enforced disappearance, extrajudicial execution, or a manifestly unfair trial; or be subject to the death penalty.
11. **Complementarity of humanitarian law:** During times of armed conflict and situations of occupation States must apply and respect the rules and principles of both international humanitarian law and human rights law. These legal regimes are complementary and mutually reinforcing.

Commitment to Act

- The ICJ, including its Commissioners, Honorary Members, National Sections and Affiliated Organisations, consistent with their professional obligations, will work singly and collectively to monitor counter-terrorism measures and assess their compatibility with the rule of law and human rights.
- The ICJ will challenge excessive counter-terrorism legislation and measures at the national level through advocacy and litigation and will work towards the promotion of policy options fully consistent with international human rights law.
- The ICJ will work to ensure that counter-terrorism measures, programs and plans of action of global and regional organisations comply with existing international human rights obligations.
- The ICJ will advocate the establishment of monitoring mechanisms by relevant intergovernmental and national institutions to help ensure that domestic counter-terrorism measures comply with international norms and human rights obligations and the rule of law, as called for in the joint NGO Declaration on the Need for an International Mechanism to Monitor Human Rights and Counter-Terrorism adopted at the ICJ Conference of 23-24 October 2003 in Geneva.
- The ICJ will invite and work with jurists and human rights organisations from around the world to join in these efforts.
- The judiciary and legal profession have a particularly heavy responsibility during times of crisis to ensure that rights are protected. The ICJ calls on all

jurists to act to uphold the rule of law and human rights while countering terrorism:

- **Lawyers:** Members of the legal profession and bar associations should express themselves publicly and employ their full professional capacities to prevent the adoption and implementation of unacceptable counter-terrorism measures. They should vigorously pursue domestic and, where available, international legal remedies to challenge counter-terrorism laws and practices in violation of international human rights standards. Lawyers have a mandate to defend persons suspected or accused of responsibility for terrorist acts.
- **Prosecutors:** In addition to working to bring to justice those responsible for terrorist acts, prosecutors should also uphold human rights and the rule of law in the performance of their professional duties, in accordance with the principles set out above. They should refuse to use evidence obtained by methods involving a serious violation of a suspect's human rights and should take all necessary steps to ensure that those responsible for using such methods are brought to justice. Prosecutors have a responsibility to tackle impunity by prosecuting persons responsible for serious human rights violations committed while countering terrorism and to seek remedy and reparation for victims of such violations.
- **The Judiciary:** The judiciary is the protector of fundamental rights and freedoms and the rule of law and the guarantor of human rights in the fight against terrorism. In trying those accused of acts of terrorism, judges should ensure the proper administration of justice in conformity with international standards of independence, due process and fair trial. Judges play a primary role in ensuring that national laws and the acts of the executive relating to counter-terrorism conform to international human rights standards, including through judicial consideration of the constitutionality and legality of such norms and acts. In the development of jurisprudence, judges should wherever possible apply international standards relating to the administration of justice and human rights. Judges should ensure that judicial procedures aimed at human rights protection, such as habeas corpus, are implemented.

Annex 2: List of National and Sub-regional Hearings

1. Colombia National Hearing

- Bogotá, 8 – 11 February 2006
- Co-organised with the Colombian Commission of Jurists (CCJ), hosted by the Santo Tomás University in Bogotá
- Panel members attending the Hearing: Raúl Zaffaroni, Robert Goldman and Stefan Trechsel

2. East Africa Sub-regional Hearing (Kenya, Tanzania and Uganda)

- Nairobi, 27 – 28 February 2006
- Co-organised with the Kenyan Section of the ICJ and with the support of the East African Law Society and the German Embassy in Kenya
- Panel members attending the Hearing: Arthur Chaskalson and Stefan Trechsel

3. Australia National Hearing

- Sydney and Canberra, 14 -17 March 2006
- Co-organised by the Australian Section of the ICJ
- Panel members attending the Hearing: Vitit Muntarbhorn and Hina Jilani

4. Northern Ireland Hearing

- Belfast, 19 – 21 April 2006
- Co-organised with the Committee on the Administration of Justice (CAJ)
- Panel members attending the Hearing: Arthur Chaskalson and Raúl Zaffaroni

5. United Kingdom National Hearing

- London, 24 – 26 April 2006
- Co-organised with JUSTICE, the British Section of the ICJ and hosted by Freshfields Bruckhaus Deringer
- Panel members attending the Hearing: Arthur Chaskalson, Robert Goldman, Hina Jilani, Vitit Muntarbhorn and Raúl Zaffaroni

6. North Africa Sub-regional Hearing (Morocco, Tunisia and Algeria)

- Rabat, 4 – 6 July 2006
- Co-organised with the Moroccan Organisation for Human Rights (OMDH), an affiliate of the ICJ
- Panel members attending the Hearing: Georges Abi-Saab and Stefan Trechsel

7. United States of America National Hearing

- Washington D.C., 6 – 14 September 2006
- Hosted by the American University, Washington College of Law
- Panel members attending the Hearing: Mary Robinson, Hina Jilani, Georges Abi-Saab, Arthur Chaskalson, Robert Goldman and Vitit Muntarbhorn

8. Southern Cone Sub-regional Hearing (Argentina, Brazil, Chile, Paraguay and Uruguay)

- Buenos Aires, 31 October – 3 November 2006
- Co-organised with the Centre for Legal and Social Studies (CELS), an affiliate of the ICJ, and hosted by the Law School of the University of Buenos Aires
- Panel members attending the Hearing: Raúl Zaffaroni, Robert Goldman and Stefan Trechsel

9. South East Asia Sub-regional Hearing (Indonesia, Malaysia, Thailand and the Philippines)

- Jakarta, 4 – 6 December 2006
- Co-organised with Imparsial (Indonesia)
- Panel members attending the Hearing: Raúl Zaffaroni and Vitit Muntarbhorn

10. Russian Federation National Hearing

- Moscow, 29 – 31 January 2007
- Co-organised with the ad hoc Steering Committee of Russian NGOs, including the Independent Council for Legal Expertise, an ICJ affiliate, the Center for the Development of Democracy and Human Rights, “Memorial” Human Rights

Center, Center “Demos”, Nizhny Novgorod Committee against Torture, and Moscow Helsinki Group

- Panel members attending the Hearing: Mary Robinson, Hina Jilani and Stefan Trechsel

11. South Asia Sub-regional Hearing (Bangladesh, India, the Maldives, Nepal and Sri Lanka)

- New Delhi, 26 February – 2 March 2007
- Co-organised with the Institute for Social Sciences (ISS)
- Panel members attending the Hearing: Arthur Chaskalson and Vitit Muntarbhorn

12. Pakistan National Hearing

- Islamabad, 5 – 7 March 2007
- Co-organised with the Human Rights Commission of Pakistan (PHRC), an affiliate of the ICJ
- Panel members attending the Hearing: Arthur Chaskalson and Vitit Muntarbhorn

13. Canada National Hearing

- Toronto and Ottawa, 24 – 26 April 2007
- Co-organised with the Canadian Section of the ICJ
- Panel members attending the Hearing: Robert Goldman and Arthur Chaskalson

14. Middle East Sub-regional Hearing (Egypt, Jordan, Syria and Yemen)

- Cairo, 4 – 6 June 2007
- Co-organised with the Arab Center for the Independence of Judges and the Legal Profession (ACIJLP), an affiliate of the ICJ
- Panel members attending the Hearing: Georges Abi-Saab and Vitit Muntarbhorn

15. EU and national experiences, Sub-regional Hearing

- Brussels, 2 – 4 July 2007
- In cooperation with the European Policy Center (EPC) and hosted by Freshfields Bruckhaus Deringer and with the support of the Dutch Section of the ICJ
- Panel members attending the Hearing: Arthur Chaskalson, Robert Goldman, Hina Jilani, Vitit Muntarbhorn and Raúl Zaffaroni

16. Israel and the Palestinian Occupied Territory

- Jerusalem, Gaza and Ramallah, 20 – 24 August 2007
- Co-organised with the Palestinian Centre for Human Rights, affiliate of the ICJ, and Al Haq, ICJ affiliate and the Association for the Civil Rights in Israel (ACRI)
- Panel members attending the Hearing: Robert Goldman and Vitit Muntarbhorn

17. Other meetings

- United Nations Headquarters, New York, September 2006
- International Committee of the Red Cross (ICRC), Geneva, October 2007

Annex 3: List of participants at public Hearings

1. Colombia National Hearing

Gloria Amparo Suárez, Female Popular Organization; Luz Estella Aponte, “Reiniciar” corporation; Representative, National Association of Hospital Workers; Jorge Mario Eastman, Vice-Minister of Defense of Colombia; Alvaro Echeverri Uriburu, Dean, School of Law, University of Santo Tomás; María Victoria Fallón, Interdisciplinary Human Rights Group of Medellín; Gloria Florez, Alternative Social Promotion Association; Gustavo Gallón Giraldo, Director, Colombian Commission of Jurists; Representative, Workers’ Trade-Union; David Martínez, Colombia – Europe – United States Coordination; Representative, Life and Peace Community of Castillo; Representative, General Labor Confederation; Representative, Colombia’s Workers Center; Hollman Morris, Journalist; Orlando Pacheco, former Public Prosecutor; Representatives, Displaced People’s Organization of “El Salado – Bolívar”; Rodrigo Uprimny Yepes, Center of Studies in Law, Justice and Society; Representative, Organization “Cavida”; Reinaldo Villalba, José Alvear Restrepo Lawyers’ Collective; Representative, “Kankuamo” indigenous group.

2. East Africa Sub-regional Hearing

Kenya

Khelef Khalifa, Commissioner, Kenya National Commission on Human Rights; Mao Tse Tung Maobe, Advocate, High Court of Kenya; Samuel Mbithi, Executive Director, Kenyan Section of the ICJ; Kathurima M’Inoti, Chairperson, Kenya Law Reform Commission, ICJ Commissioner; Evans Monari, Law Society of Kenya; Wilfred Nderitu, Chairman, Kenyan Section of the ICJ; Richard Ogesare Ogetti, National Counter Terrorism Center; Edris Omondi, Programme Officer, Centre for Governance and Development; Stephen Ouma, Kenya Human Rights Commission.

Tanzania

Justice Robert Kisanga, President, Commission for Human Rights and Good Governance; Joseph Ndunguru, Principal State Attorney, Office of the Director of Public Prosecutions; Haroub Othman, Zanzibar Legal Services Centre; Charles Rwechungura, President, Tanganyika Law Society; Harold Sungusia, Legal and Human Rights Center.

Uganda

Billy Kainamura, Acting Director, Legal Advisory Services, Ministry of Justice and Constitutional Affairs; Simon Peter Kinobe Mutegeki, Foundation for Human Rights Initiative; Henry Onoria, Senior lecturer, Faculty of Law, Makerere University; Margaret Sekaggya, Chairperson, Ugandan National Human Rights Commission;

Moses SSerwanga, News Editor, Monitor Newspaper; Patrick Tumwiine, Human Rights Network.

Regional

Donald Deya, Chief Executive Officer, East Africa Law Society; George Kegoro, Institute for Security Studies.

3. Australia National Hearing

Ibrahim Abraham, Castan Centre for Human Rights Law, Monash University; Robin Banks, Chief Executive Officer, Public Interest Advocacy Centre; Simeon Beckett, President, Australian Lawyers for Human Rights; David Bernie, Vice-President, New South Wales Council for Civil Liberties; Anish Bhasin, Executive Officer, New South Wales Council for Civil Liberties; Martin Bibley, Assistant Secretary, New South Wales Council for Civil Liberties; Phillip Boulten SC, Barrister; Nicholas Carney, Human Rights Act for Australia Campaign, New Matilda; John von Doussa, Director, Human Rights and Equal Opportunity Commission (now renamed as Australian Human Rights Commission); Howard Glenn, Executive Director, Rights Australia Inc.; Jenny Hocking, Deputy Director, National Centre for Australian Studies, and Associate Professor, Monash University; David Kinley, Professor of Human Rights Law, Sydney University; Craig Lanahan, Deputy Director, Human Rights and Equal Opportunity Commission; Peter Lange, Barrister; Renee Leon, Chief Executive Officer Department of Justice and Community Safety, Australian Capital Territory (ACT); Andrew Lynch, Terrorism and Law Project, Gilbert + Tobin Centre of Public Law, University of New South Wales; John North, President, Law Council of Australia; Ben Saul, Terrorism and Law Project, University of New South Wales, Gilbert + Tobin Centre of Public Law; Rebecca Smith, Robert Toner SC, Katie Wood, Amnesty International Australia; George Williams, Terrorism and Law Project, Gilbert + Tobin Centre of Public Law, University of New South Wales; Pauline Wright, Vice-President, New South Wales Council for Civil Liberties.

4. Northern Ireland Hearing

Chris Anderson; Maggie Beirne, Director, Committee on the Administration of Justice (CAJ); Mary and Martin Bogues, brother-in-law of Patrick Shanaghan, victim; Pat Conway, Assistant Director, Northern Ireland Association of the Care and Resettlement of Offenders; Jim Deery, Ashton Community Trust; Brice Dickson, Queen's University, Belfast; Fiona Doherty, Chairperson, CAJ; Brenda Downes, wife of a victim and member of Relatives for Justice; Pádraigin Drinan, Solicitor; Tom Duncan, Commissioner, Northern Ireland Human Rights Commission (NIHRC); Terry Enright, former internee and father of a victim; Dermot, Geraldine and Michael Finucane – brother, widow and son of human rights solicitor Patrick Finucane; Martin Flaherty, Chair, Committee on International Human Rights, Association of the Bar of the City of New York; Aideen Gilmore, Research and Policy Officer, CAJ; Tom Hadden, Law School, Queen's University Belfast; Jean Hegarty, brother of a

victim of Bloody Sunday; Paddy Hillyard, sociologist, Queen’s University Belfast; Ann Hope, Commissioner, NIHRC; Gerry Hyland, Solicitor, Madden & Finucane Solicitors; Theresa and Hugh Jordan, parents of a victim; John Kelly, brother of a victim of Bloody Sunday; Roisin Kelly, sister of a victim; John Kennedy, Barrister, Executive Board Member, Irish Council for Civil Liberties (Republic of Ireland); Sean Lennon, former internee; William Loughran, brother of a victim; Mrs Magee and Eunan Magee, mother and brother of murdered human rights solicitor Rosemary Nelson; Mairtin Mag Uidhir; Philip McCullough, former member of the Irish Republican Army (IRA), former internee; Kieran McEvoy, School of Law, Queen’s University Belfast and Vice-Chair, CAJ; Paul McIlwhaine, father of victim; Eamann Mc Menamin, former solicitor representing detainees; Bernie McQuillan, sister of Rosemary Nelson; Martin Meehan, former detainee and internee; Maggie O’Connor, solicitor for CAJ; Paul O’Connor, Pat Finucane Centre; Ciarán Ó Maoláin, Head of Legal Services, Policy and Research, Northern Ireland Human Rights Commission; Eamonn O’Neill, Commissioner, NIHRC; Mary O’Rawe, Transitional Justice Institute, University of Ulster; Mike Posner, Human Rights First; Clara Reilly, Chairperson, Relatives for Justice; Paddy Sloan, Chief Executive, NIHRC; Alan Steel, uncle of a victim; Mark Sykes, brother-in-law of a victim; Mark Thompson, Director, Relatives for Justice; Jane Winter, British Irish Rights Watch; David Wright, father of a victim.

5. United Kingdom National Hearing

Nicholas Blake QC, Matrix Chambers; Tony Bunyan, Director, Statewatch; Lord Carlile of Berriew QC, Independent Reviewer of Terrorism Legislation; Shami Chakrabarti, Director, Liberty; Louise Christian, Christian Khan law firm; Charles Clarke MP, Secretary of State for the Home Department, UK government; Carla Ferstman, REDRESS; Anne Gray, Campaign Against Criminalizing Communities; Julian Groombridge, Christian Khan law firm; Stephen Grosz, Bindman & Partners; Alison Harvey, Immigration Law Practitioners Association; Rebecca Hickman, Mayor of London’s Office; Max Hill, Bar Council; Ken Jones, President, Association of Chief Police Officers and Chief Constable of Sussex Police; Nancy Kelley, Refugee Council; Alexandra Marks, Law Society; Peter Noorlander, Article 19; Gareth Pierce, Birnberg Pierce law firm; Asim Qureshi, Cagedprisoners.com; Phil Shiner, Public Interest Lawyers; Khalid Sofi, Muslim Council of Britain; Keir Starmer QC, Doughty Street Chambers; Ben Ward, Human Rights Watch; Livio Zilli, Amnesty International.

6. North Africa Sub-regional Hearing

Algeria

Mohamed Nedjem-Eddine Boudjakdji, Lawyer, “Association Djazairouna”; Soufiane Chouiter, Lawyer, “SOS Disparus”; Fayçal Metaoui, Journalist; Amine Nouredine, Lawyer, Algerian League for Human Rights; Amine Sidhoum, Lawyer; Houcine Kheldoun, National Consultative Commission for Promotion and Protection of Human Rights (CNCPPDH).

Morocco

Lahbib Belkouch, Lawyer, President, Center for the Study of Human Rights and Democracy; Abdelaziz Bennani, Lawyer; Ahmed Chawki Benyoub, Lawyer, Advisory Council on Human Rights (CCDH); Amina Bouayach, President, Moroccan Organisation for Human Rights; Mohamed M'hifid; Abdelaziz Nouaydi, Lawyer and President, Adala Association; Mohamed Mustapha Raissouni, Lawyer, former President, Association of the Bars of Morocco; Representative, Deputy Prosecutor, Ministry of Justice; Abdelfatah Zahrach, Lawyer, Moroccan Association for Human Rights.

Tunisia

Abderraouf Ayadi, Lawyer; Samir Dilo, Lawyer; Lotfy Hajji, Journalist; Radhia Nasraoui, Lawyer, Association against Torture in Tunisia; Mokhtar Trifi, President, Tunisian League for Human Rights.

7. United States of America National Hearing

Floyd Abrams, Partner, Cahill Gordon & Reindel LLP; Baher Azmy, Associate Professor, Seton Hall Law School; Ann Beeson, Associate Legal Director, Human Rights Program and National Security Program, American Civil Liberties Union; Bradford A. Berenson, Partner, Sidley Austin LLP; Santiago Cantón, Executive Secretary, Inter-American Commission on Human Rights; Douglas Cassel, Professor of Law, University of Notre-Dame; James P. Cullen, Esq., Brigadier General, retired, U.S. Army Judge Advocate General's Corps; Jennifer Daskal, U.S. Advocacy Director, Human Rights Watch; Mary Fetchet, Founding Director, Voices of September 11th; Eugene Fidell, President, National Institute of Military Justice; Donald Goodrich, Chairman of the Board, Families of September 11th; Linda Gustitus, National Religious Campaign Against Torture; Jonathan Hafetz, Counsel, Brennan Center for Justice, New York University School of Law; Morton H. Halperin, Director of U.S. Advocacy, Open Society Institute; Scott Horton, Chairman, Committee on International Law, Association of the Bar of the City of the New York Bar Association; Jayne Huckerby, Research Director, Center for Human Rights and Global Justice, New York University School of Law; John D. Hutson, Rear Admiral, retired, US Navy Judge Advocate General's Corps, and Dean and President of the Franklin Pierce Law Center; J. Bradley Jansen, Executive Director, Center for Financial Privacy and Human Rights; David R. Johnson, Medical Doctor, Center for Victims of Torture; Neal Katyal, Professor of Law, Georgetown University; Alan Keller, Director, Bellevue/New York University Program for Survivors of Torture; Eric L. Lewis, Member of the Board of Directors, Global Rights; Joanne Mariner, Director, Terrorism/Counter-terrorism Programme, Human Rights Watch; Kate Martin, Executive Director, Center for National Security Studies; Karen J. Mathis, President, American Bar Association; Tom Melia, Deputy Executive Director, Freedom House; George B. Mickum, Keller and Heckman LLP; Jumana Musa, Advocacy Director for Domestic Human Rights and International Justice, Amnesty International USA; Robert M. O'Neil, Professor of Law, Director, Thomas Jefferson Center for the

Protection of Free Expression and member of the American Association of University Professors; Anant P. Raut, Associate, Weil, Gotshal & Manges LLP; Stephen Rickard, Director, Washington Office, Open Society Institute; Gabor Rona, International Legal Director, Human Rights First; Mark Rotenberg, Executive Director, Electronic Privacy Information Centre; Kenneth Roth, Executive Director, Human Rights Watch; Leonard Rubenstein, Executive Director, Physicians for Human Rights; Karin D. Ryan, Senior Advisor for Human Rights, The Carter Center; Kareem W. Shora, Director, Legal Department & Policy, American-Arab Anti-Discrimination Committee; Frank Smyth, Washington D.C. Representative, Committee to Protect Journalists; Steven Watt, Staff Attorney, Human Rights Program, American Civil Liberties Union; Adele Welty, 11th September Families for Peaceful Tomorrows; Richard Wilson, Director of the International Human Rights Law Clinic, Washington College of Law, American University.

8. Southern Cone Sub-regional Hearing

Argentina

Estella Barnes de Carlotto, Grandmothers of Plaza de Mayo; Haydée Birgin, Lawyer; Gastón Chillier, Executive Director, Center for Legal and Social Studies; Luis Fondebriber, Argentine Team of Forensic Anthropology; Patricia Funes, Provincial Commission for Memory; Manuel Garrido, General Prosecutor for Administrative Investigations, Anticorruption Office, Ministry of Justice, Security and Human Rights; Damián Loretti, Vice-Dean, Social Sciences School, University of Buenos Aires; Rodolfo Mattarollo, Under-Secretary of Human Rights, Ministry of Justice, Security and Human Rights; Marta Ocampo de Vázquez, Mothers of Plaza de Mayo; Hugo Omar Cañón, General Prosecutor before the Federal Chamber of Appeals of Bahía Blanca; Horacio Ravenna, Vice-president, Permanent Assembly for Human Rights.

Uruguay

José Luis González, Lawyer; Felipe Michelini, Under-Secretary of Education and Culture; Jorge Pan and Martín Sbrocca, Institute for Legal and Social Studies.

Chile

Alberto Espinoza, Foundation of Social Assistance of Christian Churches; Sergio Fuenzalida Bascuñán, Center for Public Policy and Indigenous Rights, ARCIS University; Roberto Garretón, Lawyer; Hiram Villagra Castro, Corporation for the Promotion and Defense of People's Rights.

Paraguay

Martín Almada, Lawyer; Juan Manuel Benitez Florentín, Vice-President, Truth and Justice Commission; Soledad Villagra, Lawyer.

Brazil

Dalmo de Abreu Dallari, Professor of Law, University of São Paulo.

9. South East Asia Sub-regional Hearing

Indonesia

Hamid Awaluddin, Minister for Justice and Human Rights; Taufik Basari, Director, Legal Aid and Advocacy, Indonesian Legal Aid Foundation; Afridal Darmi – Banda Aceh; J. Budi Hernawan OFM, Director, Office for Justice and Peace Jayapura; Sidney Jones, South East Asia Director, International Crisis Group; Mufti Makaanim A., Federal Secretary, Commission for Disappearances and Victims of Violence (KONTRAS); Todung Mulya Lubis, Chairman, Indonesian Human Rights Monitor (Imparsial); Bhatara Ibnu Reza, Imparsial; Andi Widjadjanto, Center for Global Civil Society Studies (Pacivis), University of Indonesia.

Malaysia

Raja Aziz Addruse, Lawyer; Edmund Bon, Suara Rakyat Malaysia (SUARAM) and Malaysia Bar Council; Yean Yoke Heng, Deputy Director-General, Southeast Asian Regional Centre for Counter Terrorism, Ministry of Foreign Affairs, Government of Malaysia; Malik Imtiaz Sarwar, President, National Human Rights Society (HAKAM); Dato' Muhammad Shafee Abdullah, Human Rights Commission of Malaysia (SUHAKAM).

Thailand

Sittipong Chantrawirod, Lawyers Council of Thailand; Somchai Homlaor, Lawyers Council of Thailand; Wasan Panich, National Human Rights Commissioner; Waemahedee Waedaoh, Member, National Legislative Assembly.

The Philippines

Ricardo R. Blancaflor, Under-Secretary, Office of the President of the Philippines; Senator Madrigal, Member of Parliament; Zainudin S. Malang, Lawyer, Bangsamoro Center for Law & Policy; Harry L. Roque, Professor of Law, Director, Institute of International Legal Studies; Geronimo L. Sy, State Prosecutor, Department of Justice.

10. Russian Federation National Hearing

Malika Abdulkerimova; Jabrail Abubakarov, Lawyer; Leila Arapkhanova; Usam Baisaev, Levada Centre; Stanislav Dmitrievsky, Chair, Russian-Chechen Friendship Society in Europe; Brigitte Dufour, Deputy Director, International Helsinki Federation; Yuri Dzhibladze, President, Center for the Development of Democracy and Human Rights; Natalya Estemirova, Member of the Commission for Control of Detention

Centres and Other Penitentiary Institutions in the Republic of Chechnya; Pavel Finogenov, Member of the Nord-Ost Committee; Svetlana Gannushkina, Chair, Civic Assistance Committee; Mars Gayanov; Allison Gill, Director, Russian Federation Office, Human Rights Watch; Alexander Gurov, Member of the Committee on Security, State Duma; Dokka Itslaev, Lawyer, Memorial Human Rights Centre, Urus-Martan, Chechnya; Igor Kalyapin, Director, Committee Against Torture, Nizhny Novgorod; Ella Kesaeva, Chair of “Voice of Beslan” Committee, North Ossetia; Vil’ Kikot’, Professor, Moscow State Juridical Academy; Irina Komissarova, Lawyer, Nalchik, Kabardino-Balkariya; Kirill Koroteev, Lawyer, Memorial Human Rights Centre; Alexei Levinson, Levada Centre; Lev Levinson, Human Rights Institute; Marina Litvinovitch, Editor-in-chief, website “Truth of Beslan”; Tania Lokshina, Director, Demos Center; Alexei Malashenko, Professor, Moscow State Institute of International Relations, and Member of the Scientific Council, Moscow Carnegie Center; Dmitri Milovidov, Member, Nord-Ost Committee; Karinna Moskalenko, Lawyer, Director, Centre for International Protection; Taita Murtazalieva; Sergey Nasonov, Assistant Professor, Moscow State Juridical Academy; Sergey Nikitin, Amnesty International; Oleg Orlov, Chair of the Council, Memorial Human Rights Centre; Mara Polyakova, Chair, Independent Council of Legal Expertise, Member of the Council of the President of the Russian Federation on Assistance to the Development of Civil Society Institutions and Human Rights; Andrey Richter, Director, “Law and Media” Centre; Elena Ryabinina, Civic Assistance Committee; Ilgiz Shaidullin; Alexei Simonov, President, Glasnost Defense Foundation; Olga Trusevitch, Memorial Human Rights Centre; Bekhan Velkhieva; Alexander Verkhovsky, Director, SOVA Center for Information and Analysis; Lidia Yusupova, Lawyer, Memorial Human Rights Centre, Ingushetia.

11. South Asia Sub-regional Hearing

India

Lokedra Arabam, Executive Chairperson, United Nations Association, Manipur; S. Bhattacharjee, President, People’s Union for Civil Liberties, Jharkhand; Colin Gonsalves, Senior Advocate, Executive Director, Human Rights Law Network; Vrinda Grover, Supreme Court lawyer; S.V.M Gtripathi, former Director General of Police and member of the State Human Rights Commission, Uttar Pradesh; A R. Hanjura, General Secretary, Yateem Trust, Jammu & Kashmir; Chaman Lal, former Special Rapporteur, National Human Rights Commission and former Director General of Police; Babloo Loitongbam, Executive Director, Human Rights Alert, Manipur; Fali S. Nariman, Senior Advocate of the Supreme Court and Honorary Member of the ICJ; Najrees Nawab, Lawyer, Jammu & Kashmir; Rohit Prajapati, Documentation & Study Centre for Action, Gujarat; Pushkar Raj, Secretary, People’s Union for Civil Liberties; Rajendra Sail, President, People’s Union for Civil Liberties, Chhattisgarh State Unit, Chhattisgarh; Vikram Singh, Indian Police Service, Addl. Director General, Central Industrial Security Force; Rajinder Sachar, former Chief Justice, Delhi High Court; Sankar Sen, Senior Fellow, Institute of Social Sciences and former Director General, National Human Rights Commission; Soli Sorabjee, Senior Advocate of the Supreme

Court and former Attorney General; J.S.Verma, Former Chief Justice of India and former Chairperson, National Human Rights Commission.

Nepal

Yak Raj Bhandari, Legal Adviser, Communist Party of Nepal (Maoists); Chet Nath Ghimire, Deputy Attorney General, Attorney General's Office; Satish Kharel, Advocate, former Secretary General, Nepal Bar Association; Bishwa Kanta Mainali, President, Nepal Bar Association; Mandira Sharma, Secretary General, Advocacy Forum; Govinda Thapa, former Assistant Inspector General of Police.

Sri Lanka

Rohan Edrisinha, Director, Legal and Constitutional Unit, Centre for Policy Alternatives; Desmond Fernando, Barrister, Honorary Member of the ICJ; Ahilan Kadirgamar; K.S. Ratnavale, Lawyer and Governor, Centre for Human Rights and Development.

Bangladesh

Mubina Asaf, Assistant Attorney General, Attorney General's Office; Sumi Khan, Regional Editor, Weekly Ekattor; Farhad Mazhar, Odhikar.

The Maldives

Aishath Bisham, Senior State Attorney, Attorney General's Office; Husnu Al Suood, Lawyer and co-founder, Maldives Centre for Human Rights & Democracy.

Regional

Tessa Boyd-Caine, Commonwealth Heads of Government Meeting (CHOGM) Coordinator, and Swati Mehta, Project Officer, Commonwealth Human Rights Initiative; Rhoderick Chalmers, Deputy South Asia Project Director, International Crisis Group.

12. Pakistan National Hearing

Tahira Abdullah, Women's Rights and development activist, Islamabad, Abdul Latif Abidi, Advocate of the Supreme Court and Former Member of Parliament, Peshawar, North-West Frontier Province (NWFP); Ishtiaq Ahmed, Professor, International Relations Department, Quaid-i-Azam University, Islamabad; Kamran Arif, Advocate of the Supreme Court, Peshawar, NWFP; Farhatullah Babar, Former Senator, NWFP; Ali Hasan Dayan, South Asia Researcher, Human Rights Watch; Ajaz Ahmed Durrani, Senior Coordinator, Civil Society Network, Strengthening Participatory Organisations, Peshawar, NWFP; Ahmed Nazir Warraich, Advocate, and Lecturer in law, University College Lahore; Rahimullah Yusufzai, Resident Editor, The News, Peshawar, NWFP; Syed Iqbal Haider, Advocate and Secretary General, Human Rights Commission of

Pakistan; Mr Ijaz, Waziristan; Tahir Mohammed Khan, Former Deputy Chairperson of the Senate and former Minister of Information, Quetta, Balochistan; Shahid Kamal Khan, Advocate, Islamabad; Sher Mohammad Khan, Advocate, Swat, NWFP; Wali Khan, Advocate, Dara Adamkhel Agency, NWFP; Muhammad Asghar, brother of the disappeared Siddique Akbar, Multan, Punjab; Asia Baig, daughter of the disappeared Hameed Baig, Defence of Human Rights, Rawalpindi, Punjab; Ghulam Farooq, son of the disappeared Ali Asghar Bangalzai, Quetta, Balochistan; Qazi Hafeezullah, father of the disappeared Ubaidullah, Multan, Punjab; Afzal Javed, Advocate, brother of the disappeared Atif Javed, Mandi Bahauddin; Abdul Karim, Waziristan (NWFP); Rabia Khalid, daughter of a detained human rights activist Khalid Khawaja, Islamabad; Zainab Khatoun, mother of the disappeared Faisal Faraz, Lahore, Punjab; Amina Masood Janjua, wife of the disappeared Masood Ahmed Janjua, and Chairperson, Defence of Human Rights, Rawalpindi, Punjab; Mohammad Nasir, uncle of the disappeared Abdul Basit, Faisalabad, Punjab; Abid Raza, a victim of disappearance (recently released), Gujrat, Punjab; Ms Shamsunnisaa, mother of Atique-ur-Rehman, Abbotabad, NWFP; Mohammad Tariq, brother of Aslam Zahid, a victim of disappearance, Sialkot, Punjab; Mr Tariq, a victim of disappearance (recently released), Gujranwala, Punjab.

13. Canada National Hearing

Sharryn Aiken, Professor, Faculty of Law, Queen's University; Warren Allmand, International Civil Liberties Monitoring Group; Nehal Bhuta, Human Rights Watch; Alan Borovoy, Canadian Civil Liberties Association; Raoul Boulakia, Lawyer; Mohamed Boudjenane, Canadian Arab Federation; Michael Byers, Professor, University of British Columbia; Terrance Carter, Carters Professional Corporation; Adil Charkaoui; Arthur Cockfield, Professor, Faculty of Law, Queens University; Paul Copeland, Lawyer; Janet Dench, Canadian Council for Refugees; Robert Diab, University of British Columbia; Johanne Doyon, Lawyer, Québec Immigration Lawyers Association (AQAADI); David Dyzenhaus, Professor, Faculty of Law, University of Toronto; Salam Elmenyawi, Muslim Council of Montreal; Martine Eloy, League of the Rights and Freedoms; Lawrence Greenspon, Lawyer; Julia Hall, Human Rights Watch; Hilary Homes, Amnesty International; Valérie Jolicoeur, Lawyer, AQAADI; Faisal Kutty, Canadian Council on American Islamic Relations; Nicole LaViolette, Professor, Faculty of Law, University of Ottawa; Audrey Macklin, Professor, Faculty of Law, University of Toronto; D. Mc Dermot, Canadian Unitarians for Social Justice; Errol Mendes, Professor, Faculty of Law, University of Ottawa; Ziyaad Mia, Canadian Muslim Lawyers Association; Dieter Misgeld, Professor Emeritus, University of Toronto; Patrick Monahan, Dean, Osgoode Hall Law School, York University; Alex Neve, Amnesty International; Kent Roach, Professor, Faculty of Law, University of Toronto; Philippe Robert de Massy, League of the Rights and Freedoms; Nathalie Des Rosiers, Dean, Faculty of Law, University of Ottawa; Jean-Louis Roy, Rights and Democracy; Craig Scott, Professor, Osgoode Hall Law School, York University; Bob Stevenson, Canadian Unitarians for Social Justice; Hamish Stewart, Professor, Faculty of Law, University of Toronto; Lorne Waldman, Lawyer, Canadian Bar Association.

14. Middle East Sub-regional Hearing

Egypt

Nasser Amin, Director General, Arab Centre for the Independence of the Judiciary and the Legal Profession; Salah-El Din Mahmoud Fawzi Amer, National Council for Human Rights; Hisham El Bastawisi, Vice President, Court of Cassation; Soha Abd El'Ati, Egyptian Initiative for Personal Rights; Yasser Hassan, Lawyer and member of the Council of Trustees, Arab Organization for Human Rights; Mahmoud Mekki, Vice-President, Court of Cassation; Montasser Al-Zayat, Secretary General, Bar Association and Rapporteur of Freedoms Committee of the Bar Association; Elijah Zarwan, Human Rights Watch.

Jordan

Hani Hourani, Director General, Al-Urdun Al Jadid Research Center; Samih Kreis, Member of the Council, Jordan Bar Association; Asem Rababa, President, Adaleh Centre for Human Rights Studies; Emad Rabie, Dean, Faculty of Law, Jarash University.

Syria

Thaer El Khateeb, Lawyer, Director, El Khateeb Institution for Rights and Freedoms; Ammar Karabi, President, National Organization for Human Rights; Haissam Manna, Arab Commission for Human Rights.

Yemen

Mohamed Ahmed Mikhlafla, Observatory for Human Rights; Basim Mohamed El-Chargaby, Bar Association; Mohammed Allaw, President, National Organization for Defending Rights and Freedoms (HOOD); Ali Ahmed Aldailami, Counsellor, Permanent Representative of the Republic of Yemen to the League of Arab States; Mounir Ahmad El-Sakaf, Lawyer; Gammal E Goa'bi, Political Development Forum.

15. European Union (EU) Sub-regional Hearing

European level

Susie Alegre, human rights consultant, Doughty Street Chambers; Michèle Coninx, National Member for Belgium and President of the Case Committee, Eurojust; Andrew Drzemczewski, Head of Secretariat, Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe; Claudio Fava, member of the European Parliament (MEP), Civil Liberties, Justice and Home Affairs Committee, Rapporteur of the Temporary Committee of Inquiry into allegations of renditions and secret detentions by the CIA in Europe (TDIP), European Parliament; Florian Geyer, Research Fellow, Centre for European Policy Studies; Jenny Goldschmidt, Professor, Netherlands Institute of Human Rights, Faculty of Law, University of Utrecht; Ben

Hayes, European Monitoring and Documentation Centre on Justice and Home Affairs in the EU, Statewatch; Hielke Hijmans, Legal Adviser to the European Data Protection Supervisor, EU; Manuel Lezertua, Director, Directorate of Legal Advice and Public International Law, Council of Europe, Brussels; Ann Isabelle von Lingen, Policy Advisor, Open Society Institute; Dick Oosting, Director, Amnesty International European Union Office; Dan van Raemdonck, Vice President, International Federation for Human Rights (FIDH); Judith Sunderland, Human Rights Watch.

National experiences

William Bourdon, Lawyer, William Bourdon Law firm, France; Giulio Cazzella, Prefetto, Director, General Administrative Office, Public Security Department, Ministry of the Interior, Government of Italy; Antoine Comte, Lawyer, Antoine Comte Law firm, France; Bernard Döcke, Lawyer, Dr. Heinrich Hannover und Partner, Germany; Wolfgang Kaleck, Lawyer, President of the Republican Lawyers Association, Germany; Mario Lana, Director, Forensic Union for Human Rights Protection, Italy; Christophe Marchand, Director, Committee of Vigilance in the Fight against Terrorism (Comité T), Belgium; Sergio Moccia, Professor, University of Naples, Italy; Saloua Ouchan, Netherlands Committee of Jurists for Human Rights (NJCM), Dutch Section of the ICJ, the Netherlands; José Antonio Martín Pallín, former Judge of the Supreme Court, Spain; Sebastia Solellas, Lawyer, Spain; Armando Spataro, Prosecutor, Prosecution Office, Milan, Italy; Lara Talsma, NJCM, the Netherlands; Michel Tubiana, Lawyer, Tubiana-Huvelin Law firm, and Honorary President, Human Rights League, France; Carlos Jiménez Villarejo, former Special Anti-Corruption Prosecutor, Spain.

16. Israel and the Occupied Palestinian Territory

Israel

Fatmeh El-Ajou, Legal Center for Arab Minority Rights in Israel (Adalah); Hanna Barag, Machsom Watch; Sari Bashi, Executive Director, Legal Center for Freedom of Movement (Gisha); Jonathan Fox, Human Rights Watch; Aeyal Gross, Professor, Faculty of Law, Tel-Aviv University; Jessica Montell, B'Tselem; Gila Orkin, Association for Civil Rights in Israel (ACRI); Tamar Pelleg, Hamoked: Center for the Defense of the Individual; André Rosenthal, Lawyer; Chagit Shlonsky, Machsom Watch; Leah Tsemel, Public Committee Against Torture in Israel; Miri Weingarten, Physicians for Human Rights-Israel; Dan Yakir, Chief Legal Counsel, ACRI.

Occupied Palestinian Territory

Sakhr Abu Alaoun, Journalist, Gaza; Nadia Abu Nzhala, women's rights activist, Gaza; Yahya Abu Shahla, Judge, Gaza; Mamdoh Al Aker, Director General, Palestinian Independent Commission for Citizens' Rights; Salama Bsisou, Lawyer, Gaza; Zen Bsisou, Prosecutor, Gaza; Saad Ch'Hebar, Judge, Gaza; Abu-Soad Eddabegh, Churches Union, Gaza; Ahmad El-Maghrni, Prosecutor, Gaza; Naha Eshawz, Solidarity Foundation, Gaza; Mustafa Essawaf, Journalist, Gaza; Sahar Francis, Director,

Prisoners' Support and Human Rights Association (Addameer); Gareth Gleed, Legal Researcher, Al-Haq; Malvina Khoury, Lawyer and Project Coordinator, Jerusalem Legal Aid and Human Rights Center; Younes Lgrou, Lawyer, Gaza; Elias Ljald, Workers Trade-Union, Gaza; Isaac Mehana, Judge, Gaza; John Reynolds, Legal Researcher, Al-Haq; Aissa Saba, Director, Canaan Institute, Gaza; Rasha Shamma, International Advocacy Officer, Defence for Children International – Palestine Section; Tarek Abdel Shafi, Ciyada Organisation, Gaza; Randa Siniora, Human Rights Officer, Mossawa Center; Mazen Sisalem, Judge, Gaza; Sophiali Tarzi, Civilian Hospital, Gaza; Essam Younes, Almizan Center, Gaza.

Annex 4: List of Private Meetings

1. Colombia National Hearing

Francisco Santos Calderón, Vice-President of Colombia; Manuel José Cepeda, President of the Constitutional Court; Mario Iguarán, General Public Prosecutor; Edgardo Maya Villazón, Inspector General.

2. East Africa Sub-regional Hearing

Martha Karua, Minister of Justice and Constitutional Affairs, Kenya; Moses Wetangala, Deputy Minister of Foreign Affairs, Kenya; Keriako Tobiko, Director of Public Prosecutions, Kenya; Amos Wako, Attorney General, Office of the Attorney General, Kenya.

3. Australia National Hearing

Ian Carnell, Inspector General of Intelligence and Security; Jon Stanhope, Chief Minister, Australian Capital Territory (ACT) government; Helen Watchirs, Human Rights Commissioner, ACT government; senior representatives of the Attorney General's Office; senior representatives of the Ministry of Foreign Affairs; senior representatives of the Commonwealth Ombudsman.

4. Northern Ireland Hearing

Brian Archer, Law Society of Northern Ireland; Siobhan Broderick, Northern Ireland Court Service; Kevin Delaney, Law Society of Northern Ireland; Sir Alasdair Fraser, Director of the Public Prosecution Service; Brian Garrett, Law Society of Northern Ireland; Justice Gillen, representing the Lord Chief Justice; Roy Junkin, Deputy Director, Public Prosecution Service for Northern Ireland; Mandy Kilpatrick, Northern Ireland Court Service; Paul Leighton, Deputy Chief Constable, Police Service of Northern Ireland; Barry MacDonald, QC, Bar Council of Northern Ireland; Sir Hugh Orde, Chief Constable of the Police Service of Northern Ireland; John Orr, QC, Bar Council of Northern Ireland; James Scholes, Head of Case Work of the Public Prosecution Service for Northern Ireland; Peter Sheridan, Assistant Chief Constable, Police Service of Northern Ireland; Justice Weatherup, representing the Lord Chief Justice.

5. United Kingdom National Hearing

Baroness Ashton, Minister for Human Rights and Constitutional Affairs, UK Government; Lord Bingham of Cornhill, House of Lords; Lord Bowness, Joint Committee on Human Rights (JCHR), UK Parliament; Lord Carlile of Berriew QC, Independent Reviewer of Terrorist Legislation; Charles Clarke, MP, Secretary of State for the Home Department, UK Government; Ken Macdonald, Director of Public

Prosecutions (DPP); Lord Lloyd of Berwick; Evan Harris, MP, JCHR; Andrew Dismore, MP, Chair, JCHR; Murray Hunt, Legal Adviser, JCHR; Justice Ouseley, President, Special Immigration Appeals Commission; Nick Walker, Clerk, JCHR.

6. North Africa Sub-regional Hearing

Mohammed Amzari, President, Justice, Legal Affairs and Human Rights Committee, Counsellors Chamber (upper house of the Parliament), Morocco; Driss Benzekri, President, and Mahjoub Al Haïba, Secretary General, Advisory Council on Human Rights (CCDH), Morocco; Mohamed Bouzoubaa, Minister of Justice, and senior advisors of the Minister of Justice, Morocco; Driss Lachgar, President, Socialist Group, Representatives Chamber (lower house of the Parliament), Morocco; Lahlali Mohammed, Secretary-General, Ministry of Foreign Affairs, Morocco.

7. United States of America National Hearing

John Bellinger, Legal Adviser, Office of the Legal Adviser, Department to Secretary of State; William J. Haynes II, General Counsel, Department of Defence; Benjamin Powell, General Counsel, Office of the Director of National Intelligence; Daniel W. Sutherland, Officer for Civil Rights & Civil Liberties, Department of Homeland Security; Juan Carlos Zarate, Deputy Assistant to the President and Deputy National Security Advisor for Combating Terrorism, National Security Council, The White House; W. Hays Parks, Chairman and members of the Law of War Working Group, Department of Defence.

8. Southern Cone Sub-regional Hearing

Jorge Taiana, Minister of Foreign Affairs, Argentina; Alberto Iribarne, Minister of Justice, Argentina; Eduardo Luis Duhalde, Secretary of Human Rights and Rodolfo Mattarollo, Under-Secretary of Human Rights, Ministry of Justice, Security and Human Rights, Argentina.

9. South East Asia Sub-regional Hearing

Jusuf Kalla, Vice-President of Indonesia.

10. Russian Federation National Hearing

Alexander Goar, Department for National Security Legislation, Ministry of Justice; Inna Litvinova, staff, Department for National Security Legislation, Ministry of Justice; Vladimir Lukin, Human Rights Ombudsman of the Russian Federation; Eduard Nekhai, Head of Department for National Security Legislation, Ministry of Justice; Ella Pamfilova, Chairperson, Council of the President of the Russian Federation on Assistance to the Development of Civil Society Institutions and Human Rights; Vladimir Pligin, Chairperson, Constitutional Legislation Committee, State Duma; Tatiana Polyakova, Deputy Head, Department for National Security Legislation,

Ministry of Justice; Dmitri Vishnyakov, staff, Department for International Law, Ministry of Justice; Deputy Chairperson, Committee on Legal and Judicial Affairs, Council of Federations (upper house of the Parliament).

11. South Asia Sub-regional Hearing

Justice Ranganath Misra, former Chief Justice of India, former Chairperson, National Human Rights Commission, India; Shri A.K. Mitra, Director General, Border Security Force, India; Shri M.K. Narayanan, National Security Advisor, Special Advisor to the Prime Minister, India; Justice Shivraj V. Patil, Judge, Supreme Court of India and Acting Chairperson, National Human Rights Commission, India; Shivraj Vishwanath. Patil, Minister of Home Affairs, India; Shri N.N. Vohra, Indian Administrative Service, Special Representative to the Government of India for Jammu and Kashmir Dialogue.

12. Pakistan National Hearing

Syed Kamal Shah, Secretary, Ministry of Interior; Justice Mansoor Ahmad, Secretary, Ministry of Law, Justice and Human Rights; Javed Iqbal Cheema, Director General, National Crisis Management Cell; Faqir Hussain, Secretary of the Law and Justice Commission of Pakistan; Tariq Usman Hyder, Additional Secretary (United Nations & Economic Coordinations), Ministry of Foreign Affairs; Tasneem Aslam, Director General, United Nations Division, Ministry of Foreign Affairs.

13. Canada National Hearing

Margaret Bloodworth, National Security Advisor to the Prime Minister; Doug Breithaupt, Ministry of Justice; Stanley Cohen, Ministry of Justice; Stockwell Day, Minister of Public Safety; Paul Kennedy, Chair, Commission for Public Complaints against the Royal Canadian Mounted Police (RCMP); Brooke McNabb, Vice-Chair, Commission for Public Complaints against the RCMP; Yvan Roy, Deputy Secretary to the Cabinet (Legislation and House Planning and Machinery of Government) and Counsel to the Clerk, Privy Council Office; Daniel Therrien, Ministry of Justice.

14. Middle East Sub-regional Hearing

General Ahmed Deiaa El-Deen, First Assistant Minister of Interior, Egypt; Abdel Mageed Mahmoud, Attorney General, Egypt; General Ahmed Omar, Minister's Office, Ministry of Interior, Egypt; Mufid Mahmoud Shihab, Minister for Legal Affairs and Parliamentary Council, Egypt.

15. European Union (EU) Sub-regional Hearing

Gilles de Kerchove, Director General, Justice and Home Affairs General Directorate, General Secretariat of the Council of the European Union (EU Council Secretariat); Christiane Hoehn, Justice and Home Affairs, EU Council Secretariat; Baroness Sarah

Ludford Member of the European Parliament (MEP) and Alexander Alvaro MEP, Members of the Civil Liberties, Justice and Home Affairs Committee, European Parliament; Ambassador Busso von Alvensleben, Commissioner for Combating International Terrorism, German Federal Ministry of Foreign Affairs, Germany; Oliver Maor, Federal Ministry of the Interior, Germany; Senior Advisor to Franco Frattini, Commissioner for Justice and Home Affairs, EU Commission.

16. Israel and Occupied Palestinian Territory

Private meetings in Israel

David Bengamin, International legal advisor, Israeli Defence Forces; Menahem Ben-Sasson, Chairman, Constitution, Law and Justice Committee, Knesset; Gottlieb, Deputy Attorney General; Gil Haskel, Head of NGO Unit, Ministry of Foreign Affairs; Shai Nitzan, Deputy State Prosecutor, State Prosecutor's Office; Ady Schonmann, International human rights law advisor, Ministry of Foreign Affairs; Daniel Taub, Principal Deputy Legal advisor, Ministry of Foreign Affairs; Hila Tene, Lawyer, Department for International Agreements and International Litigation, Ministry of Justice.

Private meetings in the Occupied Palestinian Territory

Mahmoud Abbas, President of the Palestinian Authority; Rafik Husany, Chief of Staff, President's Office; Ahmed Bahr, Vice President, Legislative Council in Gaza; Justice Abdula Ghozlan, former High Court judge under the Palestinian Authority government; Said Siyam, Minister of Interior under the Hamas government; Ahmed al-Moghani, Attorney General under the Palestinian Authority government.

Other private meetings:

United Nations Headquarters, New York

Richard Barrett, Coordinator, Analytical Support and Sanctions Monitoring Team established pursuant to Security Council resolution 1526 (2004); César Mayoral, Argentinean Ambassador, Chairman of the Security Council Committee established pursuant to Resolution 1267 (1999) concerning Al-Qaeda and the Taliban and Associated Individuals and Entities (1267 Committee); Nicolas Michel, Assistant Secretary General for Legal Affairs and United Nations Legal Counsel, Office of Legal Affairs; Robert Orr, Assistant Secretary-General, Chairman, Counter-Terrorism Implementation Task Force, Executive Office of the UN Secretary General; Javier Ruperez, Executive Director, Counter-Terrorism Committee Executive Directorate (CTED); Edward J. Flynn, Senior Human Rights Officer, CTED.

International Committee of the Red Cross (ICRC), Geneva

Jacques Forster, Permanent Vice President of the ICRC; Knut Döhrman, Deputy Head, Legal Division; Jelena Pejic, Senior Legal Advisor.

Annex 5: Written Submissions Received by the Eminent Jurists Panel⁴⁴⁸

1. Colombia National Hearing

Center for Studies in Law, Justice and Society; Colombian Commission of Jurists; Communities of African Descent; General Labour Confederation; Interdisciplinary Human Rights Group of Medellín; José Alvear Restrepo Lawyers' Collective.

2. East Africa Sub-regional Hearing

Kenya

Edris Omondi, Programme Officer, Centre for Governance and Development; Samuel Mbithi, Executive Director, Kenyan Section of the ICJ; Kathurima M'Inoti, Chairperson, Kenya Law Reform Commission, ICJ Commissioner.

Tanzania

Justice Robert Kisanga, President, Commission for Human Rights and Good Governance; Charles R. B. Rwechungur, President, Tanganyika Law Society; Harold Sungusia, Legal and Human Rights Center.

Uganda

Simon Peter Kinobe Mutegeki, Foundation for Human Rights Initiative; Henry Onoria, Senior Lecturer, Faculty of Law, Makerere University; Moses SSerwanga, News Editor, Monitor Newspaper, Patrick Tumwine, Human Rights Network (HURINET-U).

3. Australia National Hearing

Amnesty International Australia; Attorney-General's Department; Australian Lawyers for Human Rights; Australian Muslim Civil Rights Advocacy Network; Barbara Hocking; Castan Centre for Human Rights Law, Faculty of Law, Monash University; Combined Community Legal Centres Group (NSW) Inc.; Department of Justice and Community Safety, Australian Capital Territory (ACT); Gilbert + Tibin Centre of Public Law, Faculty of Law, University of New South Wales (Dr. Andrew Lynch, Dr. Ben Saul and Prof. George Williams); Jenny Hocking; Human Rights and Equal Opportunity Commission; New Matilda; Ministry of Foreign Affairs, Australian government;

⁴⁴⁸ This is a non-exhaustive list of documents received by the Panel in the course of its Hearings. Those relating to overall human rights situations, the legal system or other more general information on a country are not included in this list. Where one or more documents are submitted in the name of an organisation, the name of the author(s) is mentioned in blankets.

New South Wales Council for Civil Liberties; Rights Australia; Sydney Centre for International and Global Law.

4. Northern Ireland Hearing

Association of the Bar of the City of New York; British Irish Rights Watch; Castleberg/Aghyaran justice group; Committee on the Administration of Justice; Council of Europe; Brice Dickson, Professor and Jean Allain, Senior Lecturer, Queen's University; Neil Farris, Solicitor; Monsignors Denis Faul and Raymond Murray; Martin Flaherty, Professor, Fordham Law School, Chair, Committee on International Human Rights, Association of the Bar of the City of New York; Michael Posner, Executive Director, Human Rights First; Human Rights Watch; Law Society of England and Wales; London Metropolitan University; Dermot Nesbitt; Northern Ireland Human Rights Commission; Northern Ireland Policing Board; Pat Finucane Centre; Relatives for Justice; Sinn Féin; Peter Smith QC; Madeleine Swords; Transitional Justice Institute, University of Ulster; Ulster Human Rights Watch.

5. United Kingdom National Hearing

Article 19; Bar Council of England and Wales; Nicholas Blake QC, Matrix Chambers; British Irish Rights Watch; Cageprisoners; Campaign Against Criminalising Communities; Faculty of Advocates; David Feldman, Professor, University of Cambridge; Michael Fordham, Blackstone Chambers; Human Rights Watch; Immigration Law Practitioners Association; Islamic Human Rights Commission; Home Office, UK Government; Law Society of England and Wales; Liberty; Mayor of London's Office; Peace and Justice in East London; Public Interest Lawyers; REDRESS; Stop Political Terror.

6. North Africa Sub-regional Hearing

Morocco

Abdelaziz Bennani, Lawyer; Abdelaziz Nouaydi, Lawyer and President, Adala Association; Mohamed Mustapha Raissouni, Lawyer, Member of the Human Rights Advisory Council, former President, Association of the Bars of Morocco; Abdelfattah Zahrach, Lawyer, Moroccan Association for Human Rights.

Tunisia

Abderraouf Ayadi, Lawyer, Tunisia.

7. United States of America National Hearing

Attorneys of al Marri (Jonathan Hafetz, Brennan Center for Justice at NYU School of Law; Lawrence S. Lustberg & Mark A. Berman, Gibbons, Del Deo Dolan, Grinffinger & Vecchione, P.C.; and Andrew J. Savage III, Savage and Savage, P.A); American Association for the ICJ (A. Hays, Associate Professor of Law, Rutgers School of

Law-Camden); American Association of University Professors; American Civil Liberties Union; American-Arab Anti-Discrimination Committee (Kareem W. Shora, Director, Legal Department & Policy); Association of the Bar of the City of New York; Peter Bauer, former US Army Interrogator; Center for Financial Privacy and Human Rights (J. Bradley Jansen, Executive Director); Center for Human Rights and Global Justice; Center for National Security Studies; Center for Victims of Torture (David R. Johnson, Director of Medial Services); Committee to Protect Journalists (Frank Smyth, Washington Representative and Journalist Security Coordinator); Brigadier General James P. Cullen, retired, U.S. Army Judge Advocate General's Corps; Electronic Privacy Information Center; Families of September 11 (Donald W. Goodrich, Chairman of the Board); Freedom House; Global Rights (Eric L. Lewis, Member of the Board of Directors); Human Rights First (Gabor Rona, International Legal Director); Human Rights Watch (Jennifer Daskal, U.S Advocacy Director); John D. Hutson, Rear Admiral, retired, US Navy Judge Advocate General's Corps, Dean and President of Franklin Pierce Law Center; Inter-American Commission on Human Rights (Santiago Cantón, Executive Secretary); International Federation for Human Rights (FIDH); Neal Katyal, Professor of Law, Georgetown University; George B. Mickum, Keller and Heckman LLP; National Institute of Military Justice (Eugene R. Fidell); Bellevue/ New York University Program for Survivors of Torture (Dr. Alan Keller); Open Society Institute (Stephen Rickard, Director, Washington Office); Physicians for Human Rights (Leonard S. Rubenstein, Executive Director); Anant P. Raut, Weil, Gotshal & Manges LLP; September 11th Families for Peaceful Tomorrows (Adele Welty); Richard J. Wilson, Professor and Director of the International Human Rights Law Clinic, Washington College of Law, American University.

8. Southern Cone Sub-regional Hearing

Argentina

Association of Grandmothers of Plaza de Mayo (Estela Barnes de Carlotto); Center for Legal and Social Studies (CELS); Damián M. Loreti, Deputy Dean, Faculty of Social Sciences, University of Buenos Aires; Mothers of Plaza de Mayo (Marta Ocampo de Vásquez); Rodolfo Mattarollo, State Sub-Secretary for Human Rights, Ministry of Justice.

Brazil

Dalmo A. Dallari, Professor, Faculty of Law, University of Sao Paulo.

Chile

Sergio Fuenzalida Bascuñán, Center for Public Policy and Indigenous Rights, ARCIS University; Roberto Garretón, Lawyer.

Paraguay

Martín Almada, Lawyer and victim of the Operation Condor; Juan Manuel Benítez Florentín, Vice-President, Truth and Justice Commission; Soledad Villagra, Lawyer.

Uruguay

Institute for Legal and Social Studies.

9. South East Asia Sub-regional Hearing

Indonesia

Commission on Disappearances and Victims of Violence (KONTRAS) (Mufti Makarim A., Federation of Kontras Secretary); The Indonesian Human Rights Monitor (Imparsial); International Crisis Group (Sidney Jones, Southeast Asia Project Director); Andi Widjajanto, University of Indonesia.

Malaysia

Suara Rakyat Malaysia (SUARAM); Malaysia's National Human Rights Society (Malik Imtiaz Sarwar).

The Philippines

Commission on Human Rights of the Philippines (Ana Elzy E. Ofreneo); MoroLaw (Attorney Zainudin S. Malang); Geronimo Sy, State Prosecutor, Department of Justice.

Thailand

Somchai Homlaor, Lawyer Council of Thailand; Waemahedee Waedaoh, Member of the National Legislative Assembly.

10. Russian Federation National Hearing

Amnesty International; Center for the Development of Democracy and Human Rights (Yuri Dzhibladze); European Human Rights Advocacy Centre; Memorial Human Rights Center and the Demos Center; Demos Center (Tanya Lokshina); Human Rights Institute (Lev Levinson); Human Rights First; Human Rights Watch (Allison Gill, Director, Russian Federation Office); Khashiev; Kirill Koroteev, Lawyer, Memorial Human Rights Centre; Levada Center; Sergey Nasonov, Assistant Professor, Moscow State Juridical Academy; Russian-Chechen Friendship Society in Europe (Stanislas Dmitrievsky); Andrey Richter, Director, "Law and Media" Centre; SOVA Center for Information and Analysis; Voice of Beslan.

11. South Asia Sub-regional Hearing

South Asia

Commonwealth Human Rights Initiative.

Bangladesh

Nur Khan, Ain o Salish Kendra (ASK).

India

S.N. Chattopadhyay; A.R. Hanjura, Advocate; Human Rights Alert (Bablu Loitongbam, Executive Director); Minorities Council (Iqbal A. Ansari); Fali S. Nariman, Senior Advocate of the Supreme Court and Honorary Member of the ICJ; National Human Rights Commission; People's Union for Civil Liberties (K.G. Kannabiran and Pushkar Raj); People's Union for Civil Liberties-Chhattisgarh State Unit (Rajendra K Sail, President); Rohit Prajapati, Documentation and Study Center for Action.

The Maldives

Husnu Al Suood, Lawyer and Co-founder, Maldives Centre for Human Rights and Advocacy.

Nepal

Bishwa Kanta Mainali, President, Nepal Bar Association.

Sri Lanka

K.S. Ratnavale, Advocate, Centre for Human Rights and Development.

12. Pakistan National Hearing

Sadaf Arshad, Coordinating Editor, South Asia Media Monitor; Human Rights Commission of Pakistan (HRCP); Abdul Hafeez Lakho, former Advocate General of Sindh, former President, Karachi Bar Association and the Sindh High Court Bar Association; Syed Iqbal Haider, Vice Chairperson, HRCP; Justice Rasheed A. Razvi, Advocate Supreme Court, former Vice Chairman, Pakistan Bar Council; I. A. Rehman, Director, HRCP; Azizullah Sheikh, Advocate Supreme Court; Ahmad N. Warraich, Senior Lecturer of Laws, University College Lahore and Advocate High Court; Rahimullah Yusufzai, Resident Editor, The News.

13. Canada National Hearing

Amnesty International Canada; Raoul Boulakia, Lawyer; Canadian Bar Association; Canadian Muslim Lawyers Association; Canadian Unitarians for Social Justice; Terrance S. Carter, B.A., LL.B. and Trade-Mark Agent; Arthur J. Cockfield, Professor,

Faculty of Law, Queen's University; Robert Diab, Faculty of Law, University of British Columbia; Nicole LaViolette, Professor, Faculty of Law, University of Ottawa; Dieter Misgeld, Professor Emeritus, University of Toronto; Kent Roach, Professor, Faculty of Law, University of Toronto; Hamish Stewart, Associate Professor, Faculty of Law, University of Toronto.

14. Middle East Sub-regional Hearing

Egypt

Arab Center for the Independence of the Judiciary and the Legal Profession (Nasser Amin, Director General); Egyptian Initiative for Personal Rights; Organisation for Human Rights; Yasser Hassan, Lawyer and member of the Council of Trustees, Arab Organization for Human Rights.

Jordan

Adala Center for Human Rights (Asem Rababa); Center for Human Rights and Global Justice, New York University School of Law and International Human Rights Clinic, Washington Square Legal Services; Mousawa Center for Democratic Studies and Researches (Dr. Emad Rabei); Samih Kreis, Lawyer and member of the Council, Jordan Bar Association.

Syria

National Organization for Human Rights (Ammar El Qurabi, Professor); Arab Committee of Human Rights (Haytham Manna, Professor); El Khateeb Institution for Rights and Freedoms (Thaer El Khateeb, Director).

Yemen

Center for Constitutional Rights and International Justice Clinic, Fordham University School of Law; Center for Human Rights and Global Justice, New York University School of Law and International Human Rights Clinic, Washington Square Legal Services; National Organization for Defense of Rights and Freedoms (HOOD) (Mohamed Nagi Allao, Lawyer and Coordinator); Political Development Forum (Gammal E Goa'bi); Yemeni Observatory for Human Rights (Dr. Mohamed Ali El-Mikhlafi, President).

15. European Union (EU) Sub-regional Hearing

Europe

Amnesty International EU Office; Florian Geyer, Centre for European Policy Studies; Andrew Drzemczewski, Head of Secretariat, Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe; International Federation for Human Rights (FIDH) (M. Dan van Raemdonck, Vice President); Jochen Frowein,

Professor and Director, Max Planck Institute for Comparative Public Law and International Law; Human Rights Watch; Peter Hustinx, European Union Data Protection Supervisor; INTERIGHTS; Open Society Justice Initiative; Statewatch (Ben Hayes); Gijs de Vries, Senior Fellow, Netherlands Institute of International Relations Clingendael and former EU Counter-Terrorism Coordinator.

Belgium

Committee of vigilance in the fight against terrorism (Comité T).

Denmark

Danish Section of the ICJ.

France

Antoine Comte, Lawyer.

Germany

German Section of the ICJ (Christian Walter, Professor, Chair for International and European Public Law, University of Münster); Wolfgang Kaleck, European Center for Constitutional and Human Rights.

Italy

Giulio Cazzella, Director, General Administrative Office, Public Security Department, Ministry of the Interior; Mario Lana, Director, Forensic Union for Human Rights Protection.

Netherlands

Netherlands Committee of Jurists for Human Rights (Dutch Section of the ICJ).

Spain

Basque Observatory of Human Rights – Behatokia; José Antonio Martín Pallín, Magistrate emeritus of the Supreme Tribunal; Sebastia Salellas, Lawyer; Carlos Jiménez Villarejo, former Special Anti-Corruption Prosecutor.

16. Israel and the Occupied Palestinian Territory

Defence for Children International-Palestinian Section; Legal Center for Arab Minority Rights in Israel (Adalah); Physicians for Human Rights- Israel (Rafi Walden, Professor and member of the Board, and Deputy Director, Shiba Medical Center). Further documentation has been received at the meetings in Jerusalem, Ramallah and Gaza.